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DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

19 CFR Part 122

[CBP Dec. 09–42]

Technical Amendment to List of User Fee Airports: Termination of User Fee Status of Santa Maria Public Airport, Santa Maria, CA

AGENCY: Customs and Border Protection, DHS.

ACTION: Final rule; technical amendment.

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

DATES: *Effective Date:* October 21, 2009.

FOR FURTHER INFORMATION CONTACT: Simon Stella, Office of Field Operations, 202–344–2771.

SUPPLEMENTARY INFORMATION:

Background

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

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

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

Pursuant to 19 U.S.C. 58b, an airport may be designated as a user fee airport if the Commissioner of CBP, as delegated by the Secretary of Homeland Security, determines that the volume of business at the airport is insufficient to justify the availability of customs services at the airport and the governor of the State in which the airport is located approves the designation. Generally, the type of airport that would seek designation as a user fee airport would be one at which a company, such as an air courier service, has a specialized interest in regularly landing.

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

Pursuant to 19 U.S.C. 58b, the fees which are to be charged at user fee airports shall be paid by each person using the customs services at the airport and shall be in the amount equal to the expenses incurred by the Commissioner of CBP in providing customs services which are rendered to such person at such airport, including the salary and expenses of those employed by the Commissioner of CBP to provide the customs services. To implement this provision, generally, the airport seeking the designation as a user fee airport or that airport's authority agrees to pay a flat fee for which the users of the airport are to reimburse the airport/airport authority. The airport/airport authority agrees to set and periodically review the charges to ensure that they are in accord with the airport's expenses.

The Commissioner of CBP designates airports as user fee airports in accordance with 19 U.S.C. 58b and pursuant to 19 CFR 122.15. If the Commissioner decides that the conditions for designation as a user fee airport are satisfied, a Memorandum of Agreement (MOA) is executed between the Commissioner of CBP and the local responsible official signing on behalf of the State, city or municipality in which the airport is located. In this manner, user fee airports are designated on a case-by-case basis. Section 122.15 of CBP Regulations (19 CFR 122.15) also sets forth the grounds for withdrawal of a user fee designation and sets forth the list of designated user fee airports.

Periodically, CBP updates the list of user fee airports at 19 CFR 122.15(b) to reflect those that have been currently designated by the Commissioner. This document updates that list of user fee airports by removing Santa Maria Public Airport, Santa Maria, California from the list. On July 8, 2009, the Acting Commissioner approved the withdrawal of user fee status for Santa Maria Public Airport. The airport had requested that the User Fee Airport status be terminated.

Inapplicability of Public Notice and Delayed Effective Date Requirements

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

[1] Sections 403(1) and 411 of the Homeland Security Act of 2002 (''the Act,'' Pub. L. 107–296, 6 U.S.C. 203(1), 211) transferred the United States Customs Service and its functions from the Department of the Treasury to the Department of Homeland Security. Pursuant to section 1502 of the Act (6 U.S.C. 542 and note), the President renamed the ''Customs Service'' as the ''Bureau of Customs and Border Protection.'' Effective March 31, 2007, DHS changed the name of ''Bureau of Customs and Border Protection'' to ''U.S. Customs and Border Protection,'' also referred to as ''CBP'' (72 FR 20131, April 23, 2007).

Regulatory Flexibility Act and Executive Order 12866

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

Signing Authority

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

List of Subjects in 19 CFR Part 122

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

Amendments to Regulations

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

PART 122—AIR COMMERCE REGULATIONS

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

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

§ 122.15 [Amended]

■ 2. The listing of user fee airports in § 122.15(b) is amended by removing from the ''Location'' column, ''Santa Maria, California,'' and by removing on the same line, from the ''Name'' column, ''Santa Maria Public Airport.''

Dated: October 15, 2009.

Jayson P. Ahern,

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

[FR Doc. E9–25321 Filed 10–20–09; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

19 CFR Part 122

[CBP Dec. 09–41]

Technical Amendments to List of User Fee Airports: Removal of User Fee Status for Roswell Industrial Air Center, Roswell, NM and March Inland Port Airport, Riverside, CA and Name Change for Capital City Airport, Lansing, MI

AGENCY: Customs and Border Protection, DHS.

ACTION: Final rule; technical amendments.

SUMMARY: This document amends the Customs and Border Protection (CBP) Regulations by revising the list of user fee airports to reflect the removal of the user fee designations for the Roswell Industrial Air Center in Roswell, New Mexico and the March Inland Port Airport in Riverside, California, as well as indicating that the Capital City Airport in Lansing, Michigan has changed its name to the Capital Region International Airport. User fee airports are those airports which, while not qualifying for designation as international or landing rights airports, have been approved by the Commissioner of CBP to receive, for a fee, the services of CBP officers for the processing of aircraft entering the United States, and the passengers and cargo of those aircraft.

DATES: *Effective Date:* October 21, 2009.

FOR FURTHER INFORMATION CONTACT: Wendy M. Cooper, Office of Field Operations, 202–344–2057.

SUPPLEMENTARY INFORMATION:

Background

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

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

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

Pursuant to 19 U.S.C. 58b, an airport may be designated as a user fee airport if the Commissioner of CBP as delegated by the Secretary of Homeland Security determines that the volume of business at the airport is insufficient to justify customs services at the airport and the governor of the state in which the airport is located approves the designation. Generally, the type of airport that would seek designation as a user fee airport would be one at which a company, such as an air courier service, has a specialized interest in regularly landing.

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

Pursuant to 19 U.S.C. 58b, the fees which are to be charged at user fee airports shall be paid by each person using the customs services at the airport and shall be in the amount equal to the expenses incurred by the Commissioner of CBP in providing customs services which are rendered to such person at such airport, including the salary and expenses of those employed by the Commissioner of CBP to provide the customs services. To implement this provision, the airport seeking the designation as a user fee airport or that airport's authority generally agrees to pay a flat fee for which the users of the airport are to reimburse the airport/airport authority. The airport/airport authority agrees to set and periodically review the charges to ensure that they are in accord with the airport's expenses.

The Commissioner of CBP designates airports as user fee airports pursuant to 19 U.S.C. 58b. *See* 19 CFR 122.15. If the Commissioner decides that the conditions for designation as a user fee airport are satisfied, a Memorandum of Agreement (MOA) is executed between the Commissioner of CBP and the local responsible official signing on behalf of the state, city or municipality in which the airport is located. In this manner, user fee airports are designated on a case-by-case basis. Periodically, CBP updates the list of user fee airports at 19 CFR 122.15(b) to reflect changes in the status of user fee airports.

Recent Changes Requiring Updates to the List of User Fee Airports

Section 19 CFR 122.15(c)(1) provides that the designation as a user fee airport

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

shall be withdrawn if either CBP or the airport authority gives 120 days written notice of termination to the other party. On January 15, 2009, CBP gave written notice to the Roswell Industrial Air Center in Roswell, New Mexico terminating their status as a user fee facility, in accordance with 19 CFR 122.15(c)(1). On November 6, 2008, the March Inland Port Airport Authority gave written notice terminating their MOA with CBP, in accordance with 19 CFR 122.15(c)(1).

On January 26, 2009, Capital City Airport notified CBP that it had officially changed its name to the Capital Region International Airport.

This document updates the list of user fee airports by deleting the Roswell Industrial Air Center in Roswell, New Mexico and the March Inland Port Airport in Riverside, California, and changing the name of the Capital City Airport in Lansing, Michigan to the Capital Region International Airport.

Inapplicability of Public Notice and Delayed Effective Date Requirements

Because this amendment merely updates the list of user fee airports to reflect a name change and to remove airports already approved for withdrawal by the Commissioner of CBP in accordance with 19 CFR 122.15(c)(1) and neither imposes additional burdens on, nor takes away any existing rights or privileges from, the public, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure are unnecessary, and for the same reasons, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

The Regulatory Flexibility Act and Executive Order 12866

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

Signing Authority

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

List of Subjects in 19 CFR Part 122

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

Amendments to Regulations

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

PART 122—AIR COMMERCE REGULATIONS

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

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

§ 122.15 [Amended]

■ 2. The listing of user fee airports in § 122.15(b) is amended as follows: by removing, in the ''Location'' column, ''Roswell, New Mexico'' and by removing on the same line, in the ''Name'' column, ''Roswell Air Industrial Center.''; by removing, in the ''Location'' column, ''Riverside, California'' and by removing on the same line, in the ''Name'' column, ''March Inland Port Airport.''; and, by removing, in the ''Name'' column, ''Capital City Airport'' and adding in its place ''Capital Region International Airport.''

Dated: October 15, 2009.

Jayson P. Ahern,

Acting Commissioner, Customs and Border Protection.

[FR Doc. E9–25318 Filed 10–20–09; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 862

[Docket No. FDA–2009–N–0472]

Medical Devices; Clinical Chemistry and Clinical Toxicology Devices; Classification of the Cardiac Allograft Gene Expression Profiling Test Systems

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is announcing the classification of cardiac allograft gene expression profiling test systems into class II (special controls). The special control that will apply to the device is the guidance document entitled ''Class II Special Controls Guidance Document: Cardiac Allograft Gene Expression Profiling Test Systems.'' FDA classified the device into class II (special controls) in order to provide a reasonable assurance of safety and effectiveness of the device. Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of the guidance document that will serve as the special control for this device.

DATES: This final rule is effective November 20, 2009. The classification was effective August 26, 2008.

FOR FURTHER INFORMATION CONTACT: Kellie B. Kelm, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 5625, Silver Spring, MD 20993, 301–796–6145.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with section 513(f)(1) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360c(f)(1)), devices that were not in commercial distribution before May 28, 1976, the date of enactment of the Medical Device Amendments of 1976 (the amendments), generally referred to as postamendments devices, are classified automatically by statute into class III without any FDA rulemaking process. These devices remain in class III and require premarket approval, unless the device is classified or reclassified into class I or II, or FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the act, to a predicate device that does not require premarket approval. The agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the act (21 U.S.C. 360(k)) and part 807 (21 CFR part 807) of FDA's regulations.

Section 513(f)(2) of the act provides that any person who submits a premarket notification under section 510(k) of the act for a device that has not previously been classified may, within 30 days after receiving an order classifying the device in class III under section 513(f)(1), request FDA to classify the device under the criteria set forth in section 513(a)(1). FDA shall, within 60 days of receiving such a request, classify the device by written order. This classification shall be the initial classification of the device. Within 30 days after the issuance of an order classifying the device, FDA must publish a notice in the **Federal Register** announcing this classification (section 513(f)(2) of the act).

In accordance with section 513(f)(1) of the act, FDA issued an order on August 8, 2008, classifying the XDx AlloMap Test in class III because it was not substantially equivalent to a device that was introduced or delivered for introduction into interstate commerce for commercial distribution before May 28, 1976, or a device that was subsequently reclassified into class I or class II. On August 15, 2008, XDx, Inc., submitted a petition requesting

classification of the AlloMap Test under section 513(f)(2) of the act. The manufacturer recommended that the device be classified into class II (Ref. 1).

In accordance with section 513(f)(2) of the act, FDA reviewed the petition in order to classify the device under the criteria for classification set forth in section 513(a)(1). Devices are to be classified into class II if general controls, by themselves, are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls to provide reasonable assurance of the safety and effectiveness of the device for its intended use. After review of the information submitted in the petition, FDA determined that the AlloMap Test can be classified in class II with the establishment of special controls. FDA believes these special controls, in addition to general controls, will provide reasonable assurance of safety and effectiveness of the device.

The device is assigned the generic name ''Cardiac allograft gene expression profiling test system.'' It is identified as a device that measures the RNA expression level of multiple genes and combines this information to yield a signature (pattern, classifier, index, score) to aid in the identification of a low probability of acute cellular rejection (ACR) in heart transplant recipients with stable allograft function.

FDA has identified the following issues of safety or effectiveness requiring special controls for a cardiac allograft gene expression profiling test system. Failure of this device to perform as indicated may lead to erroneous test results. False positive results will misclassify the patient into a higher risk group and false negative results will misclassify the patient into a lower risk group. Misclassification of ACR may lead to incorrect patient management with attendant psychological distress, inaccurate counseling, and suboptimal patient care.

FDA believes the class II special controls guidance document generally addresses the risks to health identified in the previous paragraph and will aid in mitigating potential risks by providing recommendations on labeling and validation of performance characteristics. The guidance document also provides information on how to meet 510(k) premarket notification submission requirements for the device. FDA believes that the special controls, in addition to general controls, provide reasonable assurances of the safety and effectiveness of the device type. Therefore, on August 26, 2008, FDA issued an order to the petitioner classifying the device into class II (Ref. 2). FDA is codifying this classification by adding § 862.1163.

Any firm submitting a premarket notification submission for a cardiac allograft gene expression profiling test system will need to address the issues covered in the special controls guidance. However, the firm need only show that its device meets the recommendations of the guidance or in some other way provides equivalent assurance of safety and effectiveness.

Section 510(m) of the act provides that FDA may exempt a class II device from the premarket notification requirements under section 510(k) if FDA determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. For this type of device, however, FDA has determined that premarket notification is necessary to provide a reasonable assurance of the safety and effectiveness of the device and, therefore, this type of device is not exempt from premarket notification requirements. Persons who intend to market this type of device must submit to FDA a premarket notification, prior to marketing the device, which contains information about the cardiac allograft gene expression profiling test system they intend to market.

II. Environmental Impact

The agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

III. Analysis of Impacts

FDA has examined the impacts of the final rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The agency believes that this final rule is not a significant regulatory action under the Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because classification of this device into class II will relieve manufacturers of the cost of complying with the premarket approval requirements of section 515 of the act and may permit small potential competitors to enter the marketplace by lowering their costs, the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $133 million, using the most current (2008) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

IV. Federalism

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. Section 4(a) of the Executive order requires agencies to ''construe * * * a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.'' Federal law includes an express preemption provision that preempts certain state requirements ''different from or in addition to'' certain Federal requirements applicable to devices. 21 U.S.C. 360k; See *Medtronic* v. *Lohr*, 518 U.S. 470 (1996); *Riegel* v. *Medtronic*, 128 S. Ct. 999 (2008). The special controls established by this final rule create ''requirements'' for specific medical devices under 21 U.S.C. 360k, even though product sponsors have some flexibility in how they meet those requirements. See *Papike* v. *Tambrands*, Inc., 107 F.3d 737, 740–42 (9th Cir. 1997).

V. Paperwork Reduction Act of 1995

This final rule establishes as special controls a guidance document that refers to previously approved collections of information found in other FDA regulations. These collections of information are subject to review by the Office of Management and

Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (the PRA). The collections of information in part 807, subpart E, regarding premarket notification submissions, have been approved under OMB Control No. 0910–0120. The collections of information in 21 CFR part 801 and 21 CFR 809.10, regarding labeling, have been approved under OMB Control No. 0910–0485. The collections of information in 21 CFR part 820 have been approved under OMB Control No. 0910–0073.

VI. References

The following references have been placed on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Petition from XDx, Inc., dated August 15, 2008.
2. Order classifying XDx AlloMap Test, dated August 26, 2008.

List of Subjects in 21 CFR Part 862

Medical devices.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 862 is amended as follows:

PART 862—CLINICAL CHEMISTRY AND CLINICAL TOXICOLOGY DEVICES

■ 1. The authority citation for 21 CFR part 862 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 371.

■ 2. Section 862.1163 is added to subpart B to read as follows:

§ 862.1163 Cardiac allograft gene expression profiling test system.

(a) *Identification.* A cardiac allograft gene expression profiling test system is a device that measures the ribonucleic acid (RNA) expression level of multiple genes and combines this information to yield a signature (pattern, classifier, index, score) to aid in the identification of a low probability of acute cellular rejection (ACR) in heart transplant recipients with stable allograft function.

(b) *Classification.* Class II (special controls). The special control is FDA's guidance document entitled ''Class II Special Controls Guidance Document: Cardiac Allograft Gene Expression Profiling Test Systems.'' See § 862.1(d) for the availability of this guidance document.

Dated: October 9, 2009.

Jeffrey Shuren,

Acting Director, Center for Devices and Radiological Health.

[FR Doc. E9–25315 Filed 10–20–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2009–0895]

RIN 1625–AA11

Regulated Navigation Area; Portsmouth Naval Shipyard, Portsmouth, NH

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a regulated navigation area on the Piscataqua River near Portsmouth, NH. This temporary final rule places speed restrictions on all vessels transiting the navigable waters on the Piscataqua River, Portsmouth, NH near the Portsmouth Naval Shipyard between Henderson Point Light on Seavey Island and Badgers Island Buoy 14. This rule is necessary to provide for the safety of life on the navigable waters during ongoing ship construction.

DATES: This temporary final rule is effective from 7 a.m. on October 21, 2009, until 5 p.m. on November 15, 2009. This temporary final rule is enforceable with actual notice by Coast Guard personnel beginning October 15, 2009.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2009–0895 and are available online by going to *http://www.regulations.gov*, inserting USCG–2009–0895 in the ''Keyword'' box and then clicking ''Search.'' They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary final rule, call Lieutenant Junior Grade Laura van der Pol, Waterways Management Division Chief, U.S. Coast Guard Sector Northern New England, telephone 207–741–5421, e-mail *laura.k.vanderpol1@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the Portsmouth Naval Facility will be beginning diving operations in this area within a short timeframe thus making publication of a NPRM and Final Rule impractical. Further, this regulated navigation area is necessary to provide for the safety of the divers and others working in the area as wake from passing vessels could cause the ship to move erratically and unexpectedly, injuring the divers and their support crews. Not providing for the safety of the divers and others in the area is contrary to the public interest of creating a safe work environment.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register** as immediate action is necessary to provide for the safety of divers and workers on the vessel as well as to minimize the risk to commercial vessels and recreational boaters who transit the area. In addition to the reasons stated within this preamble, a delay in the effective date of this rule is contrary to the public's interest in ensuring the ship construction project continues as scheduled.

Background and Purpose

As part of ongoing ship construction projects at the Portsmouth Naval Shipyard, vessels are being launched, creating a period of particular sensitivity to the personnel and equipment involved. Specifically, divers will be working on the hull of a vessel for approximately four weeks beginning on October 15, 2009. Underwater work includes the removal and installation of heavy equipment. Unexpected and uncontrolled movement of the vessel while divers are in the water creates a significant risk of serious injury or death. Additionally, loading operations

onto ships that are severely constrained by their draft could also be adversely affected by unexpected and uncontrolled movement. Wake produced from vessels operating in the vicinity of the Portsmouth Naval Shipyard could cause unexpected and uncontrolled movement of the vessels in the shipyard. In order to minimize such unexpected and uncontrolled movement during the timeframe that divers will be operating and vessel loading conducted, the Coast Guard is creating a regulated navigation area to limit the speed, and thus wake, of all vessels operating in the vicinity of the shipyard.

Discussion of Rule

This regulated navigation area encompasses all the navigable waters on the Piscataqua River in Portsmouth, NH near the Portsmouth Naval Shipyard between Henderson Point Light 10 (LLNR 8375; 43–04–29.319N, 070–44–10.189W) on Seavey Island and Badgers Island Buoy 14 (LLNR 8405; 43–04–51.951N, 070–45–21.518W).

All vessels operating in this area shall proceed with caution; operate at no more than 5 knots and in a manner so as to produce no wake. Diving operations may occur at any time, at day or night, during the effective period of the rule; however, the regulated navigation area will only be enforced during times when divers are conducting underwater operations and during vessel loading operations.

The Captain of the Port Sector Northern New England will cause notice of enforcement or suspension of enforcement of this regulated navigation area to be made by all appropriate means to affect the widest distribution among the affected segments of the public. Such means of notification will include, but is not limited to, Broadcast Notice to Mariners and Local Notice to Mariners. The Captain of the Port will issue a Broadcast Notice to Mariners notifying the public when enforcement of the regulated navigation area is suspended. In addition, Captain of the Port Sector Northern New England maintains a telephone line that is staffed 24 hours a day, seven days a week. The public can obtain information concerning enforcement of the regulated navigation area by contacting Sector Northern New England Command Center at (207) 767–0303.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

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

We expect the economic impact of this rule to be minimal because this regulated navigation area only requires vessels to reduce speed through a small section of the Piscataqua River therefore only causing a small delay to a vessel's transit. Further, the regulation is only enforced when a vessel's wake would cause undue risk to life and safety of personnel at the Portsmouth Naval Shipyard. The regulation period is for approximately one month.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit the portion of the Piscataqua River affected by this rule between October 15, 2009 and November 15, 2009. This regulated navigation area will not have a significant economic impact on a substantial number of small entities for the following reasons. This rule allows vessels to continue to transit through the regulated area, but only at a reduced speed. The reduced speed area is relatively small (approximately 1 nautical mile) and will only be enforced when necessary to protect the safety of personnel at the Portsmouth Naval Shipyard. Further, the Coast Guard will advise mariners as to the enforcement of the regulated navigation area through broadcast and local notice to mariners thus allowing mariners to plan their transits accordingly.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

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

Indian Tribal Governments

This rule does not have Tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that this action is one of the category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under Figure 2–1, paragraph (34)(g), of the Instruction. This rule involves the establishing of a regulated navigation area and therefore falls within the categorical exclusion noted above. An environmental analysis checklist and a categorical exclusion determination will be available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Public Law 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T01–0895 to read as follows:

§ 165.T01–0895 Regulated Navigation Area; Piscataqua River, Portsmouth, NH.

(a) *Description of the regulated navigation area (RNA):* All navigable waters on the Piscataqua River, Portsmouth, NH and Kittery, ME near the Portsmouth Naval Shipyard between Henderson Point Light 10 (LLNR 8375; 43–04–29.319N, 070–44–10.189W) on Seavey Island and Badgers Island Buoy 14 (LLNR 8405; 43–04–51.951N, 070–45–21.518W).

(b) *Regulations:* (1) The general regulations contained in 33 CFR 165.10, 165.11 and 165.13 apply.

(2) In accordance with the general regulations, the restrictions contained in paragraphs (b)(2)(i) through (b)(2)(iv) of this section apply to all vessels operating within the regulated area noted above.

(i) No vessel may operate in this regulated area at a speed in excess of five knots.

(ii) All vessels must proceed through the area with caution and operate in such a manner as to produce no wake.

(iii) Vessels operating within the regulated navigation area must comply with all directions given to them by the Captain of the Port Sector Northern New England or his on-scene representative. The ''on-scene representative'' of the Captain of the Port is any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port to act on his behalf. The on-scene representative may be on a Coast Guard vessel, State Marine Patrol vessel or other designated craft, or may be on shore and will communicate with vessels via VHF–FM radio or loudhailer. Members of the Coast Guard Auxiliary or Naval Harbor Security Patrol may be present to inform vessel operators of this regulation.

(iv) For purposes of navigational safety, the Captain of the Port or on-scene representative may authorize a deviation from this regulation.

(c) *Enforcement.* (1) This regulated navigation area is enforceable 24 hours a day from October 15, 2009 until November 15, 2009.

(2) *Notice of suspension of enforcement:* The Captain of the Port Sector Northern New England may temporarily suspend enforcement of the regulated navigation area. If enforcement of the zone is temporarily suspended, the Captain of the Port Sector Northern New England will cause a notice of the suspension of enforcement of this regulated navigation area to be made by all appropriate means to effect the widest publicity among the affected segments of the public. Such means of notification may also include but are not limited to, Broadcast Notice to Mariners or Local Notice to Mariners. Such notification will include the date and time that enforcement is suspended as well as the date and time that enforcement will resume.

(3) Violations of this regulated navigation area should be reported to the Captain of the Port Sector Northern New England, at (207) 767–0303 or on VHF–Channel 16. Persons in violation of this regulated navigation area may be subject to civil and/or criminal penalties.

Dated: October 13, 2009.

Joseph L. Nimmich,

Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.

[FR Doc. E9–25263 Filed 10–20–09; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2009–0384; FRL–8959–7]

Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing approval of revisions to the San Joaquin Valley Unified Air Pollution Control District (SJVAPCD) portion of the California State Implementation Plan (SIP). These revisions were proposed in the **Federal Register** on July 13, 2009 and concern oxides of nitrogen (NO_X) emissions from Stationary Gas Turbines. We are approving a local rule that regulates these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

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

ADDRESSES: EPA has established docket number EPA–R09–OAR–2009–0384 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: Idalia Perez, EPA Region IX, (415) 942–3248, *perez.idalia@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

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I. Proposed Action
II. Public Comments and EPA Responses
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I. Proposed Action

On July 13, 2009 (74 FR 33395), EPA proposed to approve the following rule into the California SIP.

Local agency	Rule No.	Rule title	Adopted	Submitted
SJVAPCD	4703	Stationary Gas Turbines	09/20/07	03/07/08

We proposed to approve this rule because we determined that it complied with the relevant CAA requirements. Our proposed action contains more information on the rules and our evaluation.

II. Public Comments and EPA Responses

EPA's proposed action provided a 30-day public comment period. During this period, we received no comments.

III. EPA Action

No comments were submitted that change our assessment that the submitted rule complies with the relevant CAA requirements. Therefore, as authorized in section 110(k)(3) of the Act, EPA is fully approving this rule 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 December 21, 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.

Dated: August 26, 2009.

Laura Yoshii,

Acting 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)(354)(i)(E)(*5*) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(354) * * *

(i) * * *

(E) * * *

(*5*) Rule 4703, ''Stationary Gas Turbines,'' adopted on September 20, 2007.

* * * * *

[FR Doc. E9–25173 Filed 10–20–09; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 213

[Docket No. FRA–2008–0036]

RIN 2130–AB90

Track Safety Standards; Continuous Welded Rail (CWR)

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Correcting amendment.

SUMMARY: FRA published a final rule in the **Federal Register** on August 25, 2009, revising the Track Safety Standards. The final rule included compliance dates for Class I, II, and III railroads only. The final rule inadvertently omitted compliance dates for commuter railroads, intercity passenger railroads, and any other additional railroads that have continuous welded rail (CWR). This document corrects the final rule by including compliance dates for the omitted railroads and amending a reference to the effective date in the rule text.

DATES: *Effective date:* This correcting amendment is effective October 21, 2009. *Compliance dates:* October 9, 2009 for Class I railroads; November 23, 2009 for Class II railroads, commuter railroads, and intercity passenger railroads; and February 22, 2010 for Class III railroads and any other additional railroads with CWR.

FOR FURTHER INFORMATION CONTACT: Kenneth Rusk, Staff Director, Office of Railroad Safety, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20590 (*telephone:* (202) 493–6236); or Sarah Grimmer Yurasko, Trial Attorney, Office of the Chief Counsel, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20950 (*telephone:* (202) 493–6390).

SUPPLEMENTARY INFORMATION: So that the agency would be better able to review CWR plans as required by the final rule published August 25, 2009 (74 FR 42988), FRA determined that there are three different compliance dates for railroads containing CWR, based on the railroad size.[1] In the final rule, FRA stated that the compliance date for Class I railroads is October 9, 2009 (45 days after the publication date), the compliance date for Class II railroads is November 23, 2009 (90 days after the publication date), and the compliance date is February 22, 2010 (180 days after the publication date) for Class III railroads. FRA inadvertently left commuter railroads, intercity passenger railroads, and any other additional railroads with CWR track out of the compliance schedule; therefore, FRA is now clarifying that the compliance date for commuter railroads and intercity passenger railroads is November 23, 2009, and the compliance date for any other additional railroads with CWR is February 22, 2010.

Due to this inadvertent error, FRA is also changing the date listed at 49 CFR 213.119(c)(2). This paragraph states that, in the case of a bolted joint installed during CWR installation after August 25, 2009 (the publication date of the final rule), within 60 days the track owner must either: (1) Weld the joint; (2) install a joint with six bolts;[2] or (3) anchor every tie 195 feet in both directions of the joint.

List of Subjects in 49 CFR Part 213

Penalties, Railroad safety, Reporting and recordkeeping requirements.

■ Accordingly, 49 CFR part 213 is corrected by making the following correcting amendment:

PART 213—TRACK SAFETY STANDARDS

■ 1. The authority citation for part 213 continues to read as follows:

Authority: 49 U.S.C. 20102–20114 and 20142; 28 U.S.C. 2461, note; and 49 CFR 1.49(m).

§ 213.119 [Amended]

■ 2. In § 213.119(c)(2), remove the date of ''August 25, 2009'', and add in its place ''October 21, 2009''.

Issued in Washington, DC, on September 30, 2009.

Joseph C. Szabo,

Administrator.

[FR Doc. E9–25278 Filed 10–20–09; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 622

[Docket No. 0910141365–91366–01]

RIN 0648–AY21

Sea Turtle Conservation; Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic

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

ACTION: Final rule.

SUMMARY: This rule implements an area closure and associated gear restrictions applicable to the bottom longline component of the reef fish fishery in the exclusive economic zone (EEZ) of the Gulf of Mexico to reduce incidental take and mortality of sea turtles. Specifically, this rule prohibits the use of bottom longline gear for the harvest of reef fish shoreward of a line approximating the 35–fathom depth contour in the eastern Gulf of Mexico and limits bottom longline vessels operating in the reef fish fishery east of longitude 85°30′W to 1,000 hooks onboard, of which only 750

[1] *See* 49 CFR 1201.1–1(a).

[2] *See* 49 CFR 213.121(e), stating that, in the case of CWR, each rail shall be bolted with at least two bolts at each joint. This is a total of four bolts required at each joint.

may be actively fished or rigged for fishing.

DATES: This rule is effective on October 16, 2009.

FOR FURTHER INFORMATION CONTACT: Michael Barnette, telephone: 727–551–5794, fax: 727–824–5309, e-mail: *michael.barnette@noaa.gov*.

SUPPLEMENTARY INFORMATION: All sea turtles that occur in U.S. waters are listed as either endangered or threatened under the Endangered Species Act of 1973 (ESA). The Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) turtles are listed as endangered. The loggerhead (*Caretta caretta*) and green (*Chelonia mydas*) turtles are listed as threatened, except for breeding populations of green turtles in Florida and on the Pacific coast of Mexico, which are listed as endangered.

Sea turtles are incidentally taken, and some are killed, as a result of numerous activities, including fishery-related activities in the Gulf of Mexico and along the Atlantic seaboard. Under the ESA and its implementing regulations, the taking of sea turtles is prohibited, with exceptions identified in 50 CFR 223.206(d), or according to the terms and conditions of a biological opinion issued under section 7 of the ESA, or according to an incidental take permit issued under section 10 of the ESA.

Background

On February 15, 2005, NMFS completed a biological opinion for the Gulf reef fish fishery, as managed under the Gulf of Mexico Reef Fish Fishery Management Plan (Reef Fish FMP). The opinion concluded that the continued authorization of the Gulf reef fish fishery was not likely to jeopardize the continued existence of any listed species of sea turtles. An incidental take statement (ITS) was issued specifying the amount and extent of anticipated take on a three-year basis, along with reasonable and prudent measures and associated terms and conditions deemed necessary and appropriate to minimize the impact of these takes. Other listed species were found not likely to be adversely affected. No critical habitat overlapped with the action area, thus none was affected.

As provided in 50 CFR 402.16, reinitiation of formal consultation is required when discretionary involvement or control over the action has been retained (or is authorized by law) and: (1) the amount or extent of the incidental take is exceeded; (2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not previously considered; or (4) if a new species is listed or critical habitat designated that may be affected by the identified action.

On September 3, 2008, NMFS' Southeast Regional Office, Sustainable Fisheries Division, requested reinitiation of ESA section 7 consultation on the Reef Fish FMP. The request was based on a preliminary analysis conducted by the Southeast Fisheries Science Center (SEFSC) of recent observer data. The SEFSC's preliminary analysis indicated that the overall amount and extent of incidental take for sea turtles specified in the incidental take statement of the 2005 opinion had been exceeded by the bottom longline component of the fishery. The final report, ''Estimated Takes of Sea Turtles in the Bottom Longline Portion of the Gulf of Mexico Reef Fish Fishery July 2006 Through 2007 Based on Observer Data,'' (NMFS SEFSC 2008) was received on October 8, 2008. The final report confirmed that loggerhead takes had been substantially exceeded by the commercial bottom longline component and that consultation needed to be reinitiated.

On October 28, 2008, NMFS presented a summary of the final report to the Gulf of Mexico Fishery Management Council (Council), and informed the Council that the 2005 opinion ITS had been exceeded and that a new biological opinion needed to be conducted for the fishery. In response to this new information, the Council passed a motion to prepare a scoping document for Amendment 31 to the Reef Fish FMP to address sea turtle and longline interactions, indicating a desire to consider time/area closures, gear modifications, alternative baits, observer program modifications, and effort limitations. The Council also requested a temporary emergency rule to reduce the sea turtle bycatch in the Gulf bottom longline component of the reef fish fishery in the short-term while they continued to develop Amendment 31 to address the problem in the long-term. On January 9, 2009, after extensive review of NMFS SEFSC 2008 and ongoing activities in the Gulf reef fish fishery, NMFS determined that continuing to authorize the fishery during the reinitiation period would not violate section 7(a)(2) or section 7(d) of the ESA.

Per the Council's request, NMFS published a temporary emergency rule on May 1, 2009, to reduce the incidental take and mortality of sea turtles in the bottom longline component of the reef fish fishery in the Gulf of Mexico EEZ while the Council completed Amendment 31 (74 FR 20229, May 1, 2009). Effective May 18, 2009 through October 28, 2009, the rule prohibited the use of bottom longline gear to harvest reef fish east of 85°30′W longitude shoreward of a line approximating the 50–fathom depth contour until the 2009 deepwater grouper and tilefish quotas were met, and in water of all depths east of 85°30′W longitude thereafter. In the rule, NMFS specified that if it determined that less restrictive measures would suffice to adequately reduce turtle takes by the longline component of the reef fish fishery, NMFS could rescind the closure before the 180-day effective period of the emergency rule was reached and potentially implement less restrictive measures.

On August 13, 2009, the Council voted in favor of submitting Amendment 31 to NMFS for Secretarial review and approval. Amendment 31, now under Secretarial Review, proposes the following actions to reduce sea turtle take by the bottom longline component of the reef fish fishery east of Cape San Blas, Florida: (1) A prohibition on the use of bottom longline gear shoreward of a line approximating the 35–fathom contour from June through August; (2) a reduction in the number of longline vessels operating in the fishery through an endorsement provided only to vessel permits with a demonstrated history of landings, on average, of at least 40,000 pounds of reef fish annually with fish traps or longline gear during 1999–2007; and (3) restricting the total number of hooks that may be possessed onboard each reef fish bottom longline vessel to 1,000, only 750 of which may be rigged for fishing.

On October 13, 2009, NMFS completed a biological opinion on the continued authorization of the Gulf reef fish fishery, as managed under the Reef Fish FMP. The biological opinion considered all Reef Fish FMP amendments implemented to date, as well as the regulatory actions included in this rule and actions proposed in Amendment 31. The opinion concluded that the continued authorization of the Gulf reef fish fishery was likely to adversely affect sea turtles and sawfish, but was not likely to jeopardize the continued existence of any listed species. An ITS was issued specifying the amount and extent of anticipated take on a three-year basis, along with reasonable and prudent measures and

associated terms and conditions deemed necessary and appropriate to minimize the impact of these takes.

The emergency rule currently in place is set to expire on October 29, 2009. A final rule implementing Amendment 31, if approved, is not expected to be effective until May 2010. Therefore, at a minimum, an interim action is needed to reduce the incidental take and mortality of sea turtles in the bottom longline component of the reef fish fishery in the Gulf of Mexico EEZ after the emergency rule expires but before Amendment 31 is implemented; this rule supersedes the current emergency rule, which expires on October 29, 2009.

The measures implemented through the current emergency rule have effectively ended reef fish longline fishing in the eastern Gulf of Mexico until the deep-water grouper and tilefish fishing year starts January 1, 2010. This has caused economic hardship for the commercial fishing industry. Should the current emergency rule be renewed until regulations developed in Amendment 31 are implemented, this economic hardship will continue as most effort conducted by the longline component is targeted at shallow-water grouper species. Analyses of alternatives for Amendment 31, including those in the biological opinion, indicate there are alternatives that would allow longline operations, albeit with some limitations, while still providing adequate protection for sea turtles. Therefore, the purpose of this rulemaking is to balance the continued operation of the bottom longline component of the reef fish fishery while maintaining adequate protective measures for sea turtles until the Council's preferred management strategy in Amendment 31 can be implemented.

Additional time is required to implement Amendment 31, in particular the proposed longline endorsement provision, and the time constraint precludes the inclusion of this provision in this rulemaking. The longline endorsement would require evaluation of landings records and subsequent issuing of endorsements to qualifying reef fish permit owners. This process would take several months. Therefore, the longline endorsement provision will not be implemented by this action.

Classification

The Assistant Administrator for Fisheries, NOAA (AA), has determined that this rule is necessary to balance the need to reduce the incidental take and associated mortality of sea turtles with the need to reduce the ongoing social and economic hardships in the bottom longline component of the reef fish fishery in the Gulf of Mexico EEZ. The AA has determined this rule is consistent with the ESA and other applicable law.

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

Pursuant to 5 U.S.C. 553(b)(B), the AA finds good cause to waive prior notice and opportunity for public comment. Prior notice and opportunity to comment would be contrary to the public interest, because delaying action to address threatened and endangered species interactions in the fishery would likely result in additional take and mortality of sea turtle species. Such take would be in excess of the take analyzed in the effects analysis for the relevant time period, and potentially even result in exceeding the incidental take statement issued with the most recent biological opinion. As a result, this would introduce risk of jeopardizing the survival and recovery of sea turtle populations, which is inconsistent with the requirements of the ESA. While other more restrictive actions could be taken to reduce takes in the fishery, in the absence of any further regulatory action, the current restrictions in the fishery will expire on October 29, 2009, and the bottom longline component of the fishery will be authorized to occur in a manner that has been documented to result in excessive take of sea turtles. As stated above, such take would not be in compliance with the ESA, and would be contrary to the public interest in protecting threatened and endangered species populations. Extending the existing closure would be more restrictive than necessary to fulfill the agency's obligations under the ESA, and would result in undue social and economic hardship on participants using bottom longline gear in the fishery.

For these same reasons, the AA finds good cause to waive the 30-day delay in effective date pursuant to 5 U.S.C. 553(d)(3).

Because prior notice and opportunity for public comment are not required for this rule by 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* are inapplicable.

The Endangered Species Act provides the statutory basis for the rule.

List of Subjects

50 CFR Part 223

Endangered and threatened species; Exports; Imports; Transportation.

50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: Ocotber 16, 2009.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR parts 223 and 622 are amended as follows:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531 1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.*; 16 U.S.C. 5503(d) for § 223.206(d)(9).

■ 2. In § 223.206 paragraph (d) introductory text is revised and paragraph (d)(12) is added to read as follows:

§ 223.206 Exceptions to prohibitions relating to sea turtles.

* * * * *

(d) *Exception for incidental taking.* The prohibitions against taking in § 223.205(a) do not apply to the incidental take of any member of a threatened species of sea turtle (i.e., a take not directed towards such member) during fishing or scientific research activities, to the extent that those involved are in compliance with all applicable requirements of paragraphs (d)(1) through (d)(12) of this section, or in compliance with the terms and conditions of an incidental take permit issued pursuant to paragraph (a)(2) of this section.

* * * * *

(12) *Prohibitions applicable to bottom longline fishing for Gulf reef fish.* (i) Bottom longlining for Gulf reef fish as defined in § 622.2 of this title is prohibited in the portion of the Gulf EEZ east of 85°30′ W. long. that is shoreward of rhumb lines connecting, in order, the following points:

Point	North lat.	West long.
A	28°58.70′	85°30.00′
B	28°59.25′	85°26.70′
C	28°57.00′	85°13.80′
D	28°47.40′	85°03.90′
E	28°19.50′	84°43.00′
F	28°00.80′	84°20.00′
G	26°48.80′	83°40.00′

Point	North lat.	West long.
H	25°17.00′	83°19.00′
I	24°54.00′	83°21.00′
J	24°29.50′	83°12.30′
K	24°26.50′	83°00.00′

(ii) Within the prohibited area specified in paragraph (d)(12)(i) of this section, a vessel with bottom longline gear on board may not possess Gulf reef fish unless the bottom longline gear is appropriately stowed, and a vessel that is using bottom longline gear to fish for species other than Gulf reef fish may not possess Gulf reef fish. For the purposes of paragraph (d)(12) of this section, appropriately stowed means that a longline may be left on the drum if all gangions and hooks are disconnected and stowed below deck; hooks cannot be baited; and all buoys must be disconnected from the gear but may remain on deck.

(iii) Within the Gulf EEZ east of 85°30′ W. long., a vessel for which a valid Gulf reef fish permit has been issued under § 622.4 of this title and that is fishing bottom longline gear or has bottom longline gear on board cannot possess more than a total of 1,000 hooks including hooks on board the vessel and hooks being fished, and cannot possess more than 750 hooks rigged for fishing at any given time. For the purpose of this paragraph, ''hooks rigged for fishing'' means hooks attached to a line or other device capable of attaching to the mainline of the longline.

* * * * *

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

■ 3. The authority citation for part 622 continues to read as follows:

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

§ 622.34 [Amended]

■ 4. In § 622.34, paragraph (q) is removed and reserved.

[FR Doc. E9–25359 Filed 10–16–09; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 74, No. 202
Wednesday, October 21, 2009

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.

FEDERAL ELECTION COMMISSION

11 CFR Parts 100 and 109

[Notice 2009—23]

Coordinated Communications

AGENCY: Federal Election Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Election Commission seeks comments on proposed changes to its rules regarding coordinated communications under the Federal Election Campaign Act of 1971, as amended. These proposed changes are in response to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Shays* v. *FEC.* The Commission has made no final decision on the issues presented in this rulemaking. Further information is provided in the supplementary information that follows.

DATES: Comments must be received on or before January 19, 2010. The Commission will hold a hearing on these proposed rules and will announce the date of the hearing at a later date. Anyone wishing to testify at the hearing must file written comments by the due date and must include a request to testify in the written comments.

ADDRESSES: All comments must be in writing, addressed to Ms. Amy L. Rothstein, Assistant General Counsel, and submitted in either electronic, facsimile or hard copy form. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. Electronic comments should be sent to *CoordinationShays3@fec.gov.* If the electronic comments include an attachment, the attachment must be in Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments should be sent to (202) 219–3923, with hard copy follow-up. Hard copy comments and hard copy follow-up of faxed comments should be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. All comments must include the full name and postal service address of the commenter or they will not be considered. The Commission will post comments on its Web site after the comment period ends. The hearing will be held in the Commission's ninth floor meeting room, 999 E Street, NW., Washington, DC

FOR FURTHER INFORMATION, CONTACT: Ms. Amy L. Rothstein, Assistant General Counsel, or Attorneys Ms. Jessica Selinkoff, Ms. Esther D. Heiden or Ms. Joanna S. Waldstreicher, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Bipartisan Campaign Reform Act of 2002[1] (''BCRA'') contained extensive and detailed amendments to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* (''the Act''). The Commission promulgated a number of rules to implement BCRA, including rules defining ''coordinated communications'' at 11 CFR 109.21. The Court of Appeals for the District of Columbia Circuit found aspects of these rules invalid in *Shays* v. *FEC,* 528 F.3d 914 (DC Cir. 2008) (''*Shays III Appeal*'').

In response to the *Shays III Appeal* decision, the Commission seeks comment on possible changes to the ''coordinated communication'' regulations at 109.21, which govern communications made in coordination with Federal candidates, their authorized committees, or political party committees, but paid for by persons other than the candidate, the authorized committee, or the political party committee with whom the communication is coordinated. The Commission's rules at 11 CFR 109.37 regulate communications made in coordination with Federal candidates or their authorized committee, but paid for by a political party committee with which the coordination occurred (''party coordinated communication'' regulations). The party coordinated communication regulations (11 CFR 109.37) mirror, to a large extent, the coordinated communications regulations.[2] The Commission is not proposing to revise the party coordinated communication rules in this rulemaking because they were not addressed by the *Shays III Appeal* decision, but invites comment on whether it should issue a notice of proposed rulemaking on this subject.

I. Background Information

The Act and Commission regulations limit the amount a person may contribute to a candidate and that candidate's authorized political committee with respect to any election for Federal office, and also limit the amount a person may contribute to other political committees in a given calendar year. *See* 2 U.S.C. 441a(a)(1); 11 CFR 110.1(b)(1), (c)(1), (d); *see also* 2 U.S.C. 441b; 11 CFR 114.2 (prohibitions on corporate contributions). A ''contribution'' may take the form of money or ''anything of value,'' including an in-kind contribution, provided to a candidate or political committee for the purpose of influencing a Federal election. *See* 2 U.S.C. 431(8)(A)(i), (9)(A)(i); 11 CFR 100.52(a), (d)(1), 100.111(a), (e)(1). An expenditure made in coordination with a candidate, or with a candidate's authorized political committee, constitutes an in-kind contribution to that candidate subject to contribution limits and prohibitions and must, subject to certain exceptions, be reported as an expenditure by that candidate. *See* 2 U.S.C. 441a(a)(7); 11 CFR 109.20, 109.21(b).

The national committees and State committees of political parties may also make ''coordinated party expenditures'' in connection with the general election campaigns of Federal candidates, within certain limits. 2 U.S.C. 441a(d); 11 CFR 109.32(a), (b). Coordinated party expenditures are in addition to any contributions by the political party committees to candidates within the contribution limits of 11 CFR 110.1 and 110.2. 2 U.S.C. 441a(d); 11 CFR 109.32(a)(3), (b)(4).

[1] Public Law 107–155, 116 Stat. 81 (2002).

[2] When the Commission revised its coordinated communications rules in 2002 pursuant to the statutory mandate in BCRA, the Commission also adopted substantially parallel party coordinated communication rules to address coordinated communications that were paid for by political party committees in order ''to give clear guidance to those affected by BCRA.'' *See* Explanation and Justification for Final Rules on Coordinated and Independent Expenditures, 68 FR 421 (Jan. 3, 2003). When the Commission revised its coordinated communications rules in 2006, the Commission gave consideration as to whether its party coordinated communication rules at 11 CFR 109.37 should continue to mirror the coordinated communication rules at 11 CFR 109.21.

A. Before BCRA

The Supreme Court first examined independent expenditures and coordination or cooperation between candidates and other persons in *Buckley* v. *Valeo,* 424 U.S. 1, 58 (1976), though coordination was not explicitly addressed in the Act at that time. *See* Public Law 93–443, 88 Stat. 1263 (1974); Public Law 92–225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. 431 *et seq.*). In *Buckley,* the Court distinguished expenditures that were not truly independent—that is, expenditures made in coordination with a candidate or the candidate's authorized committee—from constitutionally protected ''independent expenditures.'' *Buckley,* 424 U.S. at 78–82. The Court noted that a third party's ''prearrangement and coordination of an expenditure with the candidate or his agent'' presents a ''danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.'' *Id.* at 47. The Court further noted that the Act's contribution limits must not be circumvented through ''prearranged or coordinated expenditures amounting to disguised contributions.'' *Id.* The Court concluded that a ''contribution'' includes ''all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate.'' *Id.* at 78; *see also id.* at 47 n.53.

After *Buckley,* Congress amended the Act to define an ''independent expenditure'' as excluding an expenditure made in ''cooperation or consultation with'' or ''in concert with, or at the request or suggestion of'' a candidate or the candidate's authorized committee or agent. Public Law 94–283 (1976) (now codified at 2 U.S.C. 431(17)). Congress also amended the Act to provide that an expenditure ''shall be considered to be a contribution'' when it is made by any person ''in cooperation, consultation, or concert, with, or at the request or suggestion of'' a candidate, a candidate's authorized committees, or their agents. Public Law 94–283 (1976) (codified at 2 U.S.C. 441a(a)(7)(B)(i) (1976)). The Act treats expenditures made for the dissemination, distribution, or republication of campaign materials prepared by a candidate, a candidate's authorized committees, or their agents as contributions. *See* Public Law 94–283 (1976) (now codified at 2 U.S.C. 441a(a)(7)(B)(iii)). Although Congress made some adjustments to the Act in the decades following *Buckley,* as discussed below, the coordination provisions remained substantively unchanged until BCRA.

Prior to the enactment of BCRA, the Commission adopted new coordination regulations in response to several court decisions.[3] *See* 11 CFR 100.23 (2001); Explanation and Justification for Final Rules on General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 FR 76138 (Dec. 6, 2000). Drawing on judicial guidance in *Christian Coalition,* the Commission defined a new term, ''coordinated general public political communication'' (''GPPC''), to determine whether expenditures for communications by unauthorized committees, advocacy groups, and individuals qualified as independent expenditures or were coordinated with candidates or party committees. A GPPC that ''included'' a clearly identified candidate was coordinated if a third party paid for it and if it was created, produced, or distributed (1) at the candidate's or party committee's request or suggestion; (2) after the candidate or party committee exercised control or decision-making authority over certain factors; or (3) after ''substantial discussion or negotiation'' with the candidate or party committee regarding certain factors. 11 CFR 100.23(b), (c) (2001). The regulations explained that ''substantial discussion or negotiation may be evidenced by one or more meetings, conversations or conferences regarding the value or importance of the communication for a particular election.'' 11 CFR 100.23(c)(2)(iii) (2001).

B. Impact of BCRA

In 2002, Congress revised the coordination provisions in the Act. *See* BCRA at secs. 202, 214, 116 Stat. at 90–91, 94–95. BCRA retained the statutory provision that an expenditure is a contribution to a candidate when it is made by any person ''in cooperation, consultation, or concert, with, or at the request or suggestion of'' that candidate, the candidate's authorized committee, or their agents. *See* 2 U.S.C. 441a(a)(7)(B)(i). BCRA added a similar provision governing coordination with political party committees: Expenditures made by any person, other than a candidate or the candidate's authorized committee, ''in cooperation, consultation, or concert, with, or at the request or suggestion of'' a national, State, or local party committee, are contributions to that political party committee. 2 U.S.C. 441a(a)(7)(B)(ii). BCRA also amended the Act to specify that a coordinated electioneering communication shall be a contribution to, and expenditure by, the candidate supported by that communication or that candidate's party. *See* 2 U.S.C. 441a(a)(7)(C).

BCRA expressly repealed the GPPC regulation at 11 CFR 100.23 and directed the Commission to promulgate new regulations on ''coordinated communications'' in their place. *See* BCRA at sec. 214, 116 Stat. at 94–95. Although Congress did not define the term ''coordinated communications'' in BCRA, the statute specified that the Commission's new regulations ''shall not require agreement or formal collaboration to establish coordination.''[4] BCRA at sec. 214(c), 116 Stat. at 95. BCRA also required that, ''[i]n addition to any subject determined by the Commission, the regulations shall address (1) payments for the republication of campaign materials; (2) payments for the use of a common vendor; (3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and (4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party.'' BCRA at sec. 214(c), 116 Stat. at 95; 2 U.S.C. 441a(7)(B)(ii) note.

As detailed below, the Commission promulgated revised coordinated communications regulations in 2002 as required by BCRA. Several aspects of those revised regulations were successfully challenged in *Shays* v. *FEC,* 337 F. Supp. 2d 28 (D.D.C. 2004) (''*Shays I District*''), *aff'd, Shays* v. *FEC,* 414 F.3d 76 (DC Cir. 2005) (''*Shays I Appeal*''), *petition for reh'g en banc denied,* No. 04–5352 (DC Cir. Oct. 21, 2005). In 2006, the Commission further revised its coordination regulations in

[3] *See Colo. Republican Fed. Campaign Comm.* v. *FEC,* 518 U.S. 604 (1996) (concluding that political parties may make independent expenditures on behalf of their Federal candidates); *FEC* v. *Christian Coalition,* 52 F. Supp. 2d 45, 92 (D.D.C. 1999) (''*Christian Coalition*'') (concluding that an ''expressive expenditure'' only becomes ''coordinated'' when the candidate requests or suggests the expenditure or when a candidate can exercise control over or when there has been substantial discussion or negotiation between the candidate and the spender over a communication's: (1) Content; (2) timing; (3) location, mode, or intended audience (*e.g.,* choice between newspaper or radio advertisement); or (4) ''volume'' (*e.g.,* number of copies of printed materials or frequency of media spots)).

[4] The Court of Appeals for the District of Columbia has noted that ''[a]part from this negative command—'shall not require'—BCRA merely listed several topics the rules 'shall address,' providing no guidance as to how the FEC should address them.'' *Shays* v. *Federal FEC,* 414 F.3d 76, 97–98 (DC Cir. 2005).

response to *Shays I Appeal.* These revised rules were themselves challenged in *Shays* v. *FEC,* 508 F. Supp. 2d 10 (D.D.C. 2007) (''*Shays III District''*), *aff'd, Shays* v. *FEC,* 528 F.3d 914 (DC Cir. 2008) (''*Shays III Appeal''*).[5] The Commission is issuing this Notice of Proposed Rulemaking (''NPRM'') in response to *Shays III Appeal.*

C. 2002 Rulemaking

On December 17, 2002, the Commission promulgated regulations as required by BCRA. *See* 11 CFR 109.21 (2003); *see also* Explanation and Justification for Final Rules on Coordinated and Independent Expenditures, 68 FR 421 (Jan. 3, 2003) (''2002 E&J''). The Commission's 2002 coordinated communication regulations set forth a three-prong test for determining whether a communication is a coordinated communication, and therefore an in-kind contribution to, and an expenditure by, a candidate, a candidate's authorized committee, or a political party committee. *See* 11 CFR 109.21(a). First, the communication must be paid for by someone other than a candidate, a candidate's authorized committee, a political party committee, or their agents (the ''payment prong''). *See* 11 CFR 109.21(a)(1) (2003). Second, the communication must satisfy one of four content standards (the ''content prong''). *See* 11 CFR 109.21(a)(2), (c) (2003). Third, the communication must satisfy one of five conduct standards (the ''conduct prong'').[6] *See* 11 CFR 109.21(a)(3), (d) (2003). A communication must satisfy all three prongs to be a ''coordinated communication.''

1. Content Standards

As stated in the 2002 E&J, each of the four standards that comprise the content prong of the 2002 coordinated communication regulation identified a category of communications whose ''subject matter is reasonably related to an election.'' 2002 E&J, 68 FR at 427. The first content standard is satisfied if the communication is an electioneering communication. *See* 11 CFR 109.21(c)(1) (2003). The second content standard is satisfied by a public communication made at any time that disseminates, distributes, or republishes campaign materials prepared by a candidate, a candidate's authorized committee, or agents thereof. *See* 11 CFR 109.21(c)(2) (2003), 109.37(a)(2)(i) (2003). The third content standard is satisfied if a public communication made at any time expressly advocates the election or defeat of a clearly identified candidate for Federal office. *See* 11 CFR 109.21(c)(3) (2003), 109.37(a)(2)(ii) (2003). The fourth content standard is satisfied if a public communication (1) refers to a political party or a clearly identified Federal candidate;[7] (2) is publicly distributed or publicly disseminated 120 days or fewer before an election (the ''120-Day Time Window''); and (3) is directed to voters in the jurisdiction of the clearly identified Federal candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot. *See* 11 CFR 109.21(c)(4) (2003).

2. Conduct Standards

The 2002 coordinated communication regulations also contained five conduct standards.[8] A communication created, produced, or distributed (1) at the request or suggestion of, (2) after material involvement by, or (3) after substantial discussion with, a candidate, a candidate's authorized committee, or a political party committee, would satisfy the first three conduct standards. *See* 11 CFR 109.21(d)(1)–(3) (2003). These three conduct standards were not at issue in *Shays III Appeal,* and are not addressed in this rulemaking.

The remaining two conduct standards, which are at issue in this rulemaking, are the (1) ''common vendor'' and (2) ''former employee'' standards. The common vendor conduct standard is satisfied if (1) the person paying for the communication contracts with, or employs, a ''commercial vendor'' to create, produce, or distribute the communication, (2) the commercial vendor has provided certain specified services to the political party committee or the clearly identified candidate referred to in the communication within the current election cycle, and (3) the commercial vendor uses or conveys information to the person paying for the communication about the plans, projects, activities, or needs of the candidate or political party committee, or information used by the commercial vendor in serving the candidate or political party committee, and that information is material to the creation, production, or distribution of the communication. *See* 11 CFR 109.21(d)(4) (2003).

The former employee conduct standard is satisfied if (1) the communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate or the political party committee clearly identified in the communication within the current election cycle, and (2) the former employee or independent contractor uses or conveys information to the person paying for the communication about the plans, projects, activities, or needs of the candidate or political party committee, or information used by the former employee or independent contractor in serving the candidate or political party committee, and that information is material to the creation, distribution, or production of the communication. *See* 11 CFR 109.21(d)(5) (2003).

These two conduct standards covered former employees, independent contractors, and vendors[9] only if they had provided services to a candidate or party committee during the ''current election cycle,'' as defined in 11 CFR 100.3. 2002 E&J, 68 FR at 436; 11 CFR 109.21(d)(4), (5) (2003).

D. Shays I Appeal

The Court of Appeals in *Shays I Appeal* found that the content prong regulations did not run counter to the unambiguously expressed intent of Congress. *Shays I Appeal,* 414 F.3d at 99–100 (applying *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984)). Nonetheless, the court found the 120-Day Time Window in the fourth standard of the content prong of the coordinated communication regulations to be unsupported by adequate explanation and justification and, thus, arbitrary and capricious under the Administrative Procedure Act (''APA'') and affirmed the *Shays I District* court's invalidation of the rule. *Shays I Appeal,* 414 F.3d at 102. Although the Court of Appeals found the explanation for the particular time frame adopted to be lacking, the *Shays I Appeal* court rejected the argument that the Commission is precluded from establishing a ''bright line test.'' *Id.* at 99.

[5] A third case filed by the same Plaintiff, referred to as ''*Shays II,*'' addressed the Commission's approach to regulating so-called ''527'' organizations and is not relevant to the coordination rules at issue in this NPRM. *See Shays* v. *FEC,* 511 F. Supp. 2d 19 (D.D.C. 2007).

[6] A sixth conduct standard clarifies the application of the other five to the dissemination, distribution, or republication of campaign materials. *See* 11 CFR 109.21(d)(6) (2003).

[7] The party coordinated communications content prong contains a similar standard, except that element (1) includes only references to clearly identified Federal candidates. 11 CFR 109.37(a)(2)(iii) (2003).

[8] The party coordinated communications rule incorporated the same conduct standards by reference to 11 CFR 109.21(d)(1) through (d)(6). *See* 11 CFR 109.37(a)(3) (2003).

[9] *See* 11 CFR 109.21(d)(4)(ii) for the specific services that a vendor must provide in order to trigger the common vendor standard.

The *Shays I Appeal* court concluded that the regulation's ''fatal defect'' was in offering no persuasive justification for the 120-Day Time Window and ''the weak restraints applying outside of it.'' *Id.* at 100. The court concluded that, by limiting coordinated communications made outside of the 120-Day Time Window to communications containing express advocacy or the republication of campaign materials, the Commission ''has in effect allowed a coordinated communication free-for-all for much of each election cycle.'' *Id.* Indeed, the ''most important'' question the court asked was, ''would candidates and collaborators aiming to influence elections simply shift coordinated spending outside that period to avoid the challenged rules' restrictions?'' *Id.* at 102.

The *Shays I Appeal* court required the Commission to undertake a factual inquiry to determine whether the temporal line that it drew ''reasonably defines the period before an election when non-express advocacy likely relates to purposes other than 'influencing' a Federal election'' or whether it ''will permit exactly what BCRA aims to prevent: evasion of campaign finance restrictions through unregulated collaboration.'' *Id.* at 101–02.

E. 2005 Rulemaking

In 2005, in the post-*Shays I Appeal* rulemaking, the Commission proposed seven alternatives for revising the content prong. *See* Notice of Proposed Rulemaking on Coordinated Communications, 70 FR 73946 (Dec. 14, 2005) (''2005 NPRM''). The Commission also used licensed data that provided empirical information regarding the timing, frequency and cost of television advertising spots in the 2004 election cycle. *See* Supplemental Notice of Proposed Rulemaking on Coordinated Communications, 71 FR 13306 (Mar. 15, 2006).

Although not challenged in *Shays I Appeal,* the ''election cycle'' time frame of the common vendor and former employee conduct standards at 11 CFR 109.21(d)(4) and (5), among other aspects of that prong, was also reconsidered in the 2005 NPRM. The Commission sought comment on how the ''election cycle'' time limitation works in practice and whether the strategic value of information on a candidate's plans, products, and activities lasts throughout the election cycle. 2005 NPRM, 70 FR at 73955–56.

The Commission also noted that the party coordinated communication regulation, while not addressed in *Shays I Appeal,* contained a three-prong test that was ''substantially the same'' as the coordinated communication regulation that had been invalidated by the *Shays I Appeal* court. 2005 NPRM, 70 FR at 73956. The Commission sought comment on whether it should make conforming changes to the party coordinated communication regulation if it revised the existing coordinated communication regulation. 2005 NPRM, 70 FR at 73956.

In 2006, the Commission promulgated revised rules that retained the content prong at 11 CFR 109.21(c), but revised the time periods in the fourth content standard. Relying on the licensed empirical data, the Commission revised the coordinated communication regulation at 11 CFR 109.21(c)(4) and applied different time periods for communications coordinated with Presidential candidates (120 days before a State's primary through the general election), congressional candidates (separate 90-day time windows before a primary and before a general election), and political parties (tied to either the Presidential or congressional time periods, depending on the communication and election cycle). *See* Explanation and Justification for Final Rules on Coordinated Communications, 71 FR 33190 (June 8, 2006) (''2006 E&J'').

The 2006 coordinated communication regulations also reduced the period of time during which a common vendor's or former employee's relationship with the authorized committee or political party committee referred to in the communication could satisfy the conduct prong, from the entire election cycle to 120 days. 2006 E&J, 71 FR at 33204. The 2006 E&J noted that, especially in regard to the six-year Senate election cycles, the ''election cycle'' time limit was ''overly broad and unnecessary to the effective implementation of the coordination provisions.'' *Id.* The 2006 E&J reasoned that 120 days was a ''more appropriate'' limit. *Id.*

Although the party coordinated communication regulations were not addressed in the *Shays I Appeal,* in 2006 the Commission also revised the regulations at 11 CFR 109.37 to provide consistency with revisions to the coordinated communication regulations at 11 CFR 109.21. Specifically, the Commission revised the time periods in the content standard at 11 CFR 109.37(a)(2)(iii) of the party coordinated communication regulations, adopting the same time periods for presidential candidates (120 days before a State's primary through the general election) and congressional candidates (90 days before the primary and general elections) as in the coordinated communication regulations at 11 CFR 109.21(c)(4). *See* 2006 E&J, 71 FR at 33207. The Commission also incorporated into the party coordinated communication regulations the new safe harbors at 11 CFR 109.21(d)(2)–(5) for use of publicly available information, and the safe harbors at 11 CFR 109.21(g) for endorsements and solicitations by Federal candidates, and at 11 CFR 109.21(h) for the establishment and use of a firewall. *See* 2006 E&J, 71 FR at 33207–08.

F. Shays III Appeal

On June 13, 2008, the Court of Appeals issued its opinion in *Shays III Appeal.*

1. Content Standards

The *Shays III Appeal* court held that the Commission's decision to apply ''express advocacy'' as the only content standard[10] outside the 90-day and 120-day windows ''runs counter to BCRA's purpose as well as the APA.'' *Shays III Appeal,* 528 F.3d at 926. The court found that, although the administrative record demonstrated that the ''vast majority'' of advertisements were run in the more strictly regulated 90-day and 120-day windows, a ''significant number'' of advertisements ran before those windows and ''very few ads contain magic words.''[11] *Id.* at 924. The *Shays III Appeal* court held that ''the FEC's decision to regulate ads more strictly within the 90/120-day windows was perfectly reasonable, but its decision to apply a 'functionally meaningless' standard outside those windows was not.'' *Id.* at 924 (quoting *McConnell* v. *FEC,* 540 U.S. 93, 193 (2003)) (concluding that *Buckley's* 'magic words' requirement is ''functionally meaningless''); *see also McConnell* v. *FEC,* 251 F. Supp. 2d 176, 303–04 (D.D.C. 2003) (Henderson, J.); *id.* at 534 (Kollar-Kotelly, J.); *id.* at 875–79 (Leon, J.)) (discussing ''magic words'').

The court noted that ''although the FEC * * * may choose a content standard less restrictive than the most restrictive it could impose, it must demonstrate that the standard it selects 'rationally separates election-related advocacy from other activity falling outside FECA's expenditure definition.'''[12] *Shays III Appeal,* 528

[10] The court did not address the republication of campaign materials, *see* 11 CFR 109.21(c)(2), in its analysis of the period outside the time windows.

[11] ''Magic words'' are ''examples of words of express advocacy, such as 'vote for,' 'elect,' 'support,' * * * 'defeat,' [and] 'reject.'''' *McConnell* v. *FEC,* 540 U.S. 93, 191 (2003) (quoting *Buckley,* 424 U.S. at 44 n.52).

[12] An ''expenditure'' includes ''any purchase, payment, distribution, loan, advance, deposit, or

F.3d at 926 (quoting *Shays I Appeal, 414 F.3d* at 102). The court stated that ''the 'express advocacy' standard fails that test,'' but did not explicitly articulate a less restrictive standard that would meet the test. *Id.*

The court expressed particular concern about a possible scenario in which, ''more than 90/120 days before an election, candidates may ask wealthy supporters to fund ads on their behalf, so long as those ads do not contain magic words.'' *Id.* at 925. The court noted that the Commission ''would do nothing about'' such coordination, ''even if a contract formalizing the coordination and specifying that it was 'for the purpose of influencing a Federal election' appeared on the front page of the New York Times.'' *Id.* The court held that such a rule not only frustrates Congress's purpose to prohibit funds in excess of the applicable contribution limits from being used in connection with Federal elections, but ''provides a clear roadmap for doing so.'' *Id.*

2. Conduct Standards

The *Shays III Appeal* court also invalidated the 120-day period of time during which a common vendor's or former campaign employee's relationship with an authorized committee or political party committee could satisfy the conduct prong at 11 CFR 109.21(d)(4) and (d)(5). *Shays III Appeal,* 528 F.3d at 928–29. The *Shays III Appeal* court found that with respect to the change in the 2006 coordinated communication regulations from the ''current election cycle'' to a 120-day period, ''the Commission's generalization that material information may not remain material for long overlooks the possibility that *some* information * * * may very well remain material for at least the duration of a campaign.'' *Id.* at 928. The court therefore found that the Commission had failed to justify the change to a 120-day time window, and, as such, the change was arbitrary and capricious. *Id.* The court concluded that, while the Commission may have discretion in drawing a bright line in this area, it had not provided an adequate explanation for the 120-day time period, and that the Commission must support its decision with reasoning and evidence. *Id.* at 929.

II. Proposals To Address Coordinated Communications Content Standards

To address the *Shays III Appeal* court's concern regarding election-related communications taking place outside the 90-day and 120-day windows, the Commission is considering retaining the existing four content standards in 11 CFR 109.21(c), and adopting one or more of the following four approaches: (1) Adopting a content standard to cover public communications that promote, support, attack, or oppose a political party or a clearly identified Federal candidate (the ''PASO standard''); (2) adopting a content standard to cover public communications that are the ''functional equivalent of express advocacy,'' as articulated in *FEC* v. *Wis. Right to Life, Inc.,* 551 U.S. 449, 469–70 (2007) (the ''Modified *WRTL* content standard''); (3) clarifying that the existing content standard includes express advocacy as defined under both 11 CFR 100.22(a) and (b); and (4) adopting a standard that pairs a public communication standard with a new conduct standard (the ''Explicit Agreement'' standard).[13] The Commission has not made any determination as to which, if any, of these standards to adopt in the final rules, or whether it should adopt a combination of these standards, or some other standard altogether.

The Commission invites comment on which, if any, of the four proposals best complies with the *Shays III Appeal* decision and why. The Commission is particularly interested in whether any of the proposals, standing alone, would satisfy the decision of the Court of Appeals in *Shays III Appeal.* Additionally, several of the alternatives propose broader content standards than those that are currently in 11 CFR 109.21, thus potentially bringing a broader range of communications under the Commission's more restrictive contribution regulations. The Commission invites comment on how this possibility relates to (1) the Commission's jurisdictional limitations; (2) the distinction courts have drawn between contributions versus independent spending and other protected speech (*see, e.g., Buckley,* 524 U.S. at 22; *FEC* v. *Colo. Republican Fed. Campaign Comm.,* 533 U.S. 431 (2001) (''*Colorado II*''); *Colo. Republican Fed. Campaign Comm.* v. *FEC,* 518 U.S. 604 (1996) (''*Colorado I*'')); and (3) the possibility that enforcement of the Commission's regulations that draw the line between independent and coordinated speech may have the potential to chill independent speech.

A. Alternative 1—The PASO Standard—Proposed 11 CFR 109.21(c)(3) and Proposed PASO Definition Alternatives A and B at 11 CFR 100.23

Alternative 1 would amend 11 CFR 109.21(c) by replacing the express advocacy standard with a PASO standard. Under the PASO standard, any public communication that promotes, supports, attacks, or opposes a political party or a clearly identified candidate for Federal office would meet the content prong of the coordinated communications test, without regard to when the communication is made or the targeted audience. The Commission also is considering two alternative definitions of promote, support, attack, or oppose (''PASO'').

1. Background

In BCRA, Congress created a number of new campaign finance provisions that apply to communications that PASO Federal candidates. For example, Congress included public communications that refer to a candidate for Federal office and that PASO a candidate for that office as one type of Federal election activity (''Type III'' Federal election activity). BCRA requires that State, district, and local party committees, Federal candidates, and State candidates pay for PASO communications entirely with Federal funds. *See* 2 U.S.C. 431(20)(A)(iii); 441i(b), (e), (f); *see also* 2 U.S.C. 441i(d) (prohibiting national, State, district, and local party committees from soliciting donations for tax-exempt organizations that make expenditures or disbursements for Federal election activity).

Congress also included PASO in the backup definition of ''electioneering communication,'' should that term's primary definition be found to be constitutionally insufficient. *See* 2 U.S.C. 434(f)(3)(A)(ii). In addition, Congress also incorporated by reference Type III Federal election activity as a limit on the exemptions that the Commission may make from the definition of ''electioneering communication.'' *See* 2 U.S.C. 434(f)(3)(B)(iv); *see also* 2 U.S.C. 431(20)(A)(iii). Congress did not define PASO or any of its component terms.

Accordingly, the Commission incorporated PASO in its regulations defining ''Federal election activity,'' and in the soft money rules governing State and local party committee communications and the allocation of funds for these communications. *See* 11

gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.'' 2 U.S.C. 431(9); *see also* 11 CFR 100.111(a).

[13] A ''public communication'' is ''a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. The term *general public political advertising* shall not include communications over the Internet, except for communications placed for a fee on another person's Web site.'' 11 CFR 100.26; *see also* 2 U.S.C. 431(22).

CFR 100.24(b)(3) and (c)(1); 11 CFR 300.33(c), 300.71, 300.72. The Commission also incorporated PASO as a limit to the exemption for State and local candidates from the definition of ''electioneering communication,'' and as a limit to the safe harbors from the coordinated communications rules for endorsements and solicitations. *See* 11 CFR 100.29(c)(5) and 109.21(g). To date, the Commission has not adopted a regulatory definition of either PASO or any of its component terms.

The Supreme Court in *McConnell* upheld the statutory PASO standard in the context of BCRA's provisions limiting party committees' Federal election activities to Federal funds, noting that ''any public communication that promotes or attacks a clearly identified Federal candidate directly affects the election in which he is participating.'' *McConnell,* 540 U.S. at 170. The Court further found that Type III Federal election activity was not unconstitutionally vague because the ''words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision.'' *Id.* at 170 n.64. The Court stated that the PASO words '' 'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.' '' *Id.* (quoting *Grayned* v. *City of Rockford,* 408 U.S. 104, 108–09 (1972)). The Court stated that this is ''particularly the case'' with regard to Federal election activity, ''since actions taken by political parties are presumed to be in connection with election campaigns.'' *Id.*

The Commission seeks comment on whether the Supreme Court's statement that the ''words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential party speakers must act'' applies (1) only to party committees, or also to other speakers; and (2) only to Federal election activity, or also in other contexts. After *McConnell,* is any rule defining PASO, or its component terms, necessary? Would a regulatory definition nonetheless be helpful in providing guidance and explicit standards whereby persons would know which communications are intended to be covered and which ones are not?

Additionally, does the Court's decision in *Wisconsin Right to Life* have any effect on the scope of the definition of PASO? After *Wisconsin Right to Life,* is it permissible for the Commission to regulate any speech, whether independent or not, that does not fall within either the Court's definition of ''express advocacy'' or its definition of the ''functional equivalent of express advocacy''? Is the decision in *Wisconsin Right to Life* applicable in the coordinated communications context, since the Court's decision was confined to independent electioneering communications?

2. Content Standard

The court in *Shays III Appeal* held that the Commission ''must demonstrate that the standard it selects 'rationally separates election-related advocacy from other activity falling outside FECA's expenditure definition.' '' *Shays III Appeal,* 528 F.3d at 926 (quoting *Shays I Appeal,* 414 F.3d at 102). The Commission seeks comment, consistent with the decision in *Shays III Appeal,* on whether use of the PASO standard, which would replace, but incorporate, the express advocacy standard, and whether alone or in conjunction with a definition of PASO, would rationally separate election-related advocacy from other communications falling outside the Act's expenditure definition.

The Commission also seeks comment on whether the PASO standard, either alone, or in conjunction with a definition of PASO, could potentially encompass public communications that are not made for the purpose of influencing a Federal election. If so, should the PASO standard be limited by, for example, requiring that the communication be disseminated in the jurisdiction in which the clearly identified candidate seeks election, or in some other way? *See, e.g.,* Alternative B at proposed 11 CFR 100.23(b)(4). Alternatively, could communications disseminated outside the jurisdiction in which the clearly identified candidate seeks election still be made for the purpose of influencing the election, such as by soliciting funds for the election or generating other communications that will be directed to the jurisdiction? One such example would be a communication distributed outside Ohio that states: ''Write your friends in Ohio and urge them to support/oppose candidate X.''

Conversely, the Commission seeks comment on whether limiting the PASO standard could potentially exclude public communications that are made for the purpose of influencing a Federal election provided that the payment and conduct prongs of the coordinated communication regulation are also satisfied. Would limiting the PASO standard fail to address the court's concern in *Shays III Appeal* that the Commission rationally separate election-related advocacy from other communications falling outside the Act's expenditure definition?

3. PASO Definitions

As part of its consideration of a PASO content standard, the Commission is also considering whether it should adopt a definition of PASO. This NPRM sets forth two possible approaches to defining PASO. In brief, the proposed PASO definition in Alternative A provides a specific definition for each of the component terms, which applies when any of those terms is used in conjunction with one or more of the other terms. *See* Alternative A at proposed 11 CFR 100.23(b). The proposed PASO definition in Alternative B utilizes a multi-prong test to determine whether a given communication PASOs. *See* Alternative B at proposed 11 CFR 100.23(b). The Commission seeks public comment on the proposed alternative definitions at 11 CFR 100.23. In light of the Supreme Court's conclusion in *McConnell,* as discussed above, that the component terms of the PASO standard ''provide explicit standards for those who apply them and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited,' '' *McConnell,* 540 U.S. at 170 n.64, the Commission seeks comment on whether any regulatory definition is necessary or whether such a definition would be confusing.

a. Proposed Applicability

The proposed PASO definitions differ in their applicability. Proposed Alternative A would apply to those instances in the Commission regulations in which two or more of the four component PASO words are used together. *See* Alternative A at proposed 11 CFR 100.23(a). Proposed Alternative B would apply to those instances in the Commission regulations in which all four of the component PASO words are used together. *See* Alternative B at proposed 11 CFR 100.23(a). The Commission seeks comment on whether the proposed applicability of either alternative is underinclusive or overinclusive.

The Act articulates the PASO concept by using the following phraseology: ''promotes or supports a candidate for that office, or attacks or opposes a candidate for that office.'' 2 U.S.C. 431(20)(A)(iii) (definition of ''Federal election activity''); 434(f)(3)(A)(ii) (backup definition of ''electioneering communication''). The Commission has adopted several similar, though not identical, phrases throughout its regulations. Some of the regulations group the four words in two disjunctive groups of two (*e.g.,* promote or support,

or attack or oppose)[14] and some of the regulations group the words in one disjunctive group of four (*e.g.,* promote, support, attack, or oppose).[15]

Additionally, the words ''promote,'' ''support,'' and ''oppose'' appear throughout the Act and Commission regulations often in other contexts unrelated to communications that PASO and unrelated to any electoral context. For example, the word ''support'' is used individually throughout the Act and Commission regulations in the context of technical, administrative, or financial support or ''supporting documentation.''[16] The word ''support'' is also used individually in Commission regulations with respect to political committees and individuals that support candidates financially or in other, non-communicative, ways.[17] The word ''opposed'' is used individually in the Commission's definition of ''election.'' *See* 11 CFR 100.2(a) (definition of ''election'' includes ''opposed'' and ''unopposed'' individuals).

The words are also used in combinations of less than four in some contexts that may be closer to that contemplated by the Commission in proposing the PASO definition. For example, many of the reporting requirements in the Act and Commission regulations concern communications that support or oppose clearly identified candidates.[18] Also, several provisions in the Act and Commission regulations treat certain communications or disbursements differently on the basis of whether they support, promote, or oppose candidates.[19]

Given the many uses of the words ''promote,'' ''support,'' and ''oppose'' throughout the Act and Commission regulations, the Commission seeks comment on whether the PASO definition should apply only when at least two of the four PASO component words appear together (as in Alternative A). Should the PASO definition apply instead only when all four PASO component words appear together (as in Alternative B)? Or, should the PASO definition apply wherever any one of the four PASO component words appears in the Commission's regulations? Are there particular rules that use only one or two of the four PASO words—such as the expenditure reporting rules[20]—to which the proposed definitions should or should not apply? Should the proposed PASO definition apply to the definition of ''generic campaign activity'' in 11 CFR 100.25 because section 100.25 implements BCRA? Finally, the Commission seeks comment on whether it should limit the applicability of the proposed definitions of PASO to only coordinated communications. Such an approach could result in divergent meanings of PASO in coordination and other contexts, such as Federal election activity or electioneering communications. Would this create confusion?

In addition, the Commission seeks comment on whether, in the absence of the proposed guidance above, it would be clear from a particular regulation's use of ''promote,'' ''support,'' ''attack,'' and ''oppose'' alone, that the PASO definitions would apply based on whether the word is used in an electoral context.

b. Proposed Dictionary Definitions

Consistent with the Supreme Court's statement concerning PASO in *McConnell,* both proposed PASO definitions would construe the words ''promote,'' ''support,'' ''attack,'' and ''oppose'' according to the words' commonly understood meaning applicable to the election context. The proposed PASO definitions do, however, differ in some of the particulars. Proposed Alternative A would define each of the four component PASO words separately according to dictionary definitions. Proposed Alternative B would not define any of the four PASO words, but does provide that a communication PASOs if it unambiguously performs one of several actions described in the dictionary definitions of the component words.

Dictionary definitions of the word ''promote'' include ''to help or encourage to exist or flourish; further; to advance in rank, dignity, position, *etc.''* and ''to encourage the sales, acceptance, *etc.* of (a product), esp. through advertising or publicity.'' Webster's Unabridged Dictionary 1548 (Random House 2nd ed. 2005) (''Webster's Dictionary''); *see also* American Heritage Dictionary of the English Language 1095 (4th ed. 2006) (''American Heritage'') (defining ''promote'' as ''to advance; further; to help''). The dictionary also identifies ''support * * * elevate, raise, exalt'' as synonyms of ''promote.'' Webster's Dictionary at 1548.

Dictionary definitions of the word ''support'' include ''to uphold (a person, cause, policy, *etc.*) by aid, countenance, one's vote, *etc.''* and ''to * * * advocate (a theory, principle, *etc.*).'' Webster's Dictionary at 1913; *see also* American Heritage Dictionary at 1364 (defining ''support'' as ''to aid; to argue in favor of; advocate'').

Dictionary definitions of the word ''attack'' include ''to blame; to direct unfavorable criticism against; criticize severely; argue with strongly.'' Webster's Dictionary at 133; *see also* American Heritage Dictionary at 88 (defining ''attack'' as ''to criticize strongly or in a hostile manner'').

Dictionary definitions of the word ''oppose'' include ''to act against or provide resistance to; to stand in the way of; hinder; obstruct; to set as an opponent or adversary; to be hostile or adverse to, as in opinion.'' Webster's Dictionary at 1359.

Based on these definitions, proposed Alternative A defines ''promote'' as ''to help, encourage, further, or advance.'' It defines ''support'' as ''to uphold, aid, or advocate.'' ''Attack'' is defined to mean ''to argue with, blame or criticize.'' ''Oppose'' is defined as ''to act against, hinder, obstruct, be hostile or adverse to.'' *See* proposed Alternative A at 11 CFR 100.23(a). Based on these definitions, proposed Alternative B requires that a communication only PASOs if it ''helps, encourages, advocates for, praises, furthers, argues with, sets as an adversary, is hostile or

[14] *See, e.g.,* 11 CFR 100.24(b)(3) (definition of Federal election activity) (''promotes or supports, or attacks or opposes any candidate for Federal office''), 100.24(c)(1) (exception from definition of Federal election activity) (''promote or support, or attack or oppose a clearly identified candidate for Federal office''), and 300.71 (Federal funds for certain public communications) (''promotes or supports any candidate for that Federal office, or attacks or opposes any candidate for that Federal office'').

[15] *See, e.g.,* 11 CFR 100.29(c)(5) (electioneering communications) (''promote, support, attack, or oppose''), 109.21(g) (coordinated communications safe harbor) (''promotes, supports, attacks, or opposes''), 300.33 (allocation of Federal election activity) (''promote, support, attack, or oppose''), and 300.72 (Federal funds not required for certain public communications) (''promote, support, attack, or oppose'').

[16] *See, e.g.,* 2 U.S.C. 442 (technical support); 11 CFR 110.14(j)(2)(viii) (administrative support); *see also* 11 CFR 200.3(a)(1) (comments ''in support of or opposition to'' Commission **Federal Register** publication).

[17] *See, e.g.,* 2 U.S.C. 434(a)(10) (reporting requirements for committees supporting vice presidential candidates), (f)(3)(B)(iii) (communications which promote debates or forums); 11 CFR 110.2(l)(1)(iii)(A) (the use of polling to determine the support level for a candidate), and 9008.50 (promotion of convention city by national convention committee).

[18] *See, e.g.,* 2 U.S.C. 434(b)(6)(B), (c)(2)(A) (reporting of expenditures); 11 CFR 104.4(b)(2), (c) and (e) (reporting independent expenditures).

[19] *See, e.g.,* 2 U.S.C. 431(21) (''generic campaign activity'' defined as ''promotes a political party'' but not a candidate); 11 CFR 100.25 (''generic campaign activity''), 100.57 (solicitations to support or oppose a candidate), 114.9(a)(1) and (b)(1) (use of corporate or labor organization facilities).

[20] *See, e.g.,* 11 CFR 104.3(b)(3)(vii)(B), 104.4(b)(2), (c) and (e); 11 CFR 104.5(g)(3), 104.6(c)(4), 109.10(e)(1)(iv).

adverse to, or criticizes.'' *See* proposed Alternative B at 11 CFR 100.23(b)(2).

The Commission seeks comment on whether defining each of the component terms individually, as in Alternative A, or a single definition for PASO, as in Alternative B, provides the clearest guidance. Alternatively, would a definition that combines some, but not all, of the terms (such as ''promote or support'' or ''attack or oppose'') be preferable?

c. Relationship Between PASO and Express Advocacy

In addition to these dictionary definitions, both proposed PASO definitions would state that all communications that expressly advocate the election or defeat of a clearly identified candidate also PASO that candidate. *See* Alternative A at proposed 11 CFR 100.23(b) and Alternative B at proposed 11 CFR 100.23(b)(2). The Commission seeks comment on whether this recognition that all communications that expressly advocate will PASO—that is, that express advocacy is a subset of PASO—provides useful guidance. Additionally, the Commission seeks comment on whether both proposed PASO definitions apply to a broader range of communications than the express advocacy standard as intended.

d. Scope of Proposed PASO Definitions

Under Alternative A, the PASO definition would not require any reference to the fact that an individual is a Federal candidate or any reference to a political party. The definition in Alternative B would require an ''explicit'' reference to either a clearly identified Federal candidate or a political party. *See* proposed Alternative B at 100.23(b)(1)(ii). Additionally, Alternative B requires the unambiguous PASOing of a candidate or party in addition to a clear nexus between that candidate or party and an upcoming election or candidacy.

For PASO with respect to candidates, Alternative B's definition of ''clearly identified'' incorporates by reference the definition in 11 CFR 100.17 of the same term; with respect to parties, the definition is adapted from 11 CFR 100.17. The Commission invites comment on whether a reference to a clearly identified candidate or party is necessary or appropriate. Alternatively, would a limited application of the proposed PASO definition—*i.e.,* to apply it only to those communications that constitute Federal election activity, to communications coordinated with candidates or parties, and as a limit to the exemptions from the definition of ''electioneering communication''—suffice in lieu of a ''refers to'' criterion? The Commission seeks comment on whether either Alternative A or Alternative B is too broad or too narrow in this respect.

Conversely, not all communications that refer to a clearly identified Federal candidate necessarily PASO that candidate. The Commission has concluded that a particular proposed endorsement did not PASO the endorser. *See* Advisory Opinion 2003–25 (Weinzapfel) (the proposed communication—a television advertisement in which Senator Bayh would identify himself and endorse Jonathan Weinzapfel, a candidate for State office—did not PASO Senator Bayh).[21] Both alternatives are intended to reflect the principle in the Weinzapfel AO that a communication in which a Federal candidate endorses another candidate does not, by itself, PASO the endorser. Both alternatives are also intended to reflect the idea—in BCRA's legislative history and in the Commission's prior analysis of PASO—that identification of a candidate does not automatically PASO that candidate. Should the Commission revise the proposed definitions to better reflect these principles?

Alternative A, in proposed 11 CFR 100.23(b), also is intended to recognize that many types of communications may PASO, even if, on their face, they also serve another function. For example, the proposed inclusion of ''in whole or in part'' is intended to incorporate the Commission's previous analysis that communications may promote both a business or organization and a candidate. Additionally, this proposed paragraph is consistent with the Commission's previous analysis that a communication may have dual purposes. *See* Explanation and Justification for Final Rules on Electioneering Communications, 70 FR 75713, 75714 (Dec. 21, 2005). Proposed paragraph 100.23(b) in Alternative A would define PASO so that a communication may PASO a candidate not as a candidate *per se,* but in another capacity such as a prominent individual, legislator, or public official.

The Commission seeks comment on whether Alternative A—in which the PASO component of a communication may be only one part of the communication and in which the communication may not have an explicit electoral nexus—is consistent with the Supreme Court's decisions in *Buckley, McConnell,* and *Wisconsin Right to Life.* Should Alternative A be explicitly limited to apply only to those communications that constitute Federal election activity, to communications coordinated with candidates or parties, and as a limit to the exemptions from the definition of ''electioneering communication''? Alternatively, or additionally, should Alternative A define PASO to include fewer communications, such as by requiring that, in the absence of an explicit electoral nexus, the communication must PASO the candidate's character, qualifications, or fitness for office? *See, e.g., Wis. Right to Life,* 551 U.S. at 470; 11 CFR 114.15(b)(2), (c)(1)(ii) (referring to character, qualifications, or fitness for office as indicia of express advocacy). Conversely, the Commission seeks comment on whether Alternative A should define PASO to include more communications and, if so, how.

Alternative B is intended to exclude communications directed only at legislation or some other cause by requiring PASO to be directed unambiguously at a candidate or party. Additionally, Alternative B's clear nexus criterion is intended to exclude communications that merely refer to an individual who may be a candidate for Federal office. For example, Alternative B is intended to exclude an advertisement that merely discusses a Senator's position on a legislative issue and promotes that position, but does not discuss the Senator's candidacy for reelection. Does Alternative B exclude more than mere references to individuals who are candidates for office or discussions of a candidate's position on legislative issues?

The Commission seeks comment on whether proposed Alternative B's requirement that a communication have a ''clear nexus'' to an upcoming Federal election or to a candidacy for such election is appropriate. In *Buckley,* the Court explained that its narrowing construction of the Act's disclosure provisions would ensure that reporting of independent expenditures by persons other than candidates or political committees would ''shed the light of publicity on spending that is unambiguously campaign related.'' *Buckley,* 424 U.S. at 81. Is the phrase ''unambiguously campaign related'' relevant or appropriate in the context of coordinated communications? Does the proposed ''clear nexus'' criterion properly capture or implement the Act's definition of a contribution, which

[21] ''The mere identification of an individual who is a Federal candidate does not automatically promote, support, attack, or oppose that candidate.'' 148 Cong. Rec. S2143 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold) (quoted in 2006 E&J, 71 FR at 33202) (PASO exception to the coordinated communications solicitation and endorsement safe harbor).

includes anything of value given ''for the purpose of influencing any election for Federal office''? When used in this context, do the terms ''unambiguous'' and ''clear nexus'' provide sufficiently clear guidance?

Commonly, during an election season, ads are run that compare opposing candidates' records or positions on legislative issues without mentioning their candidacies or an election. For instance, the ''Willie Horton'' ad, referenced below, is an example of this type of communication. Would ads like these be encompassed by either Alternative A or B? Should they be?

In short, do the proposed ''unambiguous'' and ''clear nexus'' criteria properly capture or implement the Act's definition of a contribution? Conversely, do these requirements overly narrow the scope of the PASO definition?

e. Verbal or Pictorial Means

Alternative B contains the additional requirement that the element of the communication that unambiguously PASOs be done through verbal (whether by visual text or audio speech) or pictorial (whether depictions of party officials, candidates, or their respective logos) means, or a combination of the two. Alternative B further provides that ''photographic or videographic alterations, facial expressions, body language, poses, or similar features'' may not be considered in determining whether the communication PASOs. In contrast, Alternative A would not restrict the manner in which a communication PASOs a candidate.

Are Alternative B's limits clear? Should any of the following elements of communications be excluded from the PASO determination: song lyrics, images of the American flag, patriotic or frightening music, or altered candidate images? The Commission seeks comment on whether to exclude from the PASO definition digital or other manipulation of images, for example an image that shows the candidate's face morphing into the visage of either Adolph Hitler, Mother Theresa, or a popular or unpopular political figure.

The Commission seeks comment on whether non-speech elements are often relevant, or even essential, in determining whether the communication promotes, supports, attacks, or opposes a candidate for Federal office.

Commenters are invited to provide the Commission with specific examples of communications in which non-speech elements are necessary to the communicative purpose. Which approach is clearer, more objective and administrable? Which approach best effectuates congressional intent?

f. Jurisdiction

Alternative B contains the additional criterion that the communication be publicly distributed or disseminated in the clearly identified Federal candidate's or party's jurisdiction. This criterion is based on the content reference standard of the current coordinated communications regulation at 11 CFR 109.21(c)(4). However, unlike the content reference standard, the fourth criterion in the proposed PASO definition does not contain the 90/120-day window. The proposed jurisdictional requirement is intended to provide an objective, bright-line standard by which to determine PASO. Does this requirement distinguish between those communications that are made for the purpose of influencing a Federal election and those that are not? Alternative A does not contain a jurisdictional requirement.

The Commission invites comment on the proposed jurisdictional criterion. In *Shays III Appeal,* the court held that the Commission's revised content standard must ''rationally separate[] election-related advocacy from other activity falling outside FECA's expenditure definition.'' *Shays III Appeal,* 528 F.3d at 926. Does the proposed jurisdictional criterion accomplish this? Conversely, does this requirement overly narrow the scope of the PASO definition? Are there communications outside a candidate's jurisdiction that nonetheless are made for the purpose of influencing that candidate's election (*e.g.,* solicitations of funds, volunteers, or requests to contact voters)?

Additionally, are the phrases ''publicly distributed'' and ''publicly disseminated'' sufficiently objective, or are they too vague? Are the phrases under- or overinclusive? Should the Commission adopt a different jurisdictional element, such as one adapted from the electioneering communications definition at 11 CFR 100.29(b)(5)?

The Commission also invites comment on whether a jurisdictional criterion appropriately limits the PASO definition to those communications made for the purpose of influencing a Federal election. *See, e.g., Shays I Appeal,* 414 F.3d at 99 (''Nor is such purpose [of influencing a Federal election] necessarily evident in statements, referring, say, to a Connecticut senator but running only in San Francisco media markets.''). Alternatively, could communications arguably favorable or critical of a candidate but disseminated outside that candidate's jurisdiction still be made for the purpose of influencing the election? How, for example, should the definition treat a communication that urges people outside a candidate's jurisdiction to influence their friends inside the jurisdiction? Would a geographic jurisdictional limit be too narrow?

g. Proposed Examples [22]

Finally, both proposed PASO definitions also provide several examples, some of which are adapted from closed Commission enforcement matters,[23] of communications that would and would not PASO. Alternatives A and B treat the examples differently. The Commission seeks comments on these differences.

The Commission invites comment on (1) whether including examples would be helpful, either in the final rule or in the Explanation and Justification, if the definition is adopted; (2) whether the proposed examples properly apply the proposed definitions; (3) whether the examples provide sufficient context for determining whether specific communications PASO; and (4) whether additional or different examples are needed, such as an example adapted from Advisory Opinion 2003–25 (Weinzapfel).

The Commission seeks comment on whether the proposed alternative definitions for 11 CFR 100.23, in all their parts, provide clear guidance as to PASO, and if not, what aspects of the proposed definitions require further explanation or clarification.

[22] Please note that the examples in the alternative proposed PASO definitions are different from, and in addition to, the examples discussed below in the coordination-specific sections.

[23] The example at proposed Alternative A at 11 CFR 100.23(c)(1) and Alternative B at 11 CFR 100.23(d)(1) is adapted from Matter Under Review (''MUR'') 6019 (Dominic Caserta for Assembly); the example at proposed Alternative A at 11 CFR 100.23(c)(2) and proposed Alternative B at 11 CFR 100.23(d)(2) is adapted from MURs 5365 (Club for Growth) and 5694 (Americans for Job Security); the example at proposed Alternative A at 11 CFR 100.23(d)(1) and proposed Alternative B at 11 CFR 100.23(e)(2) is adapted from MUR 6064 (Missouri State University); the example at proposed Alternative A at 11 CFR 100.23(d)(2) and proposed Alternative B at 11 CFR 100.23(e)(3) is adapted from MUR 5387 (Welch for Wisconsin); the example at proposed Alternative A at 11 CFR 100.23(e)(1) and proposed Alternative B at 11 CFR 100.23(d)(3) is adapted from ADR Case 250 (Your Art Here); the example at proposed Alternative A at 11 CFR 100.23(e)(2) and proposed Alternative B at 11 CFR 100.23(e)(5) is adapted from MUR 5974 (New Summit Republicans); and the example at proposed Alternative A at 11 CFR 100.23(e)(3) and proposed Alternative B at 11 CFR 100.23(d)(4) is adapted from MUR 5714 (Montana State Democratic Central Committee).

B. Alternative 2—The Modified WRTL Content Standard—Proposed 11 CFR 109.21(c)(5)

Alternative 2 would add a new content standard that would apply to any public communication that is the ''functional equivalent of express advocacy.'' The proposed standard specifies that a communication is the ''functional equivalent of express advocacy'' if it ''is susceptible of no reasonable interpretation other than as an appeal to vote for or against'' a clearly identified Federal candidate. This standard is based on the test articulated in *Wisconsin Right to Life,* 551 U.S. at 469–70, and *McConnell,* 540 U.S. at 204–06, both addressing electioneering communications. The proposed Modified *WRTL* content standard would apply without regard to the timing of the communication or the targeted audience. The Commission seeks comment on whether the proposed Modified *WRTL* content standard complies with the Court of Appeals' requirement in *Shays III Appeal* that the Commission adopt a standard that rationally separates election-related advocacy from other communications falling outside the Act's expenditure definition. Would a content standard that covers communications containing the ''functional equivalent of express advocacy'' comply with the *Shays III Appeal* requirement that the Commission adopt a standard more restrictive than ''express advocacy'' outside the 90-day and 120-day time windows?

In *Wisconsin Right to Life,* the Supreme Court decided an as-applied challenge to the BCRA provision prohibiting the use of general treasury funds by corporations and labor organizations to pay for electioneering communications.[24] 551 U.S. at 449; *see also* 2 U.S.C. 441b(b)(2) (corporate and labor organization funding prohibitions); 434(f)(3) (defining electioneering communications). *Wisconsin Right to Life* limited the reach of the electioneering communication funding prohibitions to communications by corporations and labor organizations that contain the functional equivalent of express advocacy. 551 U.S. at 456–57. Following the *Wisconsin Right to Life* decision, the Commission promulgated rules that incorporated the *Wisconsin Right to Life* test in a provision governing the funding of electioneering communications by corporations and labor organizations. *See* 11 CFR 114.15.

The proposed Modified *WRTL* content standard for coordinated communications uses the same language as 11 CFR 114.15(a). The proposed Modified *WRTL* content standard in the coordinated communications content prong does not, however, refer to or incorporate any other provision from 11 CFR 114.15. For example, the proposed Modified *WRTL* content standard does not contain the safe harbor in 11 CFR 114.15(b),[25] the rules of interpretation in 11 CFR 114.15(c), or the limitation on information to be considered in 11 CFR 114.15(d). Does the proposed Modified *WRTL* content standard, without these elements, provide sufficient guidance for compliance with the Commission's coordination rules? Would including in the Modified *WRTL* content standard any of these, or similar, elements provide clear guidance? Does the proposed Modified *WRTL* content standard, with or without the additional elements from 11 CFR 114.15, satisfy the court's concern in *Shays III Appeal* that the Commission rationally separate election-related advocacy from other communications falling outside the Act's expenditure definition? The Commission seeks comment on the practical effect, if any, of creating two different approaches to the Modified *WRTL* content standard if the Commission does not incorporate all aspects of 11 CFR 114.15 in the coordinated communication Modified *WRTL* content standard.

The Commission also seeks comment on whether the proposed Modified *WRTL* content standard and the existing express advocacy content standard are too similar to give effect to the *Shays III Appeal* court's decision. Does the Modified *WRTL* content standard's formulation of the ''functional equivalent of express advocacy'' as communications that are ''susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate'' bear substantial resemblance to components of the Commission's definition of ''expressly advocating'' at 11 CFR 100.22? Would a content standard that covers communications containing the ''functional equivalent of express advocacy'' comply with the *Shays III Appeal* requirement that the Commission adopt a standard other than ''magic words'' or ''express advocacy'' outside the 90- and 120-day time windows?

The Commission also seeks comment on whether the Modified *WRTL* content standard lends itself to applications outside of the ''electioneering communication'' context. The Supreme Court, in *McConnell,* observed that the electioneering communication definition was not unconstitutionally vague because it contained narrowly tailored, easily understood, and objectively determinable elements. *McConnell,* 540 U.S. at 194. And *Wisconsin Right to Life* suggested that the *Wisconsin Right to Life* ''test is only triggered if the speech meets the bright-line requirements of [the definition of electioneering communications] in the first place.'' *Wis. Right to Life,* 551 U.S. at 474 n.7. Untethered from the temporal and jurisdictional limitations present in the electioneering communication definition, is the Modified *WRTL* content standard too vague, broad, or overinclusive? If so, should the Modified *WRTL* content standard for coordinated communications be limited by, for example, requiring, as proposed PASO definition B does, that the communication be targeted to the relevant jurisdiction, or contain some other restriction? Alternatively, could communications disseminated outside the jurisdiction in which the election is sought still be made for the purpose of influencing the election, for example, by soliciting funds or volunteers, or requesting that the recipient of the communication contact voters within the jurisdiction?

In addressing electioneering communications, the Supreme Court in *Wisconsin Right to Life* stated that ''in a debatable case'' the ''tie goes to the speaker.'' *Wis. Right to Life,* 551 U.S. at 474; *id.* at n.7. Does that concept have any application to the proposed Modified *WRTL* content standard? Does it have application outside of the corporate and labor organization funding restriction at issue in *Wisconsin Right to Life*? The Commission seeks comment on whether application of the proposed Modified *WRTL* content standard as well as the payment and conduct prongs raises the same First Amendment issues that underlie the Supreme Court's decision in *Wisconsin Right to Life.*

[24] Electioneering communications are broadcast, cable or satellite communications that refer to a clearly identified candidate for Federal office, are publicly distributed within sixty days before a general election or thirty days before a primary election, and are targeted to the relevant electorate. *See* 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29. By definition, an electioneering communication is a communication that is not an expenditure or an independent expenditure. 2 U.S.C. 434(f)(3)(B)(ii). Thus, by definition, a communication that contains express advocacy is not an electioneering communication. *See* 2 U.S.C. 431(17).

[25] Although the proposed Modified *WRTL* content standard does not contain the 11 CFR 114.15(b) safe harbor, the Commission also is proposing safe harbors at 11 CFR 109.21(i) and (j) that are generally applicable to all coordinated communications. These safe harbors are similar to the provision at 11 CFR 114.15(b). *See below.*

Finally, neither the Commission's electioneering communication definition nor the *Wisconsin Right to Life* decision addresses communications referring to political parties. Similarly, the proposed Modified *WRTL* content standard for coordinated communications would not address political parties, either. Congress in BCRA, however, amended the Act's coordination provisions to include expenditures made in coordination with political party committees. *See* 2 U.S.C. 441a(a)(7)(b)(ii). The Commission seeks comment on whether it should revise the proposed Modified *WRTL* content standard to include communications that are ''susceptible of no reasonable interpretation other than as an appeal to vote for or against'' a political party.

C. Examples

In addition to the examples in the proposed PASO definitions in this NPRM, the Commission is considering whether to include in the final rule, or in its Explanation and Justification, additional examples of communications that would, and would not, satisfy the proposed PASO standard, the proposed Modified *WRTL* content standard, or both standards, if these standards are adopted. These examples are drawn from actual communications evaluated by the courts, the Commission, and from prior Explanations and Justifications for Commission rulemakings.

The Commission seeks comment on the application of the proposed PASO definition and content standard, as well as the proposed Modified *WRTL* content standard to the following examples, and asks whether further examples would be helpful.

Example 1 (from Koerber v. FEC, 583 F. Supp. 2d 740 (E.D.N.C. 2008)): Senator Obama. Why did you vote against protecting infants that survived late term abortions? Not once, but four times. Even Congress unanimously supported protections identical to those you blocked in Illinois. The Supreme Court upheld the ban on partial birth abortions. And yet today, you keep working to roll back this law. Call Senator Obama. Tell him to stop trying to overturn these basic human rights.

Example 2 (from Matter Under Review (''MUR'') 5854 (The Lantern Project)): It's hard to make ends meet. Yet Rick Santorum voted against raising the minimum wage. But Santorum voted to allow his own pay to be raised by $8000. What is he thinking?

Example 3 (from MUR 5991 (U.S. Term Limits, Inc.)) Today, we have more charter schools thanks to Bob Schaffer. Thanks, Bob! Thanks, Bob! Thanks, Bob! Thanks, Bob! Thanks, Bob! We couldn't have done it without you. Thanks for standing up for us. Even when it was really, really hard. Bob does the right thing. Bob keeps his promises. Thanks, Bob Schaffer, for giving my daughter a chance. Bob Schaffer helped create the Colorado Charter School Act. Tell Bob to keep giving us real education options. Thanks, Bob! Thanks, Bob!

Example 4 (from McConnell, 540 U.S. at 193 n.78) Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But ''her nose was not broken.'' He talks law and order * * * but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.

Example 5 (from Explanation and Justification for Final Rules on Electioneering Communications, 72 FR 72899 (Dec. 26, 2007)): [VISUAL OF CANDIDATE SALLY SMITH]: Hello, I'm Sally Smith. Most of us think of heart disease as a problem that mostly affects men. But today, heart disease is one of the leading causes of death among American women. It doesn't have to stay that way. Lower cholesterol, daily exercise, and regular visits to your doctor can help you fight back. So have heart, America, and together we can reduce the risk of heart disease.

VOICE OVER: This message brought to you by DISH Network.

Example 6 (from McConnell, 251 F. Supp. 2d 176, 876 (D.D.C. 2003)) It's our land; our water. America's environment must be protected. But in just 18 months, Congressman Ganske has voted 12 out of 12 times to weaken environmental protections. Congressman Ganske even voted to let corporations continue releasing cancer-causing pollutants into our air. Congressman Ganske voted for the big corporations who lobbied these bills and gave him thousands of dollars in contributions. Call Congressman Ganske. Tell him to protect America's environment. For our families. For our future.

Example 7 (from Wis. Right to Life v. FEC, 466 F. Supp. 2d 195, 198 n.4 (D.D.C. 2006)) LOAN OFFICER: Welcome Mr. and Mrs. Shulman. We've reviewed your loan application, along with your credit report, the appraisal on the house, the inspections, and well * * *

COUPLE: Yes, yes * * * we're listening.

OFFICER: Well, it all reminds me of a time I went fishing with my father. We were on the Wolf River Waupaca * * *

VOICE–OVER: Sometimes it's just not fair to delay an important decision. But in Washington, it's happening. A group of Senators is using the filibuster delay tactic to block Federal judicial nominees from a simple ''yes'' or ''no'' vote. So qualified candidates aren't getting a chance to serve. It's politics at work, causing gridlock and backing up some of our courts to a state of emergency. Contact Senators Feingold and Kohl and tell them to oppose the filibuster. Visit: BeFair.org.

Example 8 (from MUR 6013 (Friends of Peter Teahen)): VOICE OVER AND APPEARANCE BY CANDIDATE PETER TEAHEN: My father served in the Navy and like many veterans he didn't talk about his military experience. But we all knew how much he loved his country. Dad had a big flag pole in our front yard and I used to help him raise the flag. Now, when I see a flag, I think of Dad and all the men and women who sacrifice their lives for the sake of freedom. I'm Peter Teahen and I'm proud to be an American. Teahen Funeral Home: Life ends, but memories live on.

Example 9 (from MUR 6122 (National Association of Home Builders)): Protecting the American Dream. Gary voted to create a $7,500 temporary first-time home buyer tax credit. Voted for legislation to make more mortgage bonds available. He voted for legislation to help victims of the sub-prime crisis.

Energy Independence Is No Longer Just An Economic Issue, But Also A National Security Issue. Gary supports increased development of clean coal, natural gas, and oil. Supports increasing domestic exploration in Alaska and off our coast. Congressman Miller supports incentives to encourage further development and use of alternative fuels.

Example 10 (from The Real Truth About Obama v. FEC, No. 3:08–CV–483, 2008 WL 4416282 (E.D. Va. 2008), aff'd, 575 F.3d 342 (4th Cir. 2009)):

WOMAN'S VOICE: Just what is the real truth about Democrat Barack Obama's position on abortion?

OBAMA–LIKE VOICE: Change. Here is how I would like to change America * * * about abortion: Make taxpayers pay for all 1.2 million abortions performed in America each year. Make sure that minor girls' abortions are kept secret from their parents. Make partial-birth abortion legal. Give Planned Parenthood lots more money to support abortion. Change current Federal and State laws so that babies who survive abortions will die soon after they are born. Appoint more liberal Justices on the U.S. Supreme Court. One thing I would not change about America is abortion on demand, for any reason, at any time during pregnancy, as many times as a woman wants one.

WOMAN'S VOICE: Now you know the real truth about Obama's position on abortion. Is this the change you can believe in?

VOICE OVER: To learn more real truth about Obama, visit *www.TheRealTruthAboutObama.com.*

Example 11: 1964 Presidential Campaign Television Spot, ''Peace Little Girl'' (''Daisy'' Ad), available at LBJ Library and Museum Media Archives, *http://www.lbjlib.utexas.edu/johnson/media/daisyspot* (last visited Oct. 7, 2009) (but without express advocacy language).

Example 12: ''Willie Horton Political Ad 1988,'' available at *http://www.youtube.com/watch?v=SLafbHYVqVE* (last visited Oct. 8, 2009).

Example 13 (from MUR 5525 (Swift Boat Veterans for Truth)):

JOHN KERRY: They had personally raped, cut off ears, cut off heads * * *

JOE PONDER: The accusations that John Kerry made against the veterans who served in Vietnam was just devastating.

JOHN KERRY: * * * randomly shot at civilians* * *

JOE PONDER: and it hurt me more than any physical wounds I had.

JOHN KERRY: * * * Cut off limbs, blown up bodies* * *

KEN CORDIER: That was part of the torture, was to sign a statement that you had committed war crimes.

JOHN KERRY: * * * razed villages in a fashion reminiscent of Ghengis Khan* * *

PAUL GALANTI: John Kerry gave the enemy for free what I and many of my comrades in North Vietnam in the prison camps took torture to avoid saying. It demoralized us.

JOHN KERRY: * * * Crimes committed on a day to day basis* * *

KEN CORDIER: He betrayed us in the past. How could we be loyal to him now?

JOHN KERRY: * * * Ravaged the countryside of South Vietnam* * *

PAUL GALANTI: He dishonored his country, but more importantly, the people he served with. He just sold them out.

ANNOUNCER: Swift Boat Veterans for Truth is responsible for the content of this advertisement.

The Commission seeks comment on whether such examples should be provided, and what other types of communications would be appropriate examples. Furthermore, the Commission invites commenters to provide additional examples of communications demonstrating that the proposed PASO standard or proposed Modified *WRTL* content standard would rationally separate election-related advocacy from other activity falling outside the Act's expenditure definition. Conversely, the Commission invites commenters to provide examples of communications demonstrating that the proposed PASO standard or proposed Modified *WRTL* content standard would be either underinclusive or overinclusive.

D. Alternative 3—Clarification of the Express Advocacy Standard—Revised 11 CFR 109.21(c)(3)

Alternative 3 would clarify existing 11 CFR 109.21(c)(3) by including a cross-reference to the express advocacy definition at 11 CFR 100.22. As discussed above, the *Shays III Appeal* court interpreted the existing express advocacy content standard as follows: ''more than 90/120 days before an election, candidates may ask wealthy supporters to fund ads on their behalf, so long as those ads do not contain *magic words.'' Shays III Appeal,* 528 F.3d at 925 (emphasis added). However, ''magic words'' are only one part of the Commission's express advocacy regulation. *See* 11 CFR 100.22(a). As noted above, paragraph (a) of the regulatory definition also includes any ''campaign slogan(s) or individual word(s), which in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s).'' *Id.*

Additionally, paragraph (b) of that regulation provides that a communication expressly advocates:

When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

See 11 CFR 100.22(b).

The Commission is considering adding an explicit reference to 11 CFR 100.22 in the current express advocacy content standard at 11 CFR 109.21(c)(3) to clarify that, outside of the 90/120-day window, communications containing more than just ''magic words'' are regulated, provided that the conduct and payment prong are also met. The Commission seeks comment on whether, by itself, the clarification of 11 CFR 109.21(c)(3) as encompassing not only ''magic words,'' but also the entirety of the express advocacy definition at 11 CFR 100.22, would fully address the court's concern about the current limitations of the content prong (*i.e.,* the ''decision to apply a 'functionally meaningless' standard'' outside the 90- and 120-day windows). *Shays III Appeal,* 528 F.3d at 924. Or, did the court's concern about the limitations of the express advocacy standard go beyond ''magic words''?

E. Alternative 4—The ''Explicit Agreement'' Standard—Proposed 11 CFR 109.21(c)(5), (d)(7), and (e)

Congress specified in BCRA that the Commission's regulations ''shall not require agreement or formal collaboration to establish coordination.'' BCRA at sec. 214(c), 116 Stat. at 95. However, the court in *Shays III Appeal* indicated that some agreements are so explicit that to ignore them would be to permit the evasion of the law as written by Congress. *Shays III Appeal,* 528 F.3d at 925. In concluding that the current coordinated communication regulations ''frustrate Congress's goal of 'prohibiting soft money from being used in connection with Federal elections,' '' the *Shays III Appeal* court stated that, ''[o]utside the 90/120-day windows, the regulation allows candidates to evade—almost completely—BCRA's restrictions on the use of soft money.'' *Id.* (quoting *McConnell,* 540 U.S. at 177 n. 69). The court then presented an example (the ''NY Times hypothetical'') to illustrate that ''the regulation still permits exactly what we worried about'' in *Shays I Appeal:* ''more than 90/120 days before an election, candidates may ask wealthy supporters to fund ads on their behalf, so long as those ads do not contain magic words,'' and the Commission would do nothing about this, ''even if a contract formalizing the coordination and specifying that it was 'for the purpose of influencing a Federal election' appeared on the front page of the New York Times.'' *Id.* The *Shays III Appeal* court's discussion referenced the identical concern raised in *Shays I Appeal,* where the court noted that:

[M]ore than 120 days before an election or primary, a candidate may sit down with a well-heeled supporter and say, ''Why don't you run some ads about my record on tax cuts?'' The two may even sign a formal written agreement providing for such ads. Yet so long as the supporter neither recycles campaign materials nor employs the ''magic words'' of express advocacy—''vote for,'' ''vote against,'' ''elect,'' and so forth-the ads won't qualify as contributions subject to FECA.

Shays III Appeal, 528 F.3d at 921 (quoting *Shays I Appeal,* 414 F.3d 98).

The NY Times scenario is a hypothetical. But recently, an actual case came to light in which a campaign operative, with the knowledge and acquiescence of the candidate, set up an organization, funded by the candidate's donors, to run purportedly independent negative ads about the candidate's chief opponent.[26] Should the coordination regulations capture this fact pattern? Does the answer depend on the content of the ads? When combined with the court's hypothetical, does the existence of actual instances of such coordination heighten the need for this approach?

Alternative 4 is an attempt to address the underlying concern that appears to have motivated both *Shays* courts' concerns: conduct that explicitly reveals both an unquestionable agreement and unequivocal intent to affect a Federal election is the quintessential conduct that Congress sought to regulate. The reason that coordinated expenditures are treated differently is precisely because of the collaboration between the candidate's committee and outside groups. The Commission seeks comment on whether an ''Explicit Agreement'' standard addresses these

[26] David A. Lieb, *Lawmakers Plead Guilty in Obstruction Case, Resign,* Associated Press, Aug. 26, 2009 (''I wrongly believed we could conceal my campaign's coordination with the independent operator' Smith confessed to U.S. District Judge Carol Jackson * * *''); *see also* Jeff Smith, *Think You Won't Get Caught? Think Again,* St. Louis Post-Dispatch, Sept. 8, 2009 (''As Election Day drew near, I authorized a close friend and two aides to help an outside consultant send out a mailer about my opponent but without disclosing my campaign's connection.'').

concerns. Should the ''Explicit Agreement'' standard be adopted in conjunction with another proposed standard? The proposed ''Explicit Agreement'' standard requires a formal or informal agreement between a candidate, candidate's committee or political party committee and the person paying for the ''public communication,'' as defined in 11 CFR 100.26. Either the agreement or the communication must be made for the purpose of influencing an election.

The Commission seeks comment on whether limiting the standard to those public communications that are explicitly made for the purpose of influencing an election, as in the Act's definition of ''expenditure,'' is adequate to separate election-related advocacy from other communications. Like the other alternatives the Commission is now considering, the proposed ''Explicit Agreement'' standard would apply without regard to when the communication is made or the targeted audience. Should it be so limited? The Commission also seeks comment on whether the proposed ''Explicit Agreement'' standard is overinclusive, underinclusive, or vague. Should the proposed ''Explicit Agreement'' standard be limited by, for example, requiring a reference to a political party or a clearly identified candidate for Federal office?

The proposed rule states that whether the purpose of the communication is for the purpose of influencing a Federal election may be found in either the content of the communication or the agreement. This is a fact-specific determination. The Commission seeks comment on the types of facts that should lead to a determination of the purpose of a communication. For example, should the text, timing, or intended audience of the communication be considered? Should agreements entered into by a candidate's campaign staff be treated differently from agreements entered into by a candidate's congressional staff? Should the purpose be determined more broadly, *e.g.,* by inference, discussions, implicit agreements, or course of dealing?

The proposed ''Explicit Agreement'' standard requires a formal or informal agreement, and incorporates the current coordinated communication regulatory definition of ''agreement'' as ''a mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination.'' 11 CFR 109.21(e). For purposes of the proposed ''Explicit Agreement'' standard, would this current definition suffice and does it provide sufficient guidance? Should the definition not be incorporated in the proposed text? Why or why not? Does the difference between a formal and informal agreement need to be clarified, and if so, how?

Additionally, the requirement of a formal or informal agreement in the proposed ''Explicit Agreement'' standard would require certain conforming changes to the existing coordinated communications regulations. The Commission proposes to amend the statement in 11 CFR 109.21(d) that all conduct standards could be satisfied regardless of agreement. As revised, this statement would not apply to the proposed ''Explicit Agreement'' standard. Similarly, the statement in 11 CFR 109.21(e) that agreement is not required would be amended to exclude the proposed ''Explicit Agreement'' standard.

1. Examples

The Commission seeks comment on whether one, two, all, or none of the following scenarios should be, or are, covered by the proposed ''Explicit Agreement'' standard:

Example 1: Outside advocacy group G's director meets Candidate Jones at a cafe. Jones says she wants to become known as ''the education candidate'' but expresses concern that her campaign coffers are low. G's director tells Jones that her group could save Jones money by running the ''education issue'' component of Jones' campaign. Jones agrees that that is a wonderful plan. Group G pays for a series of television advertisements stressing that one of the most important issues affecting the future of our nation is education. Jones runs ads in which she states, ''I'm the education candidate.''

In this example, the candidate and outside group agree that the outside group will spend its funds to highlight what the candidate has identified as an issue of importance to her campaign through an issue ad or series of issue ads, which the candidate's campaign could then build on. The ad would not clearly identify the candidate. Is this kind of ''piggybacking'' contemplated by the *Shays III Appeal*—NY Times hypothetical?

Example 2: Candidate Jones meets with a well-heeled supporter more than 120 days before the next election and suggests the supporter run ads about Candidate Jones' record on education. Candidate Jones instructs the supporter that the ads should highlight Candidate Jones' success in Congress on the issue and the ads should ask viewers to call Candidate Jones and thank her for her ''strong voice for our State,'' but should not contain ''magic words.''

Example 3: Candidate Jones is approached by Jane Doe with an offer to produce and distribute ads against Candidate Jones' opponent. Candidate Jones agrees and directs members of his campaign to raise money for Ms. Doe and provide Ms. Doe with negative information about the opponent as well as mailing addresses. Ms. Doe distributes the ads, with no mention of Candidate Jones or his campaign committee. The ads name Candidate Jones' opponent (Senator Black) and list a series of missed votes over the course of the previous year. The ads label Senator Black as the ''Absent Senator'' and end with the tag line: ''Sorry Mr. Black, we need a Senator who shows up for work!''

III. Proposals for Revising the Common Vendor and Former Employee Provisions at 11 CFR 109.21

The fourth standard of the conduct prong (the ''common vendor'' standard) is satisfied if (1) the person paying for the communication contracts with or employs a ''commercial vendor'' to create, produce, or distribute the communication, (2) the commercial vendor has provided certain specified services to the candidate who is clearly identified in the communication, the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee during the previous 120 days, and (3) the commercial vendor uses or conveys to the person paying for the communication information about the plans, projects, activities, or needs of the candidate, candidate's opponent, or political party committee that is material to the creation, production, or distribution of the communication, or information used previously by the commercial vendor in providing services to the candidate, the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or the political party committee that also is material to the creation, production, or distribution of the communication. *See* 11 CFR 109.21(d)(4).

The fifth conduct standard (the ''former employee'' standard) is satisfied if (1) the communication is paid for by a person or by the employer of a person who was an employee or independent contractor of the candidate clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee during the previous 120 days, and (2) the former employee or independent contractor uses, or conveys to the person paying for the communication, information about the plans, projects, activities, or needs of the candidate or political party committee that is material to the creation, production, or distribution of the communication; or if the former

employee or independent contractor uses, or conveys to the person paying for the communication, information used previously by the former employee or independent contractor in providing services to the candidate, the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or the political party committee that is material to the creation, production, or distribution of the communication. *See* 11 CFR 109.21(d)(5).

As discussed above, the 2006 coordinated communication regulations reduced the period of time during which a common vendor's or former employee's relationship with the authorized committee or political party committee referred to in the communication could satisfy the conduct prong, from the entire election cycle to 120 days. 2006 E&J, 71 FR at 33204.

In order to comply with the *Shays III Appeal* holding concerning the insufficient justification for the change from the ''current election cycle'' to a 120-day period in the common vendor and former employee conduct standards, the Commission invites comment on three alternatives for the time periods specified in the common vendor and former employee conduct standards. The Commission is not, at this time, proposing specific changes to any other aspects of these two conduct standards.

The Commission seeks comments on whether each of the three alternatives would comply with the court's holding in *Shays III Appeal* that the Commission failed to provide an adequate explanation for its revision of the common vendor and former employee conduct standards to cover a 120-day period rather than the ''current election cycle.'' The Commission also seeks comments on whether it should adopt a different time period for these two conduct standards than those proposed.

With respect to all three alternatives, the Commission seeks comment on the following questions concerning different types of campaign vendors, employees, and campaign-related information. Such comments will help the Commission determine the realistic ''shelf life'' of the types of information that a campaign vendor, former employee, or independent contractor is likely to possess, and tailor the regulations accordingly. Does the *Shays III Appeal* decision suggest that empirical evidence is necessary? What factors affect how long campaign information retains its usefulness? Do some types of campaign information (*e.g.,* polling data, campaign strategy, advertising purchases, slogans, graphics, mailing lists, donor lists, or fundraising strategy) maintain their value to a campaign for a longer, or shorter, period of time than other types of information? What types of information tend to retain their usefulness the longest, and for how long? What types of information retain their usefulness for a shorter period, and for how long? Does the ''shelf life'' of campaign-related information depend on the type of campaign or election involved? That is, does information retain its usefulness longer for presidential campaigns, for example, than for Senate or House campaigns? Does the ''shelf life'' of campaign information vary depending on the particular vendor or type of media (*e.g.,* print vs. television, direct mail vs. newspaper)?

The Commission also seeks comments on whether the date a candidate files a statement of candidacy for a given election is an accurate indicator of when the candidate begins actively campaigning for that election; Commission regulations require a candidate to file such a statement within fifteen days after receiving contributions or making expenditures in excess of $5,000, or authorizing other persons to do so. 11 CFR 100.3(a) and 101.1(a). If the filing date of the statement of candidacy is an accurate indicator of the start of a campaign, is the duration of the campaign a reasonable proxy for the ''shelf life'' of campaign information? If so, should the Commission adopt a time period for the common vendor and former employee conduct standards that is based on when candidates typically file their statements of candidacy? If so, how should the Commission determine what is the typical date when candidates file their statements of candidacy? Alternatively, should the Commission use a date based on when individual candidates actually file their statements of candidacy? If not, is there some other date the Commission should use? The Commission has observed that when Federal officeholders win an election, many of them file statements of candidacy for the next election shortly thereafter, while challengers often file their statements of candidacy at a later date, closer to the election in which they plan to run. How should the Commission address this general discrepancy between incumbents and challengers?

In addition to the useful life of campaign information, the Commission seeks comment on any relevant distinctions between different types of vendors or campaign employees, and the types of information they are likely to possess. Do different categories of vendors or campaign employees typically possess different types of campaign-related information that would affect how long their knowledge would remain material? If so, would adopting different time periods for different categories of vendors or employees, or different types of information, be too cumbersome for presidential, congressional, or other political committees to implement?

The Commission also seeks comment on whether the list of vendor services set forth at 11 CFR 109.21(d)(4)(ii) captures the appropriate range of services that are likely to result in a common vendor's conveying timely campaign information that is material to a communication to a person paying for the communication. Are the types of vendor services listed the appropriate types of services to be covered by this conduct standard? Should any of them be eliminated from the list? Should any other vendor services be added? Alternatively, should the list be abandoned?

A. Alternative 1—Retain 120-Day Period

Proposed Alternative 1 would not amend 11 CFR 109.21(d)(4) and (5). The *Shays III Appeal* court found that ''the FEC has provided no explanation for why it believes 120 days is a sufficient time period to prevent circumvention of the Act,'' and that although the Commission has discretion in determining where to draw a bright-line rule, ''it must support its decision with reasoning and evidence, for 'a bright line can be drawn in the wrong place.' '' *Shays III Appeal,* 528 F.3d at 929 (quoting *Shays I Appeal,* 414 F.3d at 101). Thus, although the *Shays III Appeal* court held that the Commission had failed to justify sufficiently the 120-day period applicable to both common vendors and former employees, it did not hold that the 120-day period was inherently improper. The first alternative would therefore retain the existing rule with the 120-day period, and the Commission would provide additional justification for that period, if it receives sufficient empirical data or other evidence using specific examples supplied in response to this NPRM demonstrating that the 120-day period is the appropriate standard.

The Commission seeks comment on whether to adopt Alternative 1. Is the 120-day period an appropriate temporal limit on the operation of the regulation, in light of current campaign practices and with respect to the questions posed above? Does the 120-day period accurately reflect the period during which a vendor or former employee is

likely to possess and convey timely campaign information? Does 120 days approximate the length of time that a vendor or campaign employee is likely to possess information that remains useful to a campaign?

B. Alternative 2—Two-Year Period

Alternative 2 would amend 11 CFR 109.21(d)(4) and (5) by deleting the phrase ''the previous 120 days'' from paragraphs (d)(4)(ii) and (d)(5)(i), and replacing it with ''the two-year period ending on the date of the general election for the office or seat that the candidate seeks.'' The two-year period corresponds with the election cycle for the House of Representatives, the most common election cycle of those regulated by the Commission.

The Commission seeks comment on whether to adopt Alternative 2. Does this proposal represent the period during which the majority of candidates engage in active campaigning? Does the period of active campaigning for incumbent candidates differ from that of non-incumbent candidates? Does the period of active campaigning for Senate and presidential candidates differ significantly from that of House candidates? Is the two-year period a reasonable length of time for Senate and presidential candidates?

The specific language of this proposal (''ending on the date of the general election for the office or seat that the candidate seeks'') is intended to reflect the fact that a candidate may run in a primary election but not in the subsequent general election, or may run in a special election or other special circumstances. The period during which this provision would apply is the same regardless of whether a candidate participates in the primary and/or general election, and to obviate any uncertainty about when the two-year period begins for candidates who participate in elections, such as special elections, that are held at a different time from the usual general election. Does the language of the proposal accomplish these goals?

Should there be a different standard for the common vendor and former employee provisions in special elections? If so, what standard should apply to special elections?

C. Alternative 3—Current Election Cycle

Alternative 3 would amend 11 CFR 109.21(d)(4) and (5) by replacing the existing 120-day period in paragraphs (d)(4)(ii) and (d)(5)(i) with a ''current election cycle'' period, as in the pre-2006 version of the regulation. *See* 11 CFR 109.21(d)(4), (5) (2002). ''Current election cycle'' is defined in current Commission regulations as beginning ''on the first day following the date of the previous general election for the office or seat which the candidate seeks. * * * The election cycle shall end on the date on which the general election for the office or seat that the individual seeks is held.'' 11 CFR 100.3(b). The ''current election cycle'' period was not challenged in *Shays I Appeal,* and has not been invalidated or questioned by any court.

The Commission seeks comment on whether to adopt Alternative 3. Is the ''current election cycle'' an appropriate length of time to restrict the activities of former campaign employees and common vendors? That is, does the ''current election cycle'' accurately reflect the length of time that vendors and former employees are likely to possess and convey campaign information that is still relevant to the campaign? Given that the ''current election cycle'' differs in length for House, Senate, and presidential candidates, is this period more appropriate for some elections or candidates than for others? During previous rulemakings, several commenters asserted that ''the current election cycle'' was too long with respect to presidential and Senate candidates, whose election cycles are four and six years, respectively. Do Senate and presidential candidates typically engage in active campaigning for the entire election cycle, or for some shorter period preceding the actual election? If the latter, what shorter period is typical? If this proposal is adopted, should the definition of ''current election cycle'' be modified in any way for purposes of this provision, or is the definition set forth at 11 CFR 100.3(b) appropriate?

IV. Proposed Safe Harbors for Communications in Support of 501(c)(3) Organizations and for Business and Commercial Communications—Proposed 11 CFR 109.21(i) and (j)

The Commission is considering adding a safe harbor to 11 CFR 109.21(i) to address certain public communications in which Federal candidates endorse or solicit support for non-profit entities organized under section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)), or for public policies or legislative proposals espoused by those organizations. The Commission also is considering adding a new safe harbor at 11 CFR 109.21(j) for certain commercial and business communications.

A. Proposed 11 CFR 109.21(j)—Safe Harbor for Public Communications in Support of Tax-Exempt Organizations

From time to time, Federal candidates and officeholders may choose to participate in public communications in support of 501(c)(3) tax-exempt organizations or public policies or legislative proposals espoused by those organizations. The Commission seeks comment on whether it should adopt a new safe harbor in the coordinated communications rules to exempt these communications from regulation as coordinated communications, under certain circumstances. The Commission also seeks comment on the appropriate location of a safe harbor for communications that endorse or solicit support for non-profit organizations.

Currently, the coordinated communication rules contain safe harbors for public communications in which a Federal candidate endorses a Federal or non-Federal candidate, *see* 11 CFR 109.21(g)(1), and for public communications in which a candidate solicits funds for a Federal or non-Federal candidate or a particular organization, *see* 11 CFR 109.21(g)(2). These safe harbors do not apply, however, to public communications in which a candidate expresses or seeks non-monetary support for an organization's mission, or for a legislative or policy initiative supported by the organization.

Such a communication was the subject of a recent enforcement action. *See* MUR 6020 (Alliance/Pelosi). The enforcement action involved a television advertisement sponsored by a 501(c)(3) organization. In the advertisement, a Federal candidate appeared, discussed environmental issues, and asked viewers to visit a Web site sponsored by the organization paying for the advertisement. The advertisement was a public communication that was distributed nationwide, including in the candidate's jurisdiction, within 90 days before the candidate's primary election, and therefore satisfied the fourth coordinated communications content standard at 11 CFR 109.21(c)(4). The advertisement solicited general support for the organization's Web site and cause, but did not ''solicit[] funds * * * for [an] organization[]'' under the solicitation safe harbor at 11 CFR 109.21(g)(2).

Proposed 11 CFR 109.21(i) would, under certain circumstances, enable a Federal candidate to participate in such a public communication, without the communication being treated as an in-kind contribution to the candidate.

Specifically, the proposed safe harbor would provide that a public communication paid for by a non-profit organization described in 26 U.S.C. 501(c)(3), in which a candidate expresses or seeks support for the payor organization, or for a public policy or legislative initiative espoused by the payor organization, would not be a coordinated communication, unless the public communication PASOs the candidate or another candidate who seeks the same office.

Alternatively, rather than creating a new provision, would it be sufficient to expand the current safe harbor for endorsements at 11 CFR 109.21(g)(1) to include endorsements of an entity that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code? [27] Would expanding the safe harbor at 11 CFR 109.21(g)(1) adequately capture communications that solicit support for a nonprofit but neither explicitly endorse nor solicit funds for the entity? Would the expansion of existing 11 CFR 109.21(g)(1) address the same concerns that proposed 11 CFR 109.21(i) is intended to address? If so, is such an approach preferable to creating a new safe harbor at proposed 11 CFR 109.21(i)?

The Commission seeks comment on the proposed safe harbor with respect to both of the alternative proposed PASO definitions. The Commission is particularly interested in the following: Should the Commission exempt public communications in which a candidate expresses support for a tax-exempt organization as described above or for a position or action with respect to a specific legislative or public policy initiative, but does not PASO the candidate or another candidate seeking the same office, from regulation as coordinated communications? If so, does proposed 11 CFR 109.21(i) accomplish this goal?

Assuming that the Commission adopts such a safe harbor, what restrictions or conditions, if any, should apply to it, in addition to the existing PASO limitation? For example, should any proposed safe harbor be limited to public communications that are distributed nationwide? Should the proposed safe harbor be limited to public communications that are paid for by the tax-exempt organizations described above? Should proposed 11 CFR 109.21(i) ''public policy or legislative proposal'' be limited to legislation that is before Congress? Should it encompass other types of public policies, such as urging the public to engage in charitable work or community service, or encouraging the public to seek medical testing or take other health measures? Can public communications containing any of these examples PASO the candidate who expresses or seeks support for them or for the tax-exempt organizations paying for the communications?

Would any communications that satisfy the content standards at 11 CFR 109.21(c)(2) (republication) or (c)(3) (express advocacy) qualify for the proposed safe harbor? Or would the proposed safe harbor, as a practical matter, exempt only communications covered by the content standards at 11 CFR 109.21(c)(1) (electioneering communications) and (c)(4) (reference to a candidate), because any communications that would satisfy the republication or express advocacy content standards would necessarily PASO?

The Commission previously has considered a similar exemption for public service announcements in the context of electioneering communications. *See* Notice of Proposed Rulemaking on Electioneering Communications, 67 FR 51131, 51136 (Aug. 7, 2002) (''2002 EC NPRM''). Under the Act, the Commission may promulgate regulations exempting certain communications from the definition of an electioneering communication, only if ''the exempted communication [is] not * * * a 'public communication' that refers to a clearly identified candidate for Federal office and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office.'' 2002 EC E&J, 67 FR at 65198 (quoting 2 U.S.C. 434(f)(3)(B)(iv)).

In the 2002 electioneering communications rulemaking, the Commission asked whether the proposed electioneering communications regulation should include an exemption for public service announcements that refer to a clearly identified Federal candidate. The Commission also asked whether it ''should limit any of [several possible] exemptions to ads that do not promote, support, attack, or oppose any clearly identified candidate.'' 67 FR at 51136. The Commission ultimately decided not to exempt public service announcements, citing some commenters' assertions of ''the possibility that such an exemption could be easily abused by using a [public service announcement] to associate a Federal candidate with a public-spirited endeavor in an effort to promote or support that candidate.'' 2002 EC E&J, 67 FR at 65202. The Commission concluded that ''television and radio communications that include clearly identified candidates and that are distributed to a large audience in the candidate's State or district for a fee are appropriately subject to the electioneering communications provisions in BCRA * * * . Consequently, a [public service announcement] exemption is not included in the final rules.'' *Id.*

The Act does not limit the Commission's authority to exempt certain types of communications from regulation as a coordinated communication to communications that do not PASO, as it does for electioneering communications. Would a public communication that PASOs a clearly identified Federal candidate nonetheless present similar concerns in the coordination context as it does in the electioneering communications context? If so, does the inclusion of a PASO limitation in the proposed safe harbor address that concern? What effect, if any, would the adoption of either of the proposed PASO definitions have on the PASO limitation in the proposed safe harbor? What effect, if any, would declining to adopt a definition of PASO have on the PASO limitation in the proposed safe harbor?

The Commission invites comments on the following hypothetical example. Tax-exempt Organization A pays for a television advertisement in which a candidate appears. The candidate states in the advertisement: ''My name is X, and I endorse Organization A because I believe in equality of educational opportunities for all children. I believe in robust early childhood programs. I believe in rigorous standards for teachers. And I believe that community involvement contributes to the quality of our schools. So join me in supporting the good work of Organization A.'' Should this advertisement qualify for the proposed safe harbor, or should it continue to be treated as a coordinated communication? Does it PASO Candidate X? Why or why not?

Assuming the Commission determines that a safe harbor is necessary, is there a reason to prefer one approach to the other? Alternatively, does the Commission's dismissal of MUR 6020 (Alliance/Pelosi) demonstrate that such a safe harbor is not necessary because the Commission has adequate means of addressing the concerns at issue? Is the proposed safe harbor described above appropriate and

[27] The safe harbor for solicitation by a Federal candidate at 11 CFR 109.21(g)(2) is broader than the safe harbor for endorsement by a Federal candidate at 11 CFR 109.21(g)(1), which is limited to endorsement of candidates for Federal and non-Federal office.

advisable? Is the proposed safe harbor under- or over-inclusive?

B. Proposed 11 CFR 109.21(j)—New Safe Harbor for Business and Commercial Communications

The Commission is also considering adding a new coordinated communications safe harbor at 11 CFR 109.21(j) to address certain commercial and business communications. The proposed safe harbor would apply to any public communication in which a Federal candidate is clearly identified only in his or her capacity as the owner or operator of a business that existed prior to the candidacy, so long as the public communication does not PASO that candidate or another candidate who seeks the same office, and so long as the communication is consistent with other public communications made prior to the candidacy in terms of the medium, timing, content, and geographic distribution.

The proposed new safe harbor is intended to encompass the types of commercial and business communications that were the subjects of several recent enforcement actions. In each enforcement action, a business owned by a Federal candidate that had been operating prior to the candidacy paid for television advertisements that included the name, image, and voice of the candidate and that were distributed in the candidate's district within 90 days before the election, thus satisfying the fourth coordinated communications content standard at 11 CFR 109.21(c)(4). *See* MUR 6013 (Teahen), MUR 5517 (Stork), and MUR 5410 (Oberweis); *see also* MUR 4999 (Bernstein).

The Commission seeks comments on the proposed new safe harbor. Should the Commission exclude these commercial and business communications from regulation as coordinated communications? If so, would the proposed safe harbor accomplish this goal? Are Federal candidates who own or operate businesses or who are involved in other commercial activity currently impeded under the coordinated communications rules from being able to conduct their business activities? In addressing the time windows that are applicable to common vendors and former employees, the *Shays III District* court determined that the Commission is ''certainly not at liberty to accommodate'' business activities ''at the expense of BCRA's statutory goals.'' *Shays III District,* 508 F. Supp. 2d at 51. Notwithstanding this conclusion, could the current coordinated communications regulations be more narrowly tailored to accomplish BCRA's statutory goals without unnecessarily impeding non-electoral business activities?

Alternatively, would the proposed safe harbor provide an electoral advantage to candidates who participate in business activities as opposed to their election opponents who do not? If so, would any such advantage depend on the type of business activity in question, the type or content of the public communication at issue, the office or seat the candidate seeks or holds, or other factors? In addressing the ''Millionaires' Amendment,'' the Supreme Court reaffirmed that the government may not ''level electoral opportunities'' by equalizing candidates' advantages. *Davis* v. *FEC,* 128 S. Ct. 2759, 2773 (2008). Accordingly, may the Commission consider competitive advantages or disadvantages in fashioning its coordination rules?

Would the proposed safe harbor have the potential for circumvention of the Act's contribution limitations and prohibitions? If so, could that potential be minimized or eliminated, and if so, how?

What changes to the proposed safe harbor, if any, would better capture only *bona fide* business and commercial communications, without also encompassing election-related communications? Should the proposed safe harbor distinguish between pre-existing businesses and those that are established after a candidate files a statement of candidacy or after the beginning of the election cycle? Should it be limited to communications that are consistent with those that were made prior to the candidacy in terms of medium, timing, content, and geographic distribution, or should firms be allowed to adjust their advertising based on *bona fide* commercial need, regardless of any candidacy? How would the Commission determine *bona fide* commercial need? Should the proposed safe harbor apply only to public communications on behalf of a business whose name includes the candidate's name, or should it also apply to public communications in which a candidate appears as a spokesperson for a business, product, or service that does not share his or her name? Should the proposed safe harbor require that the public communication explicitly propose a transaction, such as the purchase of a product or service? Should the proposed safe harbor require that the public communication include contact information such as the address, phone number, or Web site of the business? Would this proposal be more appropriately limited to being an exception from only the content standard at 11 CFR 109.21(c)(4) regarding communications that refer to the candidate? What effect, if any, would the adoption of either of the proposed PASO definitions have on the PASO limitation in the proposed safe harbor? What effect, if any, would declining to adopt a definition of PASO have on the PASO limitation in the proposed safe harbor?

The Commission previously considered an exemption for business advertisements in the electioneering communications context. *See* 2002 EC NPRM at 51136. In that rulemaking, the Commission asked whether the proposed electioneering communications regulation should include an exemption for communications that refer to a clearly identified Federal candidate ''but that promote a candidate's business or professional practice,'' but it did not provide proposed text for such an exemption. *Id.* As discussed above, the Commission also asked whether it ''should limit any of [several proposed] exemptions to ads that do not promote, support, attack, or oppose any clearly identified candidate.'' *Id.* The Commission ultimately decided not to adopt an exemption for business advertisements, concluding that ''it is likely that, if run during the period before an election, such communications could well be considered to promote or support the clearly identified candidate, even if they also serve a business purpose unrelated to the election.'' 2002 EC E&J at 65202.

Nevertheless, in response to the Supreme Court's *Wisconsin Right to Life* decision, the Commission adopted, in 2007, a safe harbor at 11 CFR 114.15(b) to exclude from the prohibition on corporate-funded electioneering communications, *inter alia,* an electioneering communication that ''proposes a commercial transaction, such as purchase of a book, video, or other product or service, or such as attendance (for a fee) at a film exhibition or other event,'' provided that the communication also does not mention any election, candidacy, political party, opposing candidate, or voting; and does not take a position on any candidate's or officeholder's character, qualification, or fitness for office. As the Commission explained, such an electioneering communication ''could reasonably be interpreted as having a non-electoral, business or commercial purpose,'' and thus ''is susceptible of a reasonable interpretation other than as an appeal to vote.'' Explanation and Justification for Final Rules on Electioneering

Communications, 72 FR 72899, 72904 (Dec. 26, 2007).

Does the rationale for adopting the electioneering communication safe harbor for business transactions carry over into the coordination context, or did the reasoning of *Wisconsin Right to Life* apply only to electioneering communications? Would the new safe harbor be over- or underinclusive or vague?

V. Party Coordinated Communication Provisions in 11 CFR 109.37

The party coordinated communication regulation at 11 CFR 109.37 contains a three-prong test for determining whether a communication paid for by a political party committee is coordinated between a candidate and the party committee. The party coordinated communication test in 11 CFR 109.37 has a content prong that is substantially the same as the one for coordinated communications in 11 CFR 109.21(c). *See* 11 CFR 109.37(a)(2). Also, the common vendor and former employee conduct standards of 11 CFR 109.21(d) that were struck down in *Shays III Appeal* are incorporated by reference in the party coordinated communication regulations. *See* 11 CFR 109.37(a)(3).

As pointed out in footnote 2, above, the Commission previously has adopted parallel regulations for coordinated communications at 11 CFR 109.21 and party coordinated communications at 11 CFR 109.37. However, the party coordinated communication regulations were never challenged by the plaintiffs in the *Shays* litigation, nor were they addressed or even referenced by the appellate or district court decisions. Section 109.37 does not incorporate by reference any of the content standards of 11 CFR 109.21 that are the subject of the other parts of this rulemaking. Accordingly, the Commission is not proposing to revise the party coordinated communication regulations to maintain parallelism with any revisions to the regulations for coordinated communications at 11 CFR 109.21 in this rulemaking but seeks comment on whether it should issue a notice of proposed rulemaking on this subject, and if so, when.

In the event, however, that the Commission revises the common vendor and former employee conduct standards of 11 CFR 109.21(d), any changes to the common vendor and former employee standards that the Commission adopts will apply automatically to 11 CFR 109.37(a)(3) because, as noted above, the latter incorporates by reference the former. The Commission seeks comment on whether this result is appropriate.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The Commission certifies that the attached proposed rules, if promulgated, would not have a significant economic impact on a substantial number of small entities. The basis for this certification is that any individuals and not-for-profit enterprises that would be affected by these proposed rules would not be ''small entities'' under 5 U.S.C. 601.

The definition of ''small entity'' does not include individuals, and includes a not-for-profit enterprise as a ''small organization'' if it is independently owned and operated and not dominant in its field. 5 U.S.C. 601(4). Any State, district, and local party committees that would be affected by these proposed rules would be not-for-profit committees that do not meet the definition of ''small organization.'' State political party committees are not independently owned and operated because they are not financed and controlled by a small identifiable group of individuals, and they are affiliated with the larger national political party organizations. In addition, the State political party committees representing the Democratic and Republican parties have a major controlling influence within the political arena of their State and are thus dominant in their field. District and local party committees are generally considered affiliated with the State committees and need not be considered separately.

Furthermore, any separate segregated funds that would be affected by these proposed rules would be not-for-profit political committees that do not meet the definition of ''small organization'' because they are financed by a combination of individual contributions and financial support for certain expenses from corporations, labor organizations, membership organizations, or trade associations, and therefore are not independently owned and operated. Most of the other political committees that would be affected by these proposed rules would be not-for-profit committees that do not meet the definition of ''small organization.'' Most political committees are not independently owned and operated because they are not financed by a small identifiable group of individuals. In addition, most political committees rely on contributions from a large number of individuals to fund the committees' operations and activities.

To the extent that any State party committees representing minor political parties or any other political committees might be considered ''small organizations,'' the number that would be affected by this proposed rule would not be substantial, particularly the number that would coordinate expenditures with candidates or political party committees in connection with a Federal election. Accordingly, to the extent that any other entities may fall within the definition of ''small entities,'' any economic impact of complying with these rules would not be significant.

These proposed rules would not impose any new requirements on commercial vendors. Any indirect economic effects that the proposed rules might have on commercial vendors would result from the decisions of their clients rather than Commission requirements.

List of Subjects

11 CFR Part 100

Elections.

11 CFR Part 109

Coordinated and independent expenditures.

For reasons set out in the preamble, Subchapter A of Chapter I of title 11 of the *Code of Federal Regulations* is proposed to be amended as follows:

PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

1. The authority citation for Part 100 continues to read as follows:

Authority: 2 U.S.C. 431, 434, and 438(a)(8).

2. Section 100.23 is added to read as follows:

Alternative A

§ 100.23 Promote, support, attack, or oppose.

(a) When ''promote,'' ''support,'' ''attack,'' or ''oppose'' is used in conjunction with one or more of the other three component terms in PASO (as in ''promote or oppose'' or ''promotes or supports, or attacks or opposes''):

(1) The word *promote* means to help, encourage, further, or advance;

(2) The word *support* means to uphold, aid, or advocate;

(3) The word *attack* means to argue with, blame, or criticize; and

(4) The word *oppose* means to act against, hinder, obstruct, or be hostile or adverse to.

(b) A communication may promote, support, attack, or oppose a candidate for Federal office in whole or in part, even if it does not refer to any election, candidacy, political party, or voting. All communications that expressly advocate the election or defeat of a clearly

identified candidate under 11 CFR 100.22 also promote, support, attack, or oppose that candidate.

(c) The following are examples of communications that promote or support candidates for Federal office:

(1) In a communication by a candidate for State office, the State candidate states that, ''We have an outstanding Democratic candidate running for President.''

(2) Senator X is running for reelection and a tax advocacy group broadcasts a communication stating, ''Senator X is working hard to lower your taxes. Senator X is the one getting it done. Call Senator X and tell him 'thanks.' ''

(3) ''Congressman X is an outstanding public servant and of the highest moral character. Join Congressman X in supporting the Literacy Now! Act.''

(d) The following are examples of communications that do not promote or support a candidate for Federal office:

(1) A university mails postcards announcing the opening of a new campus building named after candidate X.

(2) Senator X is running for reelection and appears in a television advertisement stating, ''I'm Senator X. Republicans in the statehouse passed a property tax freeze. The Governor vetoed the freeze. You can help override that veto. Visit this Web site: ___.org.''

(3) Governor X is a candidate for Federal office and appears in a television advertisement created by the State's tourism bureau, stating ''Come see our State!''

(e) The following are examples of communications that attack or oppose a candidate for Federal office:

(1) A billboard consists of a picture of Candidate X and an arrow pointing from the word ''Liar'' to the candidate.

(2) A local party committee mailer to elect a local party chairman contains a picture of Federal Candidate X laughing, with the words: ''Stop her laughing. We can beat her if we are united. But the county needs a new party chairman.''

(3) Senator X is running for reelection. The State party committee in his State airs this communication: ''Is X looking out for our State? In Washington, he takes $136,000 from a notorious lobbyist now under Federal investigation. Then X fights for and passes legislation to give that lobbyist's client $3 million, in another State. X doesn't pass the smell test. Call X: tell him to start working for our State.''

(4) Congressman X is running for reelection and a group opposing X broadcasts a communication in which Candidate X's visage morphs into the visage of Hitler.

(f) The following is an example of a communication that does not attack or oppose a candidate for Federal office:

''We don't know where Congressman X stands on the Literacy Now! Act. Call Congressman X and tell him where you stand.''

Alternative B

§ 100.23 Promotes, supports, attacks, or opposes (2 U.S.C. 431(20)(A)(iii)).

(a) The definition below shall apply to the term ''promotes, supports, attacks, or opposes,'' as well as to any instance in which the terms ''promotes or attacks'' and ''supports or opposes'' are used in conjunction, regardless of the verb tense in which these terms are used, but shall not apply to occurrences of these terms when used individually or in isolation from any or all of the other terms.

(b) A communication *promotes, supports, attacks, or opposes* a candidate for Federal office or political party if it:

(1) Refers explicitly to a clearly identified candidate for Federal office or political party;

(i) With respect to a candidate, ''clearly identified'' shall have the same definition as in 11 CFR 100.17;

(ii) With respect to a political party, ''clearly identified'' shall mean the party's name, nickname, logo, or the identity of the party is otherwise apparent through an unambiguous reference such as ''the party controlling the White House,'' ''the party controlling the Senate,'' ''the party controlling the House,'' or ''the party controlling both houses of Congress'';

(2) Unambiguously helps, encourages, advocates for, praises, furthers, argues with, sets as an adversary, is hostile or adverse to, or criticizes such political party or candidate for Federal office. All communications that expressly advocate the election or defeat of a clearly identified candidate under 11 CFR 100.22 also help, encourage, advocate for, praise, further, argue with, set as an adversary, are hostile or adverse to, or criticize such candidate;

(3) Contains a clear nexus between the clearly identified candidate for Federal office or political party and an upcoming Federal election or a candidacy for such election; and

(4) Is publicly distributed or otherwise publicly disseminated in the clearly identified Federal candidate's jurisdiction, in the case of a candidate, or in a jurisdiction in which one or more candidates of that political party will appear on the ballot, in the case of a political party.

(c) A communication does not promote, support, attack, or oppose unless the element(s) of the communication that unambiguously helps, encourages, advocates for, praises, furthers, argues with, sets as an adversary, is hostile or adverse to, or criticizes is done through means that are verbal or pictorial, or a combination thereof; except that photographic or videographic alterations, facial expressions, body language, poses, or similar features of party officials or candidates, may not be considered in determining whether the communication promotes, supports, attacks, or opposes.

(1) For the purposes of this section, verbal means shall include visual text or audio speech.

(2) For the purposes of this section, pictorial means shall include depictions of party officials, candidates, or their respective logos.

(d) The following are examples of communications that promote, support, attack, or oppose, assuming each is publicly distributed or disseminated in the candidate's jurisdiction:

(1) In a public communication by a candidate for State office, the State candidate states that, ''We have an outstanding Democrat, John Doe, at the top of the ticket this year, running for the White House.''

(2) A tax advocacy group broadcasts a public communication which says, ''Senator X is running for reelection. Senator X has been a champion for lowering your taxes. Senator X is the one getting it done.''

(3) A billboard displayed in the congressional district Candidate X seeks to represent consists of a picture of Candidate X, an explicit identification of Candidate X as a candidate for Congress, and an arrow pointing from the word ''Liar'' to the picture of Candidate X.

(4) Senator X is running for reelection. The opposing party's State committee airs this public communication: ''Is X looking out for our State? In Washington, he takes $136,000 from a notorious lobbyist now under Federal investigation. Then X fights for and passes legislation to give that lobbyist's client $3 million, in another State. This November when you cast your vote, think about this.''

(5) A radio advertisement states, ''Congressman X is running for reelection. Congressman X is an outstanding public servant and of the highest moral character, and has stood with us consistently on the Literacy Now! Act.''

(e) The following are examples of communications that do not promote, support, attack, or oppose, even if they

are publicly distributed or disseminated in the candidate's jurisdiction:

(1) A radio advertisement states, ''Congressman X is an outstanding public servant and of the highest moral character. Join Congressman X in supporting the Literacy Now! Act.''

(2) A university mails postcards announcing the opening of a new campus building named after candidate X.

(3) Senator X is running for reelection and appears in a television advertisement stating, ''I'm Senator X. Republicans in the statehouse passed a property tax freeze. The Governor vetoed the freeze. You can help override that veto. Visit this Web site: _____.org.''

(4) Governor X is a candidate for Federal office and appears in a television advertisement created by the State's tourism bureau, stating ''Come see our State!''

(5) A local party committee mailer to elect a local party chairman contains a picture of Federal Candidate X laughing, with the words: ''Stop her laughing. We can beat her if we are united. But the county needs a new party chairman.''

(6) A television advertisement features a picture of Congressman X. Underneath, the text on the screen gives the date of the upcoming election. In the background, the Imperial March theme song from Star Wars is played.

(7) Same as Number 6, but instead, the Star Spangled Banner is played.

(8) A television ad shows grainy video of a presidential candidate on a large screen silently speaking to a group of masses. A passerby throws a sledgehammer at the screen.

PART 109—COORDINATED AND INDEPENDENT EXPENDITURES (2 U.S.C 431(17), 441a(a) and (d), and Pub. L. 107–155 Sec. 214(c))

3. The authority citation for Part 109 continues to read as follows:

Authority: 2 U.S.C. 431(17), 434(c), 438(a)(8), 441a, 441d; Sec. 214(c) of Pub. L. 107–155, 116 Stat. 81.

Content Alternative 1 (PASO Standard)

4. Section 109.21 is amended by revising paragraph (c)(3) to read as follows:

§ 109.21 What is a ''coordinated communication''?

* * * * *

(c) * * *

(3) A public communication, as defined in 11 CFR 100.26, that promotes, supports, attacks, or opposes a political party or a clearly identified candidate for Federal office. All communications expressly advocating the election or defeat of a clearly identified candidate under 11 CFR 100.22 also promote, support, attack, or oppose that candidate.

* * * * *

Content Alternative 2 (Modified WRTL Content Standard)

5. Section 109.21 is amended by revising paragraphs (c) introductory text and (c)(3), and adding new paragraph (c)(5) to read as follows:

§ 109.21 What is a ''coordinated communication''?

* * * * *

(c) *Content standards.* Each of the types of content described in paragraphs (c)(1) through (c)(5) of this section satisfies the content standard of this section.

* * * * *

(3) A public communication, as defined in 11 CFR 100.26, that expressly advocates, as defined in 11 CFR 100.22, the election or defeat of a clearly identified candidate for Federal office.

* * * * *

(5) A public communication, as defined in 11 CFR 100.26, that is the functional equivalent of express advocacy. For purposes of this section, a communication is the functional equivalent of express advocacy if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

* * * * *

Content Alternative 3 (Clarification of Express Advocacy Standard)

6. Section 109.21 is amended by revising paragraph (c)(3) to read as follows:

§ 109.21 What is a ''coordinated communication''?

* * * * *

(c) * * *

(3) A public communication, as defined in 11 CFR 100.26, that expressly advocates, as defined in 11 CFR 100.22, the election or defeat of a clearly identified candidate for Federal office.

* * * * *

Content Alternative 4 (''Explicit Agreement'' Standard)

7. Section 109.21 is amended by revising paragraphs (c) introductory text, (c)(3), (d) introductory text, and (e), and adding new paragraphs (c)(5) and (d)(7) to read as follows:

§ 109.21 What is a ''coordinated communication''?

* * * * *

(c) *Content standards.* Each of the types of content described in paragraphs (c)(1) through (c)(5) of this section satisfies the content standard of this section.

* * * * *

(3) A public communication, as defined in 11 CFR 100.26, that expressly advocates, as defined in 11 CFR 100.22, the election or defeat of a clearly identified candidate for Federal office.

* * * * *

(5) A public communication, as defined in 11 CFR 100.26, but only if the conduct standard in paragraph (d)(7) of this section is also satisfied.

(d) *Conduct standards.* Any one of the following types of conduct satisfies the conduct standard of this section whether or not there is formal collaboration, as defined in paragraph (e) of this section. The types of conduct described in paragraphs (d)(1) through (d)(6) of this section are satisfied whether or not there is agreement, as defined in paragraph (e) of this section:

* * * * *

(7) *Agreement.* There is a formal or informal agreement between a candidate, authorized committee, or political party committee and a person paying for the communication to create, produce, or distribute the communication. For purposes of this paragraph (d)(7), either the communication or the agreement must be made for the purpose of influencing a Federal election.

(e) *Agreement or formal collaboration.* Agreement between the person paying for the communication and the candidate clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, is not required for a communication to be a coordinated communication if any of the types of conduct described in paragraphs (d)(1) through (d)(6) of this section are satisfied. Formal collaboration between the person paying for the communication and the candidate clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, is not required for a communication to be a coordinated communication. *Agreement* means a mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination. *Formal collaboration* means planned, or

systematically organized, work on the communication.

* * * * *

8. Section 109.21 is amended by revising paragraphs (d)(4)(ii) and (d)(5)(i) to read as follows:

§ 109.21 What is a ''coordinated communication''?

* * * * *

(d) * * *

Conduct Alternative 1 (No Change)

(4) * * *

(ii) That commercial vendor, including any owner, officer, or employee of the commercial vendor, has provided any of the following services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days;

* * * * *

(5) * * *

(i) The communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days; and

* * * * *

Conduct Alternative 2 (Two-Year Period)

(4) * * *

(ii) That commercial vendor, including any owner, officer, or employee of the commercial vendor, has provided any of the following services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the two-year period ending on the date of the general election for the office or seat that the candidate seeks;

* * * * *

(5) * * *

(i) The communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days two-year period ending on the date of the general election for the office or seat that the candidate seeks; and

* * * * *

Conduct Alternative 3 (Current Election Cycle)

(4) * * *

(ii) That commercial vendor, including any owner, officer, or employee of the commercial vendor, has provided any of the following services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the current election cycle;

* * * * *

(5) * * *

(i) The communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the current election cycle; and

* * * * *

■ 9. Section 109.21 is amended by adding new paragraphs (i) and (j) to read as follows:

§ 109.21 What is a ''coordinated communication''?

* * * * *

(i) *Safe harbor for Federal candidates' support of public policies or legislative initiatives.* A public communication paid for by an organization described in 26 U.S.C. 501(c)(3) and exempt from taxation under 26 U.S.C. 501(a), in which a candidate for Federal office expresses or seeks support for that organization, or for a position on a public policy or legislative proposal espoused by that organization, is not a coordinated communication with respect to the candidate unless the public communication promotes, supports, attacks, or opposes the candidate or another candidate who seeks election to the same office as the candidate.

(j) *Safe harbor for commercial transactions.* A public communication in which a Federal candidate is clearly identified only in his or her capacity as the owner or operator of a business that existed prior to the candidacy is not a coordinated communication with respect to the clearly identified candidate if

(1) The medium, timing, content, and geographic distribution of the public communication are consistent with public communications made prior to the candidacy; and

(2) The public communication does not promote, support, attack, or oppose that candidate or another candidate who seeks the same office as that candidate.

Dated: October 15, 2009.

On behalf of the Commission.

Steven T. Walther,

Chairman, Federal Election Commission.

[FR Doc. E9–25240 Filed 10–20–09; 8:45 am]

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SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN 3245–AF71

Small Business Size Standards: Accommodation and Food Services Industries

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA) proposes to increase small business size standards for five industries in North American Industry Classification System (NAICS) Sector 72, Accommodation and Food Services—namely NAICS 721110, Hotels and Motels, from $7.0 million to $30 million; NAICS 721120, Casino Hotels, from $7.0 million to $30 million; NAICS 722211, Limited Service Restaurants, from $7.0 million to $10 million; NAICS 722212, Cafeterias, from $7.0 million to $25.5 million; and NAICS 722310, Food Service Contractors, from $20.5 million to $35.5 million. As part of its ongoing initiative to review all size standards, SBA has evaluated each industry in Sector 72 to determine whether the existing size standards should be retained or revised. This proposed rule is one of a series of proposals that will examine industries grouped by an NAICS Sector. As part of this series of proposed rules SBA is publishing concurrently in this issue of the **Federal Register** a proposed rule to modify small business size standards in Sector 44–45, Retail Trade, and Sector 81, Other Services. SBA has established its ''Size Standards Methodology'' and published elsewhere in this issue of the **Federal Register** a notice of its availability on SBA's Web site at *http://www.sba.gov/size.* SBA has applied ''Size Standards Methodology'' to this proposed rule.

DATES: SBA must receive comments to this proposed rule on or before December 21, 2009.

ADDRESSES: You may submit comments, identified by RIN 3245–AF71 by one of the following methods: (1) *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments; or (2) Mail/Hand Delivery/Courier: Khem R. Sharma, Chief, Size Standards Division, 409 Third Street, SW., Mail Code 6530, Washington, DC 20416.

SBA will post all comments on *www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov*, please submit the information to U.S. Small Business Administration, Khem R. Sharma, Chief, Size Standards Division, 409 Third Street, SW., Mail Code 6530, Washington, DC 20416, or send an e-mail to *sizestandards@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination of whether it will publish the information or not.

FOR FURTHER INFORMATION CONTACT: Carl J. Jordan, Program Analyst, Size Standards Division, (202) 205–6618 or *sizestandards@sba.gov.*

SUPPLEMENTARY INFORMATION: To determine eligibility for Federal small business assistance programs, SBA establishes small business definitions (referred to as size standards) for private sector industries in the U.S. SBA's existing size standards use two primary measures of business size—receipts and number of employees. Financial assets, electric output, and refining capacity are used as size measures for a few specialized industries. In addition, SBA's Small Business Investment Company (SBIC) and the Certified Development Company (CDC) Programs determine small business eligibility using either the industry based size standards or net worth and net income size standards. Currently, SBA's size standards consist of 45 different size levels, covering 1,141 NAICS industries and 17 sub-industry activities. Of these size levels, 32 are based on average annual receipts, eight are based on number of employees, and five are based on other measures. In addition, SBA has established 11 other size standards for its financial and procurement programs.

Over the years, SBA has received comments that its size standards have not kept up with changes in the economy and, in particular, that they do not reflect the changes in the Federal contracting marketplace. The last overall review of size standards occurred during the late 1970s to early 1980s. Since then, most reviews of size standards have been limited to in-depth analyses of specific industries in response to requests from the public and Federal agencies. SBA also makes periodic inflation adjustments to its monetary based size standards. The latest inflation adjustment to size standards was published in the **Federal Register** on July 18, 2008 (73 FR 41237).

SBA recognizes that industrial changes over time have rendered existing size standards for some industries no longer supportable by current data. Accordingly, SBA has begun a comprehensive review of its size standards to ensure that existing size standards have supportable bases and, where necessary, to make revisions to current size standards. This proposed rule affords the public an opportunity to review and comment on the data and methodology SBA uses to evaluate and revise a size standard.

Rather than review all size standards at one time, SBA believes that a more manageable approach would be to examine a group of related industries within an NAICS Sector in phases. Except for manufacturing, an NAICS Sector generally consists of 25 to 75 industries. Once a review of size standards for industries within an NAICS Sector is completed, SBA will issue a proposed rule for those industries in which the analysis of industry data supports a change to the existing size standards. SBA expects to complete a review of all NAICS Sectors in two years.

Below is a discussion of SBA's size standards methodology, including analyses of industry structure, Federal procurement trends and other factors for industries within Sector 72, Accommodation and Food Services, and the impact of the proposed revisions to size standards on Federal small businesses assistance.

Size Standards Methodology

SBA has recently developed a ''Size Standards Methodology'' that it uses for developing and modifying size standards when necessary. SBA has published the document which is available at *http://www.sba.gov/size.* SBA does not apply all features of its ''Size Standards Methodology'' to all cases because not all are appropriate. However, SBA does make it available in its entirety for parties with an interest in SBA's overall approach to evaluating, establishing and modifying small business size standards. SBA always explains its analysis in the proposed and final rules that relate to size standards for specific industries. The following discussion is of SBA's size standard analysis applied to industries in Sector 72, Accommodation and Food Services.

SBA welcomes comments from the public on a number of issues. SBA is aware that different choices among size standards can involve complex tradeoffs among relevant variables; SBA invites comments on how to identify and weigh those variables. Suggestions are invited on alternative methodologies for determining small businesses; on how these size standards affect competition in general and within the specific industry; on alternative or additional factors that SBA should consider; on whether SBA's approach to small business size standards makes sense in the current economic environment; on whether SBA's using anchor size standards is appropriate in the current economy; on whether there are gaps in SBA's methodology because of the lack of comprehensive data; and on alternative datasets SBA should consider for a specific sector.

Congress granted SBA's Administrator discretion to establish detailed small business size standards (15 U.S.C. 632(a)(2)). Section 3(a)(3) of the Small Business Act (15 U.S.C. 632(a)(3)) requires that size standards vary by industry to the extent necessary to reflect differing characteristics among various industries. Accordingly, the economic structure of an industry serves as the underlying basis for developing and modifying small business size standards. By examining data on economic characteristics defining the industry structure (as described below), the small business segment of an industry is identified. In addition to the industry structure, SBA also takes into consideration its program objectives and whether a size standard successfully excludes businesses that are dominant in the industry. Discussed below is SBA's analysis of the economic characteristics of each industry in Sector 72, Accommodation and Food Services, the impact of proposed size standards on SBA programs, and the evaluation of whether a revised size standard would exclude dominant firms in the industry from being considered as small.

Industry Analysis

For the current comprehensive size review, SBA has established three ''base'' or ''anchor'' size standards that apply to most industries—$7.0 million in average annual receipts for industries that have receipts based size standards,

500 employees for manufacturing and other industries that have employee based size standards (except for Wholesale Trade), and 100 employees for industries in the Wholesale Trade Sector. SBA established 500 employees as the anchor size standard for the manufacturing industries at SBA's inception in 1953 and shortly thereafter established a receipts based anchor size standard of $1 million in average annual receipts for the nonmanufacturing industries. The receipts based anchor size standard has been adjusted periodically for inflation. The inflation adjustment over the years has increased it to $7.0 million today. Since 1986, all industries in the Wholesale Trade Sector have had the 100-employee size standard for non-procurement SBA programs. For procurement purposes, the size standard for a non-manufacturer is 500 employees.

These long standing anchor size standards have gained legitimacy through practice and general public acceptance. An anchor size standard is neither a minimum nor a maximum size standard. It is a common size standard for a large number of industries that have similar economic characteristics and serves as a reference point in evaluating size standards for individual industries. SBA uses the anchor in lieu of trying to establish precise small business size standards for each industry. Otherwise, theoretically, that could require that the number of size standards be as high as the number of industries for which SBA establishes size standards. SBA presumes an anchor size standard is appropriate for a particular industry unless that industry displays significantly different economic characteristics, as compared to the characteristics of industries with the anchor size standard, thereby suggesting a need for revision to an existing size standard.

When evaluating a size standard, the economic characteristics of a specific industry under review are compared to the average characteristics of industries with one of the three anchor size standards (referred to as ''anchor comparison group'') to assess industry structure and to determine whether the industry displays significant differences relative to the industries in the anchor size standard group. If the characteristics of a specific industry under review are similar to the average characteristics of the anchor comparison group, the anchor size standard would be considered appropriate for that industry. SBA will consider adopting a size standard below the anchor size standard only when (1) all or most of the industry characteristics are significantly smaller than the average characteristics of the anchor comparison group, or (2) other industry considerations strongly suggest that the anchor size standard would be an unreasonably high size standard for the industry.

If the specific industry's characteristics are significantly higher than those of the anchor comparison group, a size standard higher than the anchor size standard may be considered appropriate. The larger the differences are between the characteristics of the industry under review and those in the anchor comparison group, the larger will be the difference between the appropriate industry size standard and the anchor size standard. To determine the level of a size standard above the anchor size standard, the characteristics of a second comparison group are analyzed. For industries with receipts based size standards, SBA has developed a second comparison group consisting of industries with the highest levels of receipts based size standards. The size standards for this group of industries range from $23 million to $35.5 million in average receipts, with the weighted average size standard for the group equaling $29 million. SBA refers to this comparison group as the ''higher level receipts based size standard group.''

The primary factors that SBA evaluates in analyzing the structural characteristics of an industry include average firm size, startup costs and entry barriers, industry competition, and distribution of firms by size (13 CFR 121.102(a) and (b)). SBA also evaluates the possible impact of both existing and revised size standards on Federal contracting assistance to small businesses as an additional primary factor. SBA generally considers these five factors as the most important ones for establishing or revising a size standard for an industry. However, SBA will also consider and evaluate other information that it believes relevant to the decision on a size standard for a particular industry (such as technological changes, growth trends, SBA financial assistance and other program factors, *etc.*). Public comments on a proposed size standard rule also provide important additional information. SBA thoroughly reviews all public comments before making a final decision on its proposed size standard. Below is a brief description of each of the five primary evaluation factors. A more detailed description of this analysis is provided in the ''SBA Size Standards Methodology'' paper which is available at *http://www.sba.gov/size.*

1. *Average firm size.* SBA computes two measures of average firm size: simple average firm size and weighted average firm size. For industries with receipts based standards (including Accommodation and Food Services industries), the simple average firm size is calculated as total receipts of an industry divided by the total number of firms in that industry. The weighted average firm size is computed as the sum of weighted simple average firm size in different receipts size classes where weights are the shares of total industry receipts for respective size classes. The simple average firm size weighs all firms within an industry equally regardless of their size. The weighted average overcomes that limitation by giving more weights to larger firms.

If the average firm size of an industry under review is significantly higher than the average firm size of industries in the anchor comparison industry group, this would generally support a size standard higher than the anchor size standard. Conversely, if the industry's average firm size is similar to or significantly lower than that of the anchor comparison industry group, it would be a basis to adopt the anchor size standard or, in rare cases, a standard lower than the anchor.

2. *Startup costs.* Startup costs reflect a firm's initial size in an industry. New entrants to an industry must have sufficient capital to start and maintain a viable business. If firms entering a particular industry have greater capital requirements than firms do in industries in the anchor comparison group, this will form a basis for establishing a size standard higher than the anchor standard. In lieu of data on actual startup costs, SBA uses average assets size as a proxy measure to assess the levels of capital requirements for new entrants to an industry.

SBA calculates the average assets size within a particular industry by applying the sales to total assets ratios from the Risk Management Association's Annual Statement Studies, 2006–2008 to the average receipts size of firms in that industry. An industry with a significantly higher level of average assets size than that of the anchor comparison group is likely to have higher startup costs, which would support a size standard higher than the anchor size standard. Conversely, if the industry has a significantly smaller average assets size compared to the anchor comparison group, the anchor size standard, or in rare cases one lower than the anchor, would be considered appropriate.

3. *Industry competition.* Industry competition is generally assessed by measuring the share of total industry receipts obtained by firms that are among the largest in an industry. In this proposed rule, SBA evaluates the share of industry receipts generated by the four largest firms in the industry. This is referred to as the ''four-firm concentration ratio.'' SBA then compares the four-firm concentration ratio for an industry under review to the average four-firm concentration ratio for industries in the anchor comparison group. If a significant share of economic activity within the industry is concentrated among a few relatively large companies, SBA would establish a size standard relatively higher than the anchor size standard. SBA would not consider the four-firm concentration ratio as an important factor in assessing a size standard if its value for an industry under review is less than 40 percent. For industries in which the four largest firms account for 40 percent or more of an industry's total receipts, SBA examines the average size of the four largest firms in determining a size standard.

4. *Distribution of firms by size.* SBA examines the shares of industry total receipts accounted for by firms of different receipts and employment size classes in an industry. This is an additional factor SBA evaluates in assessing competition within an industry. If the preponderance of an industry's economic activity is attributable to smaller firms, this would indicate that small businesses are competitive in that industry and supports adopting the anchor size standard. A size standard higher than the anchor size standard would be supported for an industry in which the distribution of firms indicates that most of the economic activity is concentrated among the larger firms.

Concentration among firms is a measure of inequality of distribution. To evaluate the degree of inequality of distribution within an industry, SBA computes the Gini coefficient by constructing the Lorenz curve. The Gini coefficient values vary between zero and one. If receipts are distributed perfectly equally among all the firms in an industry, the value of the Gini coefficient would equal to zero. If an industry's total receipts are attributed to a single firm, the Gini coefficient would equal to one.

SBA compares the degree of inequality of distribution for an industry under review with that for industries in the anchor comparison group. If an industry shows a higher degree of inequality of distribution (*i.e.,* higher Gini coefficient) compared to industries in the anchor comparison industry group this would, all else being equal, warrant a higher size standard than the anchor. Conversely, for industries with similar or more equal distribution (*i.e.,* similar or lower Gini coefficient values) than the anchor group, the anchor standard, or in some cases a standard lower than the anchor, would be adopted

5. *Impact on SBA programs.* SBA examines the possible impact a size standard change may have on the level of Federal small business assistance. This assessment most often focuses on the share of Federal contracting dollars awarded to small businesses in the industry in question. In general, if the share of Federal contracting dollars awarded to small businesses in an industry that receives a significant amount of Federal contracting dollars is significantly less than the small business share of the industry's total receipts, a justification would exist for considering a size standard higher than the existing size standard. The disparity between the small business Federal market share and industry-wide share may be attributed to a variety of reasons, such as extensive administrative and compliance requirements associated with Federal contracts, the different skill set required on Federal contracts as compared to typical commercial contracting work, and the size of contracting requirements of Federal customers. These, as wells as other factors, are likely to influence the type of firms within an industry that compete for Federal contracts and, hence, the firms receiving such contracts are expected to possess different characteristics than the average characteristics for all firms in that industry. By comparing the small business Federal contracting share with the industry-wide small business share, SBA includes in its size standards analysis the latest Federal contracting trends. This analysis may indicate a size standard larger than the current standard.

For this proposed rule, SBA considered Federal procurement trends in the size standards analysis only if (1) the small business share of Federal contracting dollars is at least 10 percentage points lower than the small business share of total industry receipts and (2) the amount of total Federal contracting averages $100 million or more during fiscal years 2006–2008 (the latest years for which complete Federal procurement data are available). SBA has selected these thresholds because they reflect a significant level of contracting in which a revision to a size standard may have an impact on expanding small business opportunities.

Another factor that SBA evaluates is the impact of a proposed size standard on SBA's loan programs, that is, the volume of SBA guaranteed loans within an industry and the size of firms obtaining those loans. This factor is examined to assess whether the existing or the proposed size standard for a particular industry may be restricting the level of financial assistance to small firms in that industry. If the analysis shows a reduction in financial assistance to small businesses, a higher size standard would be supportable. If small businesses have already been receiving significant amounts of financial assistance through SBA's loan programs, or if the financial assistance has been provided mainly to businesses that are much smaller in size than the existing size standard, consideration of this factor for determining the size standard may not be necessary.

Sources of Industry and Program Data

The primary source of data for SBA's industry analysis is a special tabulation of the 2002 Economic Census (see *http://www.census.gov/econ/census02/*) prepared by the U.S. Bureau of the Census (Census Bureau) for SBA. The special tabulation provides SBA with industry-specific data on the number of firms, number of establishments, number of employees, annual payroll and annual receipts of companies by the size of firm reporting the data to Census. That is, the data are by the size class of the total company; however, the data itself, within a particular size class, represents the company's total data in that industry only. The special tabulation enables SBA to evaluate average firm size, the four-firm concentration ratio, and distribution of firms by receipts and employment size.

In some cases, where Census data were not available due to disclosure prohibitions, SBA either estimated missing values using available relevant data or, examined data at a higher level of industry aggregation, such as at the 2- or 3-digit NAICS level. In some instances, SBA had to base its analysis only on those factors for which data were available or missing values could be estimated. Data sources and estimation procedures SBA uses in its size standards analysis are documented in detail in the ''SBA Size Standards Methodology'' paper, which is available at *http://www.sba.gov/size.*

Sales to total assets ratios used to calculate average assets size are from the Risk Management Association's Annual Statement Studies, 2006–2008.

To evaluate Federal contracting trends, SBA examined Federal contract award data for fiscal years 2006–2008 from the U.S. General Service Administration's Federal Procurement Data System—Next Generation (FPDS–NG). SBA's internal data on its guaranteed loan programs for fiscal years 2006–2008 were analyzed to assess the impact on financial assistance to small businesses.

Dominant in Field of Operation

Section 3(a) of the Small Business Act (15 U.S.C. 632(a)) defines a small business concern as one that is (1) independently owned and operated, (2) not dominant in its field of operation, and (3) within a specific small business definition or size standard established by the SBA Administrator. SBA considers as part of its evaluation of a size standard whether a business concern at a proposed size standard would be considered dominant in its field of operation. For this, SBA generally examines the industry's market share of firms at the proposed standard or other factors that may indicate whether a firm can exercise a major controlling influence on a national basis in which significant numbers of business concerns are engaged. If SBA's analysis indicates that a proposed size standard would include a dominant firm, a lower size standard would be considered to exclude the dominant firm from being defined as small.

Selection of Size Standards

To simplify size standards, for the ongoing comprehensive size standards review, SBA has proposed to select a size standard for an industry from a limited number of receipts based size standard levels. For many years, SBA has been concerned about the complexity of determining small business status caused by a large number of varying receipts based size standards (see 69 FR 13130, March 4, 2004, and 57 FR 62515, December 31, 1992). Currently, there are 32 different levels of receipts based size standards, ranging from $0.75 million to $35.5 million, with many of those levels applying to one or just a few industries only. SBA believes that such a large number of variations with small variations are both unnecessary and difficult to justify analytically. Simplifying the administration of SBA's size standards to a fewer number of size standard levels will produce more common size standards for businesses operating in multiple related industries and greater consistency in the size standards among industries that are similar in their economic characteristics.

This proposed rule, therefore, applies one of eight receipts based size standards to each industry in Sector 72. These eight ''fixed'' size standard levels are $5 million, $7 million, $10 million, $14 million, $19 million, $25.5 million, $30.0 million and $35.5 million. These eight receipts based size standard levels are established by taking into consideration the minimum, maximum, and the more commonly used receipts based size standards. Currently, the more commonly used receipts based size standards cluster around the following six levels—$2.5 million to $4.5 million, $7 million, $9.0 million to $10 million, $12.5 million to $14.0 million, $25.0 million to $25.5 million, and $33.5 million to $35.5 million. SBA has selected $7 million as one of eight fixed levels of receipts based size standards because this is also an anchor standard for receipts based standards. A lower or minimum receipts based size level is established at $5 million. Excluding monetary standards for agriculture and those based on net commissions (such as real estate brokers and travel agents), $5 million is in the close neighborhood of the current minimum receipts based standard of $4.5 million. Among the higher levels size clusters, $10 million, $14 million, $25.5 million, and $35.5 million are selected as other four levels of the fixed size standards. Because of a large gap between two of the size standard intervals, SBA has established intermediate levels of $19 million between $14 million and $25.5 million, and $30 million between $25.5 million and $35.5 million. These two intermediate size levels reflect roughly similar proportional differences between the two successive size standard levels.

In a further effort to simplify size standards, SBA may propose a common size standard for certain closely related group of industries. Although the size standard analysis may support a specific size standard level for each industry, SBA believes that establishing different size standards for closely related industries may not be appropriate. For example, in cases where many of the same businesses operate in the same two industries, establishing the common size standard would better reflect the industry marketplace than establishing separate size standards for each of those industries. This situation has led SBA to establish a common size standard for the information technology (IT) services industries (NAICS 541511, NAICS 541112, NAICS 541513 and NAICS 541519), even though the industry data might support a distinct size standard for each industry. Businesses engaged in IT related services typically perform activities in two or more other related industries. Whenever SBA proposes a common size standard for closely related industries it will provide a justification for that in the proposed rule.

Evaluation of Industry Structure

SBA has evaluated the structure of each industry in the Accommodation and Food Services Sector to assess the appropriateness of the current size standards. As described above, SBA compared data on the economic characteristics of each industry in that Sector to the average characteristics of industries in two comparison groups. The first comparison group is comprised of all industries with $7.0 million size standards—referred to as the ''receipts based anchor comparison group.'' Because the goal of SBA's size review is to assess whether a specific industry's size standard should be at or different from the anchor size standard, this is the most logical set of industries to group together for the industry analysis. In addition, this group includes a sufficient number of firms to provide a meaningful assessment and comparison of industry characteristics.

If the characteristics of an industry under review are similar to the average characteristics of industries in the anchor comparison group, the anchor size standard would be considered an appropriate standard for that industry. If an individual industry's structure is significantly different from that of the anchor group, a size standard lower or higher than the anchor size standard would be selected. The level of the new size standard is determined based on the difference between the characteristics of the anchor comparison group and a second industry comparison group. As described above, the second comparison group for receipts based standards consists of industries with the highest receipts based size standards, ranging from $23 million to $35.5 million, with the average size standard for the group equaling $29 million. SBA refers to this group of industries as the ''higher level receipts based size standard comparison group.'' Differences in industry structure between an industry under review and the industries in the two comparison groups are determined by comparing data on each of the industry factors, including average firm size, average assets size, four-firm concentration ratio, and the Gini coefficient of distribution of firms by size. Table 1 shows two measures of the

average firm size (simple and weighted), average assets size, four-firm concentration ratio, average receipts of the four largest firms, and the Gini coefficient for both anchor level and higher level comparison groups for receipts based size standards.

TABLE 1—AVERAGE CHARACTERISTICS OF RECEIPTS BASED COMPARISON GROUPS

Receipts based comparison group	Avg. firm size ($ million)		Avg. assets size ($ million)	Avg. four-firm concentration ratio (%)	Avg. receipts of four largest firms ($ million) [a]	Gini coefficient
	Simple average	Weighted average				
Anchor Level	1.19	17.64	0.71	18.7	189.9	0.599
Higher Level	4.77	52.27	2.05	22.3	639.4	0.725

[a] To be used for industries with a four-firm concentration ratio of 40% or greater.

Derivation of Size Standards Based on Industry Factors

For each of the industry factors shown in Table 1, SBA derives a separate size standard based on the amount of differences between their values for an industry under review and those for the two comparison groups. An estimated size standard that is supported by each industry factor is derived by comparing its value for a specific industry under review to the corresponding value for the two comparison groups. If the industry value for a particular factor is near that for the anchor comparison group, the $7.0 million anchor size standard would be considered appropriate for that factor.

If an industry's value for a factor is significantly above or below the anchor comparison group value, a size standard above or below the $7.0 million anchor size would be warranted. The level of the new size standard in these cases is derived based on the proportional difference between the industry value and the values for the two comparison groups.

For example, if an industry's simple average receipts size equals $3.0 million, SBA's analysis would supports a size standard of $19 million. The $3.0 million level is 50.6 percent between the average firm size of $1.19 million for the anchor comparison group and $4.77 million for the higher level comparison group (($3.00 million—$1.19 million) ÷ ($4.77 million—$1.19 million) = 0.506 or 50.6%). This proportional difference is applied to the difference between the $7.0 million anchor size standard and average size standard of $29 million for the higher level size standard group and then added to $7.0 million to estimate a size standard of $18.12 million ([{$29.0 million—$7.0 million} * 0.506] + $7.0 million = $18.12 million). The final step rounds the estimated size standard of $18.12 million to the nearest fixed size standard level, in this case to $19 million.

SBA applies the above method of calculation to derive a size standard for each industry factor. Detailed formulas involved in these calculations are presented in ''SBA Size Standards Methodology'' which is available at *http://www.sba.gov/size.* Table 2 shows ranges of values for each industry factor and the levels of size standards supported by those values.

TABLE 2—VALUES OF INDUSTRY FACTORS AND SUPPORTED SIZE STANDARDS

If simple avg. receipts size ($ million)	*Or if* weighted avg. receipts size ($ million)	*Or if* avg. assets size ($ million)	*Or if* avg. receipts of largest four firms ($ million)	*Or if* gini coefficient	Then size standard is ($ million)
< 1.03	< 16.07	< 0.65	< 169.4	< 0.593	5.0
1.03 to 1.43	16.07 to 20.00	0.65 to 0.80	169.4 to 220.5	0.593 to 0.608	7.0
1.44 to 2.00	20.01 to 25.51	0.81 to 1.02	220.6 to 292.0	0.609 to 0.628	10.0
2.01 to 2.74	25.52 to 32.59	1.03 to 1.29	292.1 to 384.0	0.629 to 0.653	14.0
2.75 to 3.67	32.60 to 41.65	1.30 to 1.64	384.1 to 501.5	0.654 to 0.686	19.0
3.68 to 4.57	41.66 to 50.30	1.65 to 1.97	501.6 to 613.8	0.687 to 0.718	25.5
4.58 to 5.38	50.31 to 58.17	1.98 to 2.28	613.9 to 716.1	0.719 to 0.746	30.0
> 5.38	>58.17	> 2.28	> 716.1	> 0.746	35.5

Table 3 shows the results of industry analysis for each industry in Sector 72, Accommodation and Food Services. Each NAICS industry row in columns 2, 3, 4, 6 and 7 shows two numbers. The upper number is the value for the industry factor shown on the top of the column and the lower number is the size standard supported by that factor. For the four-firm concentration ratio, a size standard is estimated based on the average receipts of the top four firms if its value is 40 percent or more. If the four-firm concentration ratio for an industry is less than 40 percent, no size standard is estimated for that factor and column 5 is left blank. Column 8 shows the proposed or revised size standard for each industry, calculated as the average of size standards supported by each industry factor and rounded to the nearest fixed size level. Analytical details involved in the averaging procedure are described in the SBA ''Size Standards Methodology'' paper which is available at *http://www.sba.gov/size.* For comparison, the current size standards for industries in Sector 72 are also shown in column 9 of Table 3.

TABLE 3—SIZE STANDARDS SUPPORTED BY EACH INDUSTRY FACTOR

[Millions of dollars]

NAICS	Simple average firm size	Weighted average firm size	Average assets size	Four-firm ratio (%)	Four-firm average firm size	Gini coefficient	Revised size standard	Current size standard
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
721110—Hotels (except Casino Hotels) & Motels	$2.5	$118.5	$4.9	.....	.....	0.765	.....	.....
	$14.0	$35.5	$35.5	22.4%	.....	$35.5	$30.0	$7.0
721120—Casino Hotels	$203.8	$523.8	$179.8	.....	$3,557.7	0.611	.....	.....
	$35.5	$35.5	$35.5	42.6%	$35.5	$10.0	$30.0	$7.0
721191—Bed-and-Breakfast Inns	$0.3	$0.7	.....	.....	.....	0.061	.....	.....
	$5.0	$5.0	.....	3.0%	.....	$5.0	$5.0	$7.0
721199—All Other Traveler Accommodation	$0.3	$1.1	.....	.....	.....	0.123	.....	.....
	$5.0	$5.0	.....	9.9%	.....	$5.0	$5.0	$7.0
721211—RV (Recreational Vehicle) Parks & Campgrounds	$0.4	$2.5	$0.5	.....	.....	0.287	.....	.....
	$5.0	$5.0	$5.0	9.1%	.....	$5.0	$5.0	$7.0
721214—Recreational & Vacation Camps (except Campgrounds)	$0.6	$1.7	0.8	.....	.....	0.276	.....	.....
	$5.0	$5.0	$10.0	5.1%	.....	$5.0	$7.0	$7.0
721310—Rooming & Boarding Houses	0.3	$1.2	.....	.....	.....	0.187	.....	.....
	$5.0	$5.0	.....	6.6%	.....	$5.0	$5.0	$7.0
722110—Full Service Restaurants	$0.9	$46.1	$0.3	.....	.....	0.467	.....	.....
	$5.0	$25.5	$5.0	8.6%	.....	$5.0	$7.0	$7.0
722211—Limited Service Restaurants	$1.0	$52.3	$0.3	.....	.....	0.599	.....	.....
	$5.0	$30.0	$5.0	10.2%	.....	$7.0	$10.0	$7.0
722212—Cafeterias	$1.3	$61.3	.....	.....	.....	0.729	.....	.....
	$7.0	$35.5	.....	39.2%	.....	$30.0	$25.5	$7.0
722213—Snack & Non-alcoholic Beverage Bars	$0.5	$29.9	$0.2	.....	.....	0.454	.....	.....
	$5.0	$14.0	$5.0	24.6%	.....	$5.0	$7.0	$7.0
722310—Food Service Contractors	$7.7	$471.8	$2.3	.....	$3,357.8	0.937	.....	.....
	$35.5	$35.5	$35.5	64.4%	$35.5	$35.5	$35.5	$20.5
722320—Caterers	$0.6	$2.4	$0.1	.....	.....	0.333	.....	.....
	$5.0	$5.0	$5.0	2.1%	.....	$5.0	$5.0	$7.0
722330—Mobile Food Services	$0.4	$9.1	.....	.....	.....	0.464	.....	.....
	$5.0	$5.0	.....	24.7%	.....	$5.0	$5.0	$7.0
722410—Drinking Places (Alcoholic Beverages)	$0.3	$1.4	$0.1	.....	.....	0.151	.....	.....
	$5.0	$5.0	$5.0	2.2%	.....	$5.0	$5.0	$7.0

As can be seen in Table 3, the results of SBA analyses of industry data would support lowering size standards from $7 million in annual receipts to $5 million in annual receipts for seven industries in Sector 72. Those seven industries are NAICS 721191, Bed and Breakfast Inns; NAICS 721199, All Other Traveler Accommodation; NAICS 721211, Recreational Vehicle Parks and Campgrounds; NAICS 721310, Rooming and Boarding Houses; NAICS 722320 Caterers; NAICS 722330, Mobile Food Services; and NAICS 722410, Drinking Places.

However, SBA believes that lowering size standard for those industries would not be in the best interests of small businesses when the economy is in a deep recession. Aiming to promote economic recovery and to preserve and create jobs the U.S. Congress passed and the President signed the American Recovery and Reinvestment Act of 2009 (Recovery Act). The purposes and goals of the Recovery Act are to promote economic recovery and to preserve and create jobs. Under the Recovery Act, SBA has changed its various programs to assist small businesses, including the following: (1) Temporary reduction or elimination of fees in the 7(a) and 504 loan guarantee programs; (2) creation of a temporary 90 percent guarantee loan program; (3) creation of a temporary Secondary Market Guarantee Authority to provide a Federal guarantee for pools of first lien 504 loans that are to be sold to third-party investors; (4) new authority for refinancing community development loans under the 504 program; (5) revision of the job creation goals of the 504 program; (6) simplification of the maximum leverage limits and aggregate investment limits required of Small Business Investment Companies; (7) temporary authority to provide loans on a deferred basis to viable small business concerns that have a qualifying small business loan and are experiencing immediate financial hardship; (8) temporary increase in the surety bond maximum amount; (9) establishment of a Secondary Market

Lending Authority to make loans to systemically important broker dealers in SBA's 7(a) secondary market; and (10) application of SBA's Certified Development Company (CDC) alternative size standard to its 7(a) Business Loan Program (see 13 CFR 121.301).

SBA believes that to reduce size standards and thereby reduce eligibility for those programs, or to reduce the number of firms that can participate in financial and Federal procurement assistance programs would run counter to what it is trying to do for small businesses. Reducing size eligibility for Federal procurement opportunities would not preserve or create more jobs; rather, it would have the opposite effect. Therefore, SBA has decided not to propose to reduce the size standards for those industries. SBA has decided to retain their current size standards. Further, SBA does not anticipate that it will propose to lower size standards after the Recovery Act terminates on September 30, 2010. SBA intends for the proposed size standards, if adopted, to remain in effect unless and until it receives information or data that suggests a change is needed.

Evaluation of Federal Contracting and SBA Loan Data

Besides industry structure, SBA also evaluates Federal contracting data to assess the extent to which small businesses are successful in getting Federal contracts under the existing size standards. However, the available data on Federal contracting are limited to identifying businesses as small or other than small, with no information on exact size of businesses receiving Federal contracts in order to conduct a more precise analysis.

Given limited data, for the current comprehensive size review, SBA has decided to designate a size standard at one level higher than their current size standard for industries where the small business share of total Federal contracting dollars is between 10 and 30 percentage points lower than their shares in total industry receipts and at two levels higher than the current size standard if the difference is higher than 30 percentage points.

SBA has chosen not to designate a size standard for the Federal contracting factor alone that is higher than two levels above the current size standard because doing so would result in most cases of designating a size standard more than twice the current size standard. Given the limitations of the FPDS data, and the complex relationships among a number of variables affecting small business participation in the Federal marketplace, SBA believes that a larger adjustment to size standards based on Federal contracting activity should be based on a more detailed analysis of the impact of any subsequent revision to the current size standard. In limited situations, however, SBA may conduct a more extensive examination of Federal contracting experience to support a different size standard than indicated by this general rule to take into consideration significant and unique aspects of small business competitiveness in the Federal contract market.

SBA welcomes comment on its methodology of incorporating the Federal contracting factor in the size standard analysis and suggestions for alternative methods and other relevant information on small business experience in the Federal contract market.

Only two industries in Sector 72, Accommodation and Food Services, received an average of $100 million or more annually in Federal contracting dollars during fiscal years 2006–2008. These industries are NAICS 721110, Hotels (except Casino Hotels) and Motels, and NAICS 722310, Food Service Contractors. However, because the small business share of total Federal contracting dollars was already higher than small business share of total industry receipts for both of these industries, the Federal procurement factor was not considered in determining the level of size standard. The latest data show that Federal contracting activity is insignificant for most of the industries in Sector 72 and, for those two industries where it is significant, small businesses seem to be doing well in terms of their share in Federal marketplace relative to their share in industry's total sales.

Before deciding on an industry's size standard, SBA also considers the impact of new or revised standards on SBA's loan programs. SBA examined 7(a) Loan Program data for fiscal years 2006–2008 to assess whether the existing or proposed size standards need further adjustments to ensure credit opportunities for small businesses through that program. For the industries reviewed, primarily small businesses that are much smaller than the size standards use the 7(a) Loan Program. Based on that analysis, no size standard Sector 72, Accommodation and Food Services, needs an adjustment based on this factor.

Summary of Size Standards Changes

The analyses of industry structure, Federal contracting data and SBA loan information, support retaining the existing $7.0 million standard for three industries in Sector 72, Accommodation and Food Services. These are NAICS 721214, Recreational and Vacation Camps (except Campgrounds); NAICS 722110, Full Service Restaurants; and NAICS 722213, Snacks and Nonalcoholic Beverage Bars.

The analyses support an increase to the current size standard for five industries, namely NAICS 721110, Hotels and Motels, from $7.0 million to $30 million; NAICS 721120, Casino Hotels, from $7.0 million to $30 million; NAICS 722211, Limited Service Restaurants, from $7.0 million to $10 million; NAICS 722212, Cafeterias, from $7.0 million to $25.5 million; and NAICS 722310, Food Service Contractors, from $20.5 million to $35.5 million. These revisions are summarized in Table 4.

TABLE 4—SUMMARY OF PROPOSED SIZE STANDARD REVISIONS

NAICS	Current size standard ($ million)	Revised size standard ($ million)
721110—Hotels (except Casino Hotels) & Motels	$7.0	$30.0
721120—Casino Hotels	7.0	30.0
722211—Limited Service Restaurants	7.0	10.0
722212—Cafeterias	7.0	25.5
722310—Food Service Contractors	20.5	35.5

SBA's analyses support a decrease to the current standard for seven industries from $7.0 million to $5.0 million. These industries are NAICS 721191, Bed and Breakfast Inns; NAICS 721199, All Other Traveler Accommodation; NAICS 721211, Recreational Vehicle Parks and Campgrounds; NAICS 721310, Rooming and Boarding Houses; NAICS 722320 Caterers; NAICS 722330, Mobile Food Services; and NAICS 722410, Drinking Places. However, as discussed above, SBA has decided that proposing to lower small business size standards would be inconsistent with its ongoing effort to promote small business assistance under the Recovery Act. Therefore, SBA proposes to retain the current size standards for those industries. SBA intends for the proposed size standards, if adopted, to remain in effect unless and until it receives information or data that suggests a change is needed.

Evaluation of Dominance in Field of Operation

SBA has determined that for the industries in Sector 72, Accommodation and Food Services, no firm at or below the proposed size standard would be large enough to dominate its field of operation. A firm at the proposed size standard within these industries generates less than one percent of total industry receipts. This level of market share effectively precludes a firm at or below the proposed size standard from exerting a controlling effect on this industry.

Request for Comments

SBA invites public comments on the proposed rule, especially on the following areas.

1. In an effort to simplify size standards, for this proposed rule SBA has proposed a set of eight fixed size levels for receipts based size standards: $5.0 million, $7.0 million, $10.0 million, $14.0 million, $19.0 million, $25.5 million, $30.0 million, and $35.5 million. SBA invites comments on whether simplification of size standards in this way is necessary and if these proposed fixed size levels are appropriate, or suggestions on alternative approaches to simplifying small business size standards.

2. For all industries in Sector 72, Accommodation and Food Services, SBA has proposed receipts based size standards ranging from $7 million to $35.5 million. SBA seeks feedback on whether the levels of size standards it proposes seem right given the economic characteristics of each industry. SBA also seeks feedback and suggestions on alternative standards, if they would be more appropriate, including whether an employee based standard for certain industries is a more suitable measure of size, and what that employee level should be.

3. SBA's proposed standards are based on its evaluation of five primary factors—average firm size, average assets size (as proxy of startup costs and entry barriers), four-firm concentration ratio, distribution of firms by size, and the level and small business share of Federal contracting dollars. SBA welcomes comments on these and other factors that interested parties believe are important to consider for describing industry characteristics when SBA evaluates its size standards. Please provide relevant data sources, if available.

4. SBA derives its proposed standards by applying equal weights to each of the five primary factors in all industries. Should SBA continue with the equal weighting of each factor or should it give more weight to one or more factors in size standard determination of certain industries? If it is more appropriate to weigh some factors more than others, SBA welcomes suggestions on specific weights for each factor along with supporting information.

5. For some industries, SBA proposes to increase the existing size standards by a large amount, while for others the proposed increase is less. Should SBA, as a policy, limit the amount of increase or decrease to a size standard? Also should SBA, as a policy, establish certain minimum or maximum values for its size standards? SBA seeks suggestions on appropriate levels of change to size standards and on their minimum or maximum levels.

6. For analytical simplicity and efficiency, SBA has refined its size standard methodology to obtain a single value as a proposed size standard instead of a range of values as was SBA's methodology in its past size regulations. SBA welcomes any comments on this procedure and suggestions for alternative methods.

Public comments on above issues are very critical for SBA to validate its size standard methodology and move forward in a timely manner with review of size standards of other industry groups under the two-year comprehensive size review.

Compliance With Executive Orders 12866, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612).

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this proposed rule is a ''significant'' regulatory action for purposes of Executive Order 12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis. This is not a major rule, however, under the Congressional Review Act, 5 U.S.C. 800.

Regulatory Impact Analysis

1. Is there a need for the regulatory action?

SBA believes that adjustments to certain size standards in Sector 72, Accommodation and Food Services, are needed to better reflect the economic characteristics of small businesses in those industries. SBA's mission is to aid and assist small businesses through a variety of financial, procurement, business development, and advocacy programs. To assist effectively the intended beneficiaries of these programs, SBA must establish distinct definitions of which businesses are deemed small businesses. The Small Business Act (15 U.S.C. 632(a)) delegates to SBA's Administrator the responsibility for establishing small business definitions. The Act also requires that small business definitions vary to reflect industry differences. The supplementary information section of this proposed rule explains SBA's methodology for analyzing a size standard for a particular industry.

2. What are the potential benefits and costs of this regulatory action?

The most significant benefit to businesses obtaining small business status as a result of this rule is eligibility for Federal small business assistance programs, including SBA's financial assistance programs, economic injury disaster loans, and Federal procurement preference programs for small businesses. Federal procurement provides opportunities for small businesses under SBA's business development programs, such as 8(a), Small Disadvantaged Businesses (SDB), small businesses located in Historically Underutilized Business Zones (HUBZone), women owned small businesses, and service disabled veteran owned small businesses (SDVOSB). Other Federal agencies also may use SBA size standards for a variety of regulatory and program purposes. Through the assistance of these programs, small businesses become more knowledgeable, stable, and competitive businesses. In five industries under Sector 72 for which SBA has proposed to increase their size standards, about 2,050 additional firms are estimated to obtain small business status and become eligible for these

programs. In the seven industries for which SBA's analyses indicated a lower size standard as appropriate, there are about 450 firms that might have lost their small business status, had SBA proposed lowering them. That number is less than 0.6 percent of total number of firms in those industries defined as small under the current standards. Thus, the net impact for the sector as a whole is about 2,050 additional firms gaining and none losing small business status under the proposed rule. This will increase the small business share of total industry receipts for the Sector from about 46 percent under the current size standards to nearly 50 percent under the proposed standards.

The benefits of increasing certain size standards to a more appropriate level would accrue to three groups: (1) Businesses that benefit by gaining small business status from the higher size standard that also use small business assistance programs; (2) growing small businesses that may exceed the current size standards in the near future and that will retain small business status from the higher size standard; and (3) Federal agencies that award contracts under procurement programs that require small business status.

Nearly 90 percent of Federal contracting dollars spent in Sector 72 during fiscal years 2006–2008 was accounted for by two of five industries for which size standards have been proposed to increase. SBA estimates that additional firms gaining small business status in those two industries under the proposed size standards could potentially obtain Federal contracts totaling up to $75 million per year under the small business set-aside program, the 8(a), HUBZone, and SDVOSB Programs, or unrestricted procurements. This represents about 5.5 percent of the $1.13 billion in average Federal contracts awarded to the Accommodation and Food Services Sector during fiscal years 2006–2008. The added competition for many of these procurements also would likely result in a lower price to the Government for procurements reserved for small businesses, but SBA is not able to quantify this benefit.

Under SBA's 7(a) Guaranteed Loan Program and Certified Development Company (504) Program, SBA estimates only a few additional loans totaling $1 million to $2 million in Federal loan guarantees could be made to these newly defined small businesses. Because of the size of the loan guarantees, however, most loans are made to small businesses well below the size standard. Moreover, under the Recovery Act, effective February 17, 2009, SBA is temporarily raising guarantees on its SBA's 7(a) loan program and also temporarily eliminating fees for borrowers on SBA 7(a) loans and for both borrowers and lenders on 504 Certified Development Company loans, through calendar year 2009, or until the funds are exhausted. The fee elimination is retroactive to February 17, 2009, the day the Recovery Act was signed. Furthermore, SBA is developing a mechanism for refunding fees paid on loans since then. In addition, since SBA has applied its CDC alternative size standard to its 7(a) Business Loan Program, more capital is available to small businesses. Thus, increasing the size standards will likely result in an increase in small business guaranteed loans to businesses in these industries, but it would be impractical to try to estimate the extent of their number and the total amount loaned.

The newly defined small businesses would also benefit from SBA's Economic Injury Disaster Loan (EIDL) Program. Since this program is contingent upon the occurrence and severity of a disaster, no meaningful estimate of benefits can be projected for future disasters.

To the extent that 2,050 additional firms could become active in Federal procurement programs, this may entail some additional administrative costs to the Federal Government associated with additional bidders for Federal small business procurement opportunities, additional firms seeking SBA guaranteed lending programs, additional firms eligible for enrollment in the Central Contractor Registration's Dynamic Small Business Search database, and additional firms seeking certification as 8(a) or HUBZone firms or qualifying for SDB status. Among businesses in this group seeking SBA assistance, there could be some additional costs associated with compliance and verification of small business status and protests of small business status. These additional costs are likely to be minimal because mechanisms are already in place to handle these additional administrative requirements.

The costs to the Federal Government may be higher on some Federal contracts. With a greater number of businesses defined as small, Federal agencies may choose to set aside more contracts for competition among small businesses rather than using full and open competition. The movement from unrestricted to set-aside contracting is likely to result in competition among fewer bidders. In addition, higher costs may result if additional full and open contracts are awarded to HUBZone and SDB businesses because of a price evaluation preference. The additional costs associated with fewer bidders, however, are likely to be minor since, as a matter of law, procurements may be set aside for small businesses or reserved for the 8(a) or HUBZone Programs only if awards are expected to be made at fair and reasonable prices.

The proposed size standards may have distributional effects among large and small businesses. Although the actual outcome of the gains and losses among small and large businesses cannot be estimated with certainty, several likely impacts can be identified. There will likely be a transfer of some Federal contracts to small businesses from large businesses. Large businesses may have fewer Federal contract opportunities as Federal agencies decide to set aside more Federal contracts for small businesses. Also, some Federal contracts may be awarded to HUBZone or SDB concerns instead of large businesses since those two categories of small businesses may be eligible for an evaluation adjustment for contracts competed on a full and open basis. Similarly, currently defined small businesses may obtain fewer Federal contracts due to the increased competition from more businesses defined as small. This transfer may be offset by a greater number of Federal procurements set aside for all small businesses. The number of newly defined and expanding small businesses that are willing and able to sell to the Federal Government will limit the potential transfer of contracts away from large and currently defined small businesses. The potential distributional impacts of these transfers may not be estimated with any degree of precision because the data on the size of business receiving a Federal contract are limited to identifying small or other than small businesses, without regard to the exact size of the business.

The proposed revisions to the existing size standards for Accommodation and Food Services industries is consistent with SBA's statutory mandate to assist small business. This regulatory action promotes the Administration's objectives. One of SBA's goals in support of the Administration's objectives is to help individual small businesses succeed through fair and equitable access to capital and credit, Government contracts, and management and technical assistance. Reviewing and modifying size standards, when appropriate, ensures that intended beneficiaries have access to small business programs designed to assist them.

Executive Order 12988

For purposes of Executive Order 12988, SBA has determined that this rule is drafted, to the extent practicable, in accordance with the standards set forth in that Order.

Executive Order 13132

For purposes of Executive Order 13132, SBA has determined that this rule does not have any federalism implications warranting the preparation of a federalism assessment.

Paperwork Reduction Act

For the purpose of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA has determined that this rule would not impose new reporting or record keeping requirements, other than those required of SBA.

Initial Regulatory Flexibility Analysis

Under the Regulatory Flexibility Act (RFA), this rule, if finalized, may have a significant impact on a substantial number of small entities in Sector 72, Accommodation and Food Services. As described above, this rule may affect small entities seeking Federal contracts, SBA (7a) and 504 Guaranteed Loan Programs, SBA Economic Injury Disaster Loans, and other Federal small business programs.

Immediately below, SBA sets forth an initial regulatory flexibility analysis (IRFA) of this proposed rule addressing the following questions: (1) What is the need for and objective of the rule? (2) what is SBA's description and estimate of the number of small entities to which the rule will apply? (3) what are the projected reporting, record keeping, and other compliance requirements of the rule? (4) what are the relevant Federal rules which may duplicate, overlap or conflict with the rule? and (5) what alternatives will allow the Agency to accomplish its regulatory objectives while minimizing the impact on small entities?

(1) What is the need for and objective of the rule?

Most of SBA's size standards for Accommodation and Food Services industries have not been reviewed since the early 1980s. Technology, productivity growth, international competition, mergers and acquisitions, and updated industry definitions may have changed the structure of many industries. Such changes can be sufficient to support a revision to size standards for some industries. Based an analysis of the latest data available to the Agency, SBA believes that the revised standards in this proposed rule more appropriately reflect the size of businesses in those industries that need Federal assistance.

(2) What is SBA's description and estimate of the number of small entities to which the rule will apply?

If the proposed rule is adopted in its present form, SBA estimates that approximately 2,050 additional firms will become small because of increases in size standard in five industries. That represents 1.1 percent of total firms in those industries. This will result in an increase in the small business share of total industry receipts for this Sector from about 46 percent under the current size standard to nearly 50 percent under the proposed standards.

(3) What are the projected reporting, record keeping, and other compliance requirements of the rule and an estimate of the classes of small entities which will be subject to the requirements?

A new size standard does not impose any additional reporting, record keeping or compliance requirements on small entities. Revising size standards alters the access to SBA programs that assist small businesses, but does not impose a regulatory burden as they neither regulate nor control business behavior.

(4) What are the relevant Federal rules which may duplicate, overlap or conflict with the rule?

This proposed rule overlaps with other Federal rules that use SBA's size standards to define a small business. Under § 3(a)(2)(C) of the Small Business Act, 15 U.S.C. 632(a)(2)(c), Federal agencies must use SBA's size standards to define a small business, unless specifically authorized by statute. In 1995, SBA published in the **Federal Register** a list of statutory and regulatory size standards that identified the application of SBA's size standards as well as other size standards used by Federal agencies (60 FR 57988–57991, dated November 24, 1995). SBA is not aware of any Federal rule that would duplicate or conflict with establishing size standards.

However, the Small Business Act and SBA's regulations allow Federal agencies to develop different size standards if they believe that SBA's size standards are not appropriate for their programs, with the approval of SBA's Administrator (13 CFR 121.903). The Regulatory Flexibility Act authorizes an Agency to establish an alternative small business definition, after consultation with the Office of Advocacy of the U.S. Small Business Administration (5 U.S.C. 601(3). Thus, there may be instances where this rule conflicts with other rules.

(5) What alternatives will allow the Agency to accomplish its regulatory objectives while minimizing the impact on small entities?

SBA is required to develop numerical size standards for identifying businesses eligible for Federal small business programs. Other than varying the size standards, no viable alternative exists to the systems of numerical size standards.

List of Subjects in 13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Reporting and recordkeeping requirements, Small businesses.

For the reasons set forth in the preamble, SBA proposes to amend part 13 CFR Part 121 as follows.

PART 121—SMALL BUSINESS SIZE REGULATIONS

1. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 637(a), 644, and 662(5); and Pub. L. 105–135, sec. 401 *et seq.,* 111 Stat. 2592.

2. Amend the table in § 121.201 by revising all entries under Sector 72 to read as follows:

§ 121.201 What size standards has SBA identified by North American Industry Classification System codes?

* * * * *

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
*	* * * * *	*	*
	Sector 72—Accommodation and Food Services		
Subsector 721—Accommodation			
721110	Hotels (except Casino Hotels) and Motels	$30.0	
721120	Casino Hotels	30.0	
721191	Bed-and-Breakfast Inns	7.0	
721199	All Other Traveler Accommodation	7.0	
721211	RV (Recreational Vehicle) Parks and Campgrounds	7.0	
721214	Recreational and Vacation Camps (except Campgrounds)	7.0	
721310	Rooming and Boarding Houses	7.0	
	Subsector 722—Food Services and Drinking Places		
722110	Full-Service Restaurants	7.0	
722211	Limited-Service Restaurants	10.0	
722212	Cafeterias	25.5	
722213	Snack and Nonalcoholic Beverage Bars	7.0	
722310	Food Service Contractors	35.5	
722320	Caterers	7.0	
722330	Mobile Food Services	7.0	
722410	Drinking Places (Alcoholic Beverages)	7.0	

* * * * *

Dated: October 9, 2009.

Karen G. Mills,

Administrator.

[FR Doc. E9–25204 Filed 10–20–09; 8:45 am]

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SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN: 3245–AF69

Small Business Size Standards: Retail Trade

AGENCY: U.S. Small Business Administration.

ACTION: Proposed Rule.

SUMMARY: The U.S. Small Business Administration (SBA) proposes to increase small business size standards for 48 industries in North American Industry Classification System (NAICS) Sector 44–45, Retail Trade, and retain the current standards for the remaining 28 industries in the Sector. As part of its ongoing initiative to review all size standards, SBA has evaluated each industry in Sector 44–45 to determine whether the existing size standards should be retained or revised. This proposed rule is one of a series of proposals that will examine industries grouped by an NAICS Sector. As part of this series of proposed rules SBA is publishing concurrently in this issue of the **Federal Register** a proposed rule to modify small business size standards in Sector 72, Accommodation and Food Services, and in Sector 81, Other Services. SBA has established its ''Size Standards Methodology'' and published elsewhere in this issue of the **Federal Register** a notice of its availability on SBA's Web site at *http://www.sba.gov/size.* SBA has applied ''Size Standards Methodology'' to this proposed rule.

DATES: SBA must receive comments to this proposed rule on or before December 21, 2009.

ADDRESSES: You may submit comments, identified by RIN 3245–AF69 by one of the following methods: (1) Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments; or (2) Mail/Hand Delivery/Courier: Khem R. Sharma, Chief, Size Standards Division, 409 Third Street, SW., Mail Code 6530, Washington, DC 20416.

SBA will post all comments on *http://www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *http://www.regulations.gov,* please submit the information to U.S. Small Business Administration, Khem R. Sharma, Chief, Size Standards Division, 409 Third Street, SW., Mail Code 6530, Washington, DC 20416, or send an e-mail to *sizestandards@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination of whether it will publish the information or not.

FOR FURTHER INFORMATION CONTACT: Carl J. Jordan, Program Analyst, Size Standards Division, (202) 205–6618 or *sizestandards@sba.gov.*

SUPPLEMENTARY INFORMATION: To determine eligibility for Federal small business assistance programs, SBA establishes small business definitions (referred to as size standards) for private sector industries in the U.S. SBA's existing size standards use two primary measures of business size—receipts and number of employees. Financial assets, electric output, and refining capacity are used as size measures for a few specialized industries. In addition, SBA's Small Business Investment Company (SBIC) and the Certified Development Company (CDC) Programs determine small business eligibility using either the industry based size standards or net worth and net income size standards. Currently, SBA's size standards consist of 45 different size levels, covering 1,141 NAICS industries and 17 sub-industry activities. Of these size levels, 32 are based on average annual receipts, eight are based on number of employees, and five are based on other measures. In addition, SBA has established 11 other size standards for its financial and procurement programs.

Over the years, SBA has received comments that its size standards have not kept up with changes in the economy and, in particular, that they do not reflect the changes in the Federal contracting marketplace. The last overall review of size standards occurred during the late 1970s to early 1980s. Since then, most reviews of size standards have been limited to in-depth analyses of specific industries in response to requests from the public and Federal agencies. SBA also makes

periodic inflation adjustments to its monetary based size standards. The latest inflation adjustment to size standards was published in the **Federal Register** on July 18, 2008 (73 FR 41237).

The evaluation of the size standards in the Retail Trade is also necessary to account for changes in the industry classification. The development of NAICS in 1997 included a significant change in the definition of industries in the Retail and Wholesale Trade Sectors. Many businesses engaged in retail trade activities that had been classified in the Wholesale Trade Sector under the earlier Standard Industrial Classification (SIC) System were reclassified into the Retail Trade Sector under NAICS (*see* NAICS Clarification Memorandum No. 1, ''NAICS Sector 42—Wholesale Trade Scope and Implementation Guidelines for U.S. Statistical Agencies''). Furthermore, the NAICS codes used in the 2002 Economic Census included a different set of businesses in the Retail Trade Sector than that in the 1997 Economic Census. For example, the 2002 NAICS included 11 new industries in Retail Trade. These changes in the industry classification have led SBA to evaluate if the existing size standards for the Retail Trade industries are appropriate. Most of the Retail Trade size standards have not been reviewed since the 1980s, and many have not been changed since the 1960s, except for periodic adjustments for inflation.

SBA recognizes that industrial changes over time have rendered existing size standards for some industries no longer supportable by current data. Accordingly, SBA has begun a comprehensive review of its size standards to ensure that existing size standards have supportable bases and, where necessary, to make revisions to current size standards. This proposed rule affords the public an opportunity to review and comment on the data and methodology SBA uses to evaluate and revise a size standard.

Rather than review all size standards at one time, SBA believes that a more manageable approach would be to examine a group of related industries within an NAICS Sector in phases. Except for manufacturing, an NAICS Sector generally consists of 25 to 75 industries. Once a review of size standards for industries within an NAICS Sector is completed, SBA will issue a proposed rule for those industries in which the analysis of industry data supports a change to the existing size standards. SBA expects to complete a review of all NAICS Sectors in two years.

Below is a discussion of SBA's size standards methodology, including analyses of industry structure, Federal procurement trends and other factors for industries within Sector 44–45, Retail Trade, and the impact of the proposed revisions to size standards on Federal small businesses assistance.

Size Standards Methodology

SBA has recently developed a ''Size Standards Methodology'' that it uses for developing and modifying size standards when necessary. SBA has published the document which is available at *http://www.sba.gov/size.* SBA does not apply all features of its ''Size Standards Methodology'' to all cases because not all are appropriate. However, SBA does make it available in its entirety for parties with an interest in SBA's overall approach to evaluating, establishing and modifying small business size standards. SBA always explains its analysis in the proposed and final rules that relate to size standards for specific industries. The following discussion is of SBA's size standard analysis applied to industries in Sector 44–45, Retail Trade.

SBA welcomes comments from the public on a number of issues. SBA is aware that different choices among size standards can involve complex tradeoffs among relevant variables; SBA invites comments on how to identify and weigh those variables. Suggestions are invited on alternative methodologies for determining small businesses; on how these size standards affect competition in general and within the specific industry; on alternative or additional factors that SBA should consider; on whether SBA's approach to small business size standards makes sense in the current economic environment; on whether SBA's using anchor size standards is appropriate in the current economy; on whether there are gaps in SBA's methodology because of the lack of comprehensive data; and on alternative datasets SBA should consider for a specific sector.

Congress granted SBA's Administrator discretion to establish detailed small business size standards (15 U.S.C. 632(a)(2)). Section 3(a)(3) of the Small Business Act (15 U.S.C. 632 (a)(3)) requires that size standards vary by industry to the extent necessary to reflect differing characteristics among various industries. Accordingly, the economic structure of an industry serves as the underlying basis for developing and modifying small business size standards. By examining data on economic characteristics defining the industry structure (as described below), the small business segment of an industry is identified. In addition to the industry structure, SBA also takes into consideration its program objectives and whether a size standard successfully excludes businesses that are dominant in the industry. Discussed below is SBA's analysis of the economic characteristics of each industry in Sector 44–45, Retail Trade, the impact of proposed size standards on SBA programs, and the evaluation of whether a revised size standard would exclude dominant firms in the industry from being considered as small.

Industry Analysis

For the current comprehensive size review, SBA has established three ''base'' or ''anchor'' size standards that apply to most industries—$7.0 million in average annual receipts for industries that have receipts based size standards, 500 employees for manufacturing and other industries that have employee based size standards (except for Wholesale Trade), and 100 employees for industries in the Wholesale Trade Sector. SBA established 500 employees as the anchor size standard for the manufacturing industries at SBA's inception in 1953 and shortly thereafter established a receipts based anchor size standard of $1 million in average annual receipts for the nonmanufacturing industries. The receipts based anchor size standard has been adjusted periodically for inflation. The inflation adjustment over the years has increased it to $7.0 million today. Since 1986, all industries in the Wholesale Trade Sector have had the 100-employee size standard for non-procurement SBA programs. The size standard for a non-manufacturer in Federal procurement is 500 employees. A procuring agency must classify a procurement for supplies with a manufacturing NAICS code, not a wholesale or retail NAICS code. 13 CFR 121.402(b).

These long standing anchor size standards have gained legitimacy through practice and general public acceptance. An anchor size standard is neither a minimum nor a maximum size standard. It is a common size standard for a large number of industries that have similar economic characteristics and serves as a reference point in evaluating size standards for individual industries. SBA uses the anchor in lieu of trying to establish precise small business size standards for each industry. Otherwise, theoretically, that could require that the number of size standards be as high as the number of industries for which SBA establishes size standards. SBA presumes an anchor size standard is appropriate for a particular industry unless that industry displays significantly different economic characteristics, as compared

to the characteristics of industries with the anchor size standard, thereby suggesting a need for revision to an existing size standard.

When evaluating a size standard, the economic characteristics of a specific industry under review are compared to the average characteristics of industries with one of the three anchor size standards (referred to as ''anchor comparison group'') to assess industry structure and to determine whether the industry displays significant differences relative to the industries in the anchor size standard group. If the characteristics of a specific industry under review are similar to the average characteristics of the anchor comparison group, the anchor size standard would be considered appropriate for that industry. SBA will consider adopting a size standard below the anchor size standard only when (1) all or most of the industry characteristics are significantly smaller than the average characteristics of the anchor comparison group, or (2) other industry considerations strongly suggest that the anchor size standard would be an unreasonably high size standard for the industry.

If the specific industry's characteristics are significantly higher than those of the anchor comparison group, a size standard higher than the anchor size standard may be considered appropriate. The larger the differences are between the characteristics of the industry under review and those in the anchor comparison group, the larger will be the difference between the appropriate industry size standard and the anchor size standard. To determine the level of a size standard above the anchor size standard, the characteristics of a second comparison group are analyzed. For industries with receipts based size standards, SBA has developed a second comparison group consisting of industries with the highest levels of receipts based size standards. The size standards for this group of industries range from $23 million to $35.5 million in average receipts, with the weighted average size standard for the group equaling $29 million. SBA refers to this comparison group as the ''higher level receipts based size standard group.''

The primary factors that SBA evaluates in analyzing the structural characteristics of an industry include average firm size, startup costs and entry barriers, industry competition, and distribution of firms by size (13 CFR 121.102(a) and (b)). SBA also evaluates the possible impact of both existing and revised size standards on Federal contracting assistance to small businesses as an additional primary factor. SBA generally considers these five factors as the most important ones for establishing or revising a size standard for an industry. However, SBA will also consider and evaluate other information that it believes relevant to the decision on a size standard for a particular industry (such as technological changes, growth trends, SBA financial assistance and other program factors, *etc.*). Public comments on a proposed size standard rule also provide important additional information. SBA thoroughly reviews all public comments before making a final decision on its proposed size standard. Below is a brief description of each of the five primary evaluation factors. A more detailed description of this analysis is provided in ''SBA Size Standards Methodology'' paper which is available at *http://www.sba.gov/size.*

1. *Average firm size.* SBA computes two measures of average firm size: simple average firm size and weighted average firm size. For industries with receipts based standards (including Retail Trade industries), the simple average firm size is calculated as total receipts of an industry divided by the total number of firms in that industry. The weighted average firm size is computed as the sum of weighted simple average firm size in different receipts size classes where weights are the shares of total industry receipts for respective size classes. The simple average firm size weighs all firms within an industry equally regardless of their size. The weighted average overcomes that limitation by giving more weights to larger firms.

If the average firm size of an industry under review is significantly higher than the average firm size of industries in the anchor comparison industry group, this would generally support a size standard higher than the anchor size standard. Conversely, if the industry's average firm size is similar to or significantly lower than that of the anchor comparison industry group, it would be a basis to adopt the anchor size standard or, in rare cases, a standard lower than the anchor.

2. *Startup costs.* Startup costs reflect a firm's initial size in an industry. New entrants to an industry must have sufficient capital to start and maintain a viable business. If firms entering a particular industry have greater capital requirements than firms do in industries in the anchor comparison group, this will form a basis for establishing a size standard higher than the anchor standard. In lieu of data on actual startup costs, SBA uses average assets size as a proxy measure to assess the levels of capital requirements for new entrants to an industry.

SBA calculates the average assets size within a particular industry by applying the sales to total assets ratios from the Risk Management Association's Annual Statement Studies, 2006–2008 to the average receipts size of firms in that industry. An industry with a significantly higher level of average assets size than that of the anchor comparison group is likely to have higher startup costs, which would support a size standard higher than the anchor size standard. Conversely, if the industry has a significantly smaller average assets size compared to the anchor comparison group, the anchor size standard, or in rare cases one lower than the anchor, would be considered appropriate.

3. *Industry competition.* Industry competition is generally assessed by measuring the share of total industry receipts obtained by firms that are among the largest in an industry. In this proposed rule, SBA evaluates the share of industry receipts generated by the four largest firms in the industry. This is referred to as the ''four-firm concentration ratio.'' SBA then compares the four-firm concentration ratio for an industry under review to the average four-firm concentration ratio for industries in the anchor comparison group. If a significant share of economic activity within the industry is concentrated among a few relatively large companies, SBA would establish a size standard relatively higher than the anchor size standard. SBA would not consider the four-firm concentration ratio as an important factor in assessing a size standard if its value for an industry under review is less than 40 percent. For industries in which the four largest firms account for 40 percent or more of an industry's total receipts, SBA examines the average size of the four largest firms in determining a size standard.

4. *Distribution of firms by size.* SBA examines the shares of industry total receipts accounted for by firms of different receipts and employment size classes in an industry. This is an additional factor SBA evaluates in assessing competition within an industry. If the preponderance of an industry's economic activity is attributable to smaller firms, this would indicate that small businesses are competitive in that industry and supports adopting the anchor size standard. A size standard higher than the anchor size standard would be supported for an industry in which the distribution of firms indicates that most

of the economic activity is concentrated among the larger firms.

Concentration among firms is a measure of inequality of distribution. To evaluate the degree of inequality of distribution within an industry, SBA computes the Gini coefficient by constructing the Lorenz curve. The Gini coefficient values vary between zero and one. If receipts are distributed perfectly equally among all the firms in an industry, the value of the Gini coefficient would equal to zero. If an industry's total receipts are attributed to a single firm, the Gini coefficient would equal to one.

SBA compares the degree of inequality of distribution for an industry under review with that for industries in the anchor comparison group. If an industry shows a higher degree of inequality of distribution (*i.e.,* higher Gini coefficient) compared to industries in the anchor comparison industry group this would, all else being equal, warrant a higher size standard than the anchor. Conversely, for industries with similar or more equal distribution (*i.e.,* similar or lower Gini coefficient values) than the anchor group, the anchor standard, or in some cases a standard lower than the anchor, would be adopted

5. *Impact on SBA programs.* SBA examines the possible impact a size standard change may have on the level of Federal small business assistance. This assessment most often focuses on the share of Federal contracting dollars awarded to small businesses in the industry in question. In general, if the share of Federal contracting dollars awarded to small businesses in an industry that receives a significant amount of Federal assistance is significantly less than the small business share of the industry's total receipts, a justification would exist for considering a size standard higher than the existing size standard. The disparity between the small business Federal market share and industry-wide share may be attributed to a variety of reasons, such as extensive administrative and compliance requirements associated with Federal contracts, the different skill set required on Federal contracts as compared to typical commercial contracting work, and the size of contracting requirements of Federal customers. These, as wells as other factors, are likely to influence the type of firms within an industry that compete for Federal contracts and, hence, the firms receiving such contracts are expected to possess different characteristics than the average characteristics for all firms in that industry. By comparing the small business Federal contracting share with the industry-wide small business share, SBA includes in its size standards analysis the latest Federal contracting trends. This analysis may indicate a size standard larger than the current standard.

For this proposed rule, SBA considered Federal procurement trends in the size standards analysis only if (1) the small business share of Federal contracting dollars is at least 10 percentage points lower than the small business share of total industry receipts and (2) the amount of total Federal contracting averages $100 million or more during fiscal years 2006–2008 (the latest years for which complete Federal procurement data are available). SBA has selected these thresholds because they reflect a significant level of contracting in which a revision to a size standard may have an impact on expanding small business opportunities.

Another factor that SBA evaluates is the impact of a proposed size standard on SBA's loan programs, that is, the volume of SBA guaranteed loans within an industry and the size of firms obtaining those loans. This factor is examined to assess whether the existing or the proposed size standard for a particular industry may be restricting the level of financial assistance to small firms in that industry. If the analysis shows a reduction in financial assistance to small businesses, a higher size standard would be supportable. If small businesses have already been receiving significant amounts of financial assistance through SBA's loan programs, or if the financial assistance has been provided mainly to businesses that are much smaller in size than the existing size standard, consideration of this factor for determining the size standard may not be necessary.

Sources of Industry and Program Data

The primary source of data for SBA's industry analysis is a special tabulation of the 2002 Economic Census (*see http://www.census.gov/econ/census02/*) prepared by the U.S. Bureau of the Census (Census Bureau) for SBA. The special tabulation provides SBA with industry-specific data on the number of firms, number of establishments, number of employees, annual payroll and annual receipts of companies by the size of firm reporting the data to Census. That is, the data are by the size class of the total company; however, the data itself, within a particular size class, represents the company's total data in that industry only. The special tabulation enables SBA to evaluate average firm size, the four-firm concentration ratio, and distribution of firms by receipts and employment size.

In some cases, where Census data were not available due to disclosure prohibitions, SBA either estimated missing values using available relevant data, or examined data at a higher level of industry aggregation, such as at the 2- or 3-digit NAICS level. In some instances, SBA had to base its analysis only on those factors for which data were available or missing values could be estimated. Data sources and estimation procedures SBA uses in its size standards analysis are documented in detail in the ''SBA Size Standards Methodology'' paper, which is available at *http://www.sba.gov/size.*

Sales to total assets ratios used to calculate average assets size are from the Risk Management Association's Annual Statement Studies, 2006–2008.

To evaluate Federal contracting trends, SBA examined Federal contract award data for fiscal years 2006–2008 from the U.S. General Service Administration's Federal Procurement Data System—Next Generation (FPDS–NG). SBA's internal data on its guaranteed loan programs for fiscal years 2006–2008 were analyzed to assess the impact on financial assistance to small businesses.

Dominant in Field of Operation

Section 3(a) of the Small Business Act (15 U.S.C. § 632(c) defines a small business concern as one that is (1) independently owned and operated, (2) not dominant in its field of operation, and (3) within a specific small business definition or size standard established by the SBA Administrator. SBA considers as part of its evaluation of a size standard whether a business concern at a proposed size standard would be considered dominant in its field of operation. For this, SBA generally examines the industry's market share of firms at the proposed standard or other factors that may indicate whether a firm can exercise a major controlling influence on a national basis in which significant numbers of business concerns are engaged. If SBA's analysis indicates that a proposed size standard would include a dominant firm, a lower size standard would be considered to exclude the dominant firm from being defined as small.

Selection of Size Standards

To simplify size standards, for the ongoing comprehensive size standards review, SBA has proposed to select a size standard for an industry from a limited number of receipts based size standard levels. For many years, SBA

has been concerned about the complexity of determining small business status caused by a large number of varying receipts based size standards (*see* 69 FR 13130, March 4, 2004, and 57 FR 62515, December 31, 1992). Currently, there are 32 different levels of receipts based size standards, ranging from $0.75 million to $35.5 million, with many of those levels applying to one or just a few industries only. SBA believes that such a large number of variations with small variations are both unnecessary and difficult to justify analytically. Simplifying the administration of SBA's size standards to a fewer number of size standard levels will produce more common size standards for businesses operating in multiple related industries and greater consistency in the size standards among industries that are similar in their economic characteristics.

This proposed rule, therefore, applies one of eight receipts based size standards to each industry in Sector 44–45, Retail Trade. These eight ''fixed'' size standard levels are $5 million, $7 million, $10 million, $14 million, $19 million, $25.5 million, $30.0 million and $35.5 million. These eight receipts based size standard levels are established by taking into consideration the minimum, maximum, and the more commonly used receipts based size standards. Currently, the more commonly used receipts based size standards cluster around the following six levels—$2.5 million to $4.5 million, $7 million, $9.0 million to $10 million, $12.5 million to $14.0 million, $25.0 million to $25.5 million, and $33.5 million to $35.5 million. SBA has selected $7 million as one of eight fixed levels of receipts based size standards because this is also an anchor standard for receipts based standards. A lower or minimum receipts based size level is established at $5 million. Excluding monetary standards for agriculture and those based on net commissions (such as real estate brokers and travel agents), $5 million is in the close neighborhood of the current minimum receipts based standard of $4.5 million. Among the higher levels size clusters, $10 million, $14 million, $25.5 million, and $35.5 million are selected as other four levels of the fixed size standards. Because of a large gap between two of the size standard intervals, SBA has established intermediate levels of $19 million between $14 million and $25.5 million, and $30 million between $25.5 million and $35.5 million. These two intermediate size levels reflect roughly similar proportional differences between the two successive size standard levels.

In a further effort to simplify size standards, SBA may propose a common size standard for certain closely related group of industries. Although the size standard analysis may support a specific size standard level for each industry, SBA believes that establishing different size standards for closely related industries may not be appropriate. For example, in cases where many of the same businesses operate in the same two industries, establishing the common size standard would better reflect the industry marketplace than establishing separate size standards for each of those industries. This situation has led SBA to establish a common size standard for the information technology (IT) services industries (NAICS 541511, NAICS 541112, NAICS 541513 and NAICS 541519), even though the industry data might support a distinct size standard for each industry. Businesses engaged in IT related services typically perform activities in two or more other related industries. Whenever SBA proposes a common size standard for closely related industries it will provide a justification for that in the proposed rule.

Evaluation of Industry Structure

SBA has evaluated the structure of each industry in the Retail Trade Sector to assess the appropriateness of the current size standards. As described above, SBA compared data on the economic characteristics of each industry in that Sector to the average characteristics of industries in two comparison groups. The first comparison group is comprised of all industries with $7.0 million size standards—referred to as the ''receipts based anchor comparison group.'' Because the goal of SBA's size review is to assess whether a specific industry's size standard should be at or different from the anchor size standard, this is the most logical set of industries to group together for the industry analysis. In addition, this group includes a sufficient number of firms to provide a meaningful assessment and comparison of industry characteristics.

If the characteristics of an industry under review are similar to the average characteristics of industries in the anchor comparison group, the anchor size standard would be considered an appropriate standard for that industry. If an individual industry's structure is significantly different from that of the anchor group, a size standard lower or higher than the anchor size standard would be selected. The level of the new size standard is determined based on the difference between the characteristics of the anchor comparison group and a second industry comparison group. As described above, the second comparison group for receipts based standards consists of industries with the highest receipts based size standards, ranging from $23 million to $35.5 million, with the average size standard for the group equaling $29 million. SBA refers to this group of industries as the ''higher level receipts based size standard comparison group.'' Differences in industry structure between an industry under review and the industries in the two comparison groups are determined by comparing data on each of the industry factors, including average firm size, average assets size, four-firm concentration ratio, and the Gini coefficient of distribution of firms by size. Table 1 shows two measures of the average firm size (simple and weighted), average assets size, four-firm concentration ratio, average receipts of the four largest firms, and the Gini coefficient for both anchor level and higher level comparison groups for receipts based size standards.

TABLE 1—AVERAGE CHARACTERISTICS OF RECEIPTS BASED COMPARISON GROUPS

Receipts Based Comparison Group	Avg. Firm Size ($ million)		Avg. Assets Size ($ million)	Avg. Four-firm Concentration Ratio (%)	Avg. Receipts of Four Largest Firms ($ million) [a]	Gini Coefficient
	Simple Average	Weighted Average				
Anchor Level	1.19	17.64	0.71	18.7	189.9	0.599
Higher Level	4.77	52.27	2.05	22.3	639.4	0.725

[a] To be used for industries with a four-firm concentration ratio of 40% or greater.

Derivation of Size Standards Based on Industry Factors

For each of the industry factors shown in Table 1, SBA derives a separate size standard based on the amount of differences between their values for an industry under review and those for the two comparison groups. An estimated size standard that is supported by each industry factor is derived by comparing its value for a specific industry under review to the corresponding value for the two comparison groups. If the industry value for a particular factor is near that for the anchor comparison group, the $7.0 million anchor size standard would be considered appropriate for that factor.

If an industry's value for a factor is significantly above or below the anchor comparison group value, a size standard above or below the $7.0 million anchor size would be warranted. The level of the new size standard in these cases is derived based on the proportional difference between the industry value and the values for the two comparison groups.

For example, if an industry's simple average receipts size equals $3.0 million, SBA's analysis would supports a size standard of $19 million. The $3.0 million level is 50.6 percent between the average firm size of $1.19 million for the anchor comparison group and $4.77 million for the higher level comparison group (($3.00 million − $1.19 million) ÷ ($4.77 million − $1.19 million) = 0.506 or 50.6%). This proportional difference is applied to the difference between the $7.0 million anchor size standard and average size standard of $29 million for the higher level size standard group and then added to $7.0 million to estimate a size standard of $18.12 million ([{$29.0 million − $7.0 million} * 0.506] + $7.0 million = $18.12 million). The final step rounds the estimated size standard of $18.12 million to the nearest fixed size standard level, in this case to $19 million.

SBA applies the above method of calculation to derive a size standard for each industry factor. Detailed formulas involved in these calculations are presented in ''SBA Size Standards Methodology'' which is available at *http://www.sba.gov/size.* Table 2 shows ranges of values for each industry factor and the levels of size standards supported by those values.

TABLE 2—VALUES OF INDUSTRY FACTORS AND SUPPORTED SIZE STANDARDS

If Simple avg. receipts size ($ million)	*Or if* weighted avg. receipts size ($ million)	*Or if* avg. assets size ($ million)	*Or if* avg. receipts of largest four firms ($ million)	*Or if* gini coefficient	Then size standard is ($ million)
<1.03	<16.07	<0.65	<169.4	<0.593	5.0
1.03 to 1.43	16.07 to 20.00	0.65 to 0.80	169.4 to 220.5	0.593 to 0.608	7.0
1.44 to 2.00	20.01 to 25.51	0.81 to 1.02	220.6 to 292.0	0.609 to 0.628	10.0
2.01 to 2.74	25.52 to 32.59	1.03 to 1.29	292.1 to 384.0	0.629 to 0.653	14.0
2.75 to 3.67	32.60 to 41.65	1.30 to 1.64	384.1 to 501.5	0.654 to 0.686	19.0
3.68 to 4.57	41.66 to 50.30	1.65 to 1.97	501.6 to 613.8	0.687 to 0.718	25.5
4.58 to 5.38	50.31 to 58.17	1.98 to 2.28	613.9 to 716.1	0.719 to 0.746	30.0
> 5.38	>58.17	>2.28	>716.1	>0.746	35.5

Table 3 shows the results of analyses of industry data and latest Federal contracting trends for each industry in Sector 44–45, Retail Trade. It is important to note, however, that the Federal procurement of supplies must be classified under the appropriate manufacturing NAICS code. *See* 13 CFR 121.402(b). However, because there were Federal procurements during the years analyzed that were classified in the Retail Sector, SBA is including the data because they affect its evaluation of size standards for the Retail Trade Sector. Each NAICS industry row in columns 2, 3, 4, 6, 7 and 8 shows two numbers. The upper number is the value for the industry factor shown on the top of the column, while the lower number is the size standard supported by that factor. For the four-firm concentration ratio, a size standard is estimated based on the average receipts of the top four firms if its value is 40 percent or more. If the four-firm concentration ratio for an industry is less than 40 percent, no size standard is estimated for that factor and column 5 is left blank. The value for Federal contracting factor in column 8 is shown only for industries that averaged $100 million or more annually in Federal contracting dollars during fiscal years 2006–2008. A size standard for that factor is derived only if the small business share of total Federal contracting dollars is 10 percentage points less than the small business share of industry's total receipts. Otherwise column 8 is also left blank. Column 9 shows the proposed or revised size standard for each industry in the Retail Trade Sector, calculated as the average of size standards supported by each industry factor and rounded to the nearest fixed size level. Analytical details involved in the averaging procedure are described in the SBA ''Size Standards Methodology'' paper *which* is available at *http://www.sba.gov/size.* For comparison, the current size standards for industries in Sector 44–45 are also shown in column 10 of Table 3.

TABLE 3—SIZE STANDARDS SUPPORTED BY EACH INDUSTRY FACTOR

[Millions of dollars]

(1) NAICS	(2) Simple average firm size	(3) Weighted average firm size	(4) Average assets size	(5) Four-firm ratio (%)	(6) Four-firm average size	(7) Gini coefficient	(8) Federal contract factor (%)	(9) Revised size standard	(10) Current size standard
441110	$27.4	$102.6	$7.6	5.6	$9,110.3	0.638	.....	$30.0	$29.0
New Car Dealers	35.5	35.5	35.5	.....	.....	$14.0	.....	.....	.....
441120	2.0	14.7	0.5	7.1	854.7	0.561	.....	5.0	23.0
Used Car Dealers	10.0	5.0	5.0	.....	.....	5.0	.....	.....	.....
441210	5.2	45.2	2.2	10.5	388.7	0.702	72.4	30.0	7.0
Recreational Vehicle Dealers	30.0	25.5	30.0	.....	.....	25.5	.....	.....	.....
441221	3.4	10.4	1.4	2.4	97.8	0.576	.....	14.0	7.0

TABLE 3—SIZE STANDARDS SUPPORTED BY EACH INDUSTRY FACTOR—Continued

[Millions of dollars]

(1) NAICS	(2) Simple average firm size	(3) Weighted average firm size	(4) Average assets size	(5) Four-firm ratio (%)	(6) Four-firm average size	(7) Gini coefficient	(8) Federal contract factor (%)	(9) Revised size standard	(10) Current size standard
Motorcycle, ATV, and Personal Watercraft Dealers	19.0	5.0	19.0	.....	.....	5.0	.....	.....	.....
441222	2.6	23.3	1.4	10.1	310.7	0.624	.....	14.0	7.0
Boat Dealers	14.0	10.0	19.0	.....	.....	10.0	.....	.....	.....
441229	1.8	11.1	0.7	8.6	85.3	0.545	.....	5.0	7.0
All Other Motor Vehicle Dealers	10.0	5.0	5.0	.....	.....	5.0	.....	.....	.....
Except	3.8	.....	1.3	.....	.....	.....	.....	.....	.....
Aircraft Dealers, Retail	25.5	.....	19.0	.....	.....	.....	.....	25.5	10.0
441310	1.6	109.5	0.6	30.7	3,004.6	0.643	.....	14.0	7.0
Automotive Parts and Accessories Stores	10.0	35.5	5.0	.....	.....	14.0	.....	.....	.....
441320	2.0	92.0	0.6	25.9	1,399.2	0.647	.....	14.0	7.0
Tire Dealers	14.0	35.5	5.0	.....	.....	14.0	.....	.....	.....
442110	2.4	66.4	0.9	8.1	1,017.8	0.683	.....	19.0	7.0
Furniture Stores	14.0	35.5	10.0	.....	.....	19.0	.....	.....	.....
442210	1.3	6.4	0.4	2.1	93.7	0.441	.....	5.0	7.0
Floor Covering Stores	7.0	5.0	5.0	.....	.....	5.0	.....	.....	.....
442291	0.6	5.6	.....	20.9	58.9	0.341	.....	5.0	7.0
Window Treatment Stores	5.0	5.0	.....	.....	.....	5.0	.....	.....	.....
442299	1.8	146.4	0.6	39.1	2,175.8	0.776	.....	19.0	7.0
All Other Home Furnishings Stores	10.0	35.5	5.0	.....	.....	35.5	.....	.....	.....
443111	1.6	40.2	0.5	16.8	584.6	0.630	.....	10.0	9.0
Household Appliance Stores	10.0	19.0	5.0	.....	.....	14.0	.....	.....	.....
443112	3.6	575.9	1.0	68.9	8,351.1	0.869	.....	25.5	9.0
Radio, Television and Other Electronics Stores	19.0	35.5	14.0	.....	35.5	35.5	.....	.....	.....
443120	2.2	285.2	0.6	52.5	2,192.0	0.782	9.7	25.5	9.0
Computer and Software Stores	14.0	35.5	5.0	.....	35.5	35.5	.....	.....	.....
443130	2.6	423.0	0.7	54.3	427.9	0.770	.....	19.0	7.0
Camera and Photographic Supplies Stores	14.0	35.5	7.0	.....	19.0	35.5	.....	.....	.....
444110	37.3	4,210.0	13.2	91.1	21,591.9	0.960	.....	35.5	7.0
Home Centers	35.5	35.5	35.5	.....	35.5	35.5	.....	.....	.....
444120	2.7	302.7	0.9	47.3	943.7	0.767	.....	25.5	7.0
Paint and Wallpaper Stores	14.0	35.5	10.0	.....	35.5	35.5	.....	.....	.....
444130	1.3	21.7	0.5	13.4	556.5	0.496	−10.2	7.0	7.0
Hardware Stores	7.0	10.0	5.0	.....	.....	5.0	10.0	.....	.....
444190	3.3	36.9	1.1	8.7	2,100.2	0.695	.....	19.0	7.0
Other Building Material Dealers	19.0	19.0	14.0	.....	.....	25.5	.....	.....	.....
444210	1.1	3.3	0.4	2.1	23.4	0.391	.....	5.0	7.0
Outdoor Power Equipment Stores	7.0	5.0	5.0	.....	.....	5.0	.....	.....	.....
444220	1.9	22.1	0.7	12.1	800.1	0.634	.....	10.0	7.0
Nursery and Garden Centers	10.0	10.0	7.0	.....	.....	14.0	.....	.....	.....
445110	9.3	852.4	1.8	32.5	32,122.8	0.915	66.3	30.0	27.0
Supermarkets and Other Grocery (except Convenience) Stores	35.5	35.5	25.5	.....	.....	35.5	.....	.....	.....
445120	0.8	15.9	0.2	15.5	791.3	0.353	.....	5.0	27.0
Convenience Stores	5.0	5.0	5.0	.....	.....	5.0	.....	.....	.....
445210	0.8	4.4	0.2	6.5	71.6	0.336	.....	5.0	7.0
Meat Markets	5.0	5.0	5.0	.....	.....	5.0	.....	.....	.....
445220	0.8	3.1	.....	5.3	19.9	0.340	.....	5.0	7.0
Fish and Seafood Markets	5.0	5.0	.....	.....	.....	5.0	.....	.....	.....
445230	0.9	5.5	0.1	5.4	37.6	0.428	26.1	5.0	7.0
Fruit and Vegetable Markets	5.0	5.0	5.0	.....	.....	5.0	.....	.....	.....
445291	0.5	19.6	0.2	36.1	126.0	0.499	.....	5.0	7.0
Baked Goods Stores	5.0	7.0	5.0	.....	.....	5.0	.....	.....	.....
445292	0.7	25.4	0.3	41.2	139.3	0.627	.....	7.0	7.0
Confectionery and Nut Stores	5.0	10.0	5.0	.....	5.0	10.0	.....	.....	.....
445299	0.4	3.5	0.1	11.3	46.4	0.264	.....	5.0	7.0
All Other Specialty Food Stores	5.0	5.0	5.0	.....	.....	5.0	.....	.....	.....
445310	1.1	14.9	0.3	8.3	583.0	0.403	.....	5.0	7.0
Beer, Wine and Liquor Stores	7.0	5.0	5.0	.....	.....	5.0	.....	.....	.....
446110	7.8	376.9	1.6	52.8	20,311.0	0.804	−20.2	25.5	7.0
Pharmacies and Drug Stores	35.5	35.5	19.0	.....	35.5	35.5	10.0	.....	.....
446120	1.2	162.6	0.5	56.8	892.5	0.748	.....	25.5	7.0
Cosmetics, Beauty Supplies and Perfume Stores	7.0	35.5	5.0	.....	35.5	35.5	.....	.....	.....
446130	1.1	88.3	0.4	44.1	733.0	0.642	.....	19.0	7.0
Optical Goods Stores	7.0	35.5	5.0	.....	35.5	14.0	.....	.....	.....
446191	0.8	67.5	.....	31.1	361.8	0.527	.....	14.0	7.0
Food (Health) Supplement Stores	5.0	35.5	.....	.....	.....	5.0	.....	.....	.....
446199	1.1	5.3	.....	11.4	188.2	0.492	.....	7.0	7.0
All Other Health and Personal Care Stores	7.0	5.0	.....	.....	.....	5.0	.....	.....	.....

TABLE 3—SIZE STANDARDS SUPPORTED BY EACH INDUSTRY FACTOR—Continued

[Millions of dollars]

(1) NAICS	(2) Simple average firm size	(3) Weighted average firm size	(4) Average assets size	(5) Four-firm ratio (%)	(6) Four-firm average size	(7) Gini coefficient	(8) Federal contract factor (%)	(9) Revised size standard	(10) Current size standard
447110	4.2	150.8	0.7	10.4	4,854.2	0.723		25.5	27.0
Gasoline Stations with Convenience Stores	25.5	35.5	7.0			30.0			
447190	2.7	35.7	0.4	19.2	2,993.6	0.645		14.0	9.0
Other Gasoline Stations	14.0	19.0	5.0			14.0			
448110	1.4	41.5	0.6	27.6	546.9	0.635		10.0	9.0
Men's Clothing Stores	10.0	19.0	5.0			14.0			
448120	2.2	180.2	0.8	30.5	2,334.0	0.812		25.5	9.0
Women's Clothing Stores	14.0	35.5	7.0			35.5			
448130	2.5	176.3		58.5	1,035.4	0.851		30.0	7.0
Children's and Infants' Clothing Stores	14.0	35.5			35.5	35.5			
448140	8.1	526.1	3.1	47.5	7,579.2	0.930		35.5	9.0
Family Clothing Stores	35.5	35.5	35.5		35.5	35.5			
448150	1.1	46.1	0.4	52.9	360.9	0.728		14.0	7.0
Clothing Accessories Stores	7.0	25.5	5.0		14.0	30.0			
448190	1.1	59.7	0.4	43.6	868.0	0.663		19.0	7.0
Other Clothing Stores	7.0	35.5	5.0		35.5	19.0			
448210	3.3	256.6	1.4	39.9	2,292.5	0.842		25.5	9.0
Shoe Stores	19.0	35.5	19.0			35.5			
448310	1.2	113.2	0.8	23.8	1,385.1	0.625		14.0	7.0
Jewelry Stores	7.0	35.5	7.0			10.0			
448320	2.0	61.0		49.8	192.3	0.750		25.5	7.0
Luggage and Leather Goods Stores	14.0	35.5			7.0	35.5			
451110	1.4	102.4	0.6	18.1	1,134.1	0.636	54.4	14.0	7.0
Sporting Goods Stores	7.0	35.5	5.0			14.0			
451120	2.7	488.2	1.0	71.7	2,903.1	0.853		25.5	7.0
Hobby, Toy and Game Stores	14.0	35.5	14.0		35.5	35.5			
451130	1.1	194.2		59.4	580.9	0.700		25.5	7.0
Sewing, Needlework and Piece Goods Stores	7.0	35.5			25.5	25.5			
451140	1.4	69.6	0.7	30.2	378.2	0.580		10.0	7.0
Musical Instrument and Supplies Stores	7.0	35.5	7.0			5.0			
451211	2.7	406.2	1.1	65.6	2,469.3	0.846		25.5	7.0
Book Stores	19.0	35.5	14.0		35.5	35.5			
451212	0.5	6.1		17.1	34.6	0.354		5.0	7.0
News Dealers and Newsstands	5.0	5.0				5.0			
451220	2.2	259.4		57.7	1,042.1	0.836		30.0	7.0
Prerecorded Tape, Compact Disc and Record Stores	14.0	35.5			35.5	35.5			
452111	2,227.1	3,926.7	890.8	72.1	15,654.5	0.434		30.0	27.0
Department Stores (except Discount Department Stores)	35.5	35.5	35.5		35.5	5.0			
452112	3,433.0	8,326.5		95.0	31,807.8	0.588		25.5	27.0
Discount Department Stores	35.5	35.5			35.5	5.0			
452910	11,953.3	17,358.4		92.1	44,059.2	0.312		25.5	27.0
Warehouse Clubs and Superstores	35.5	35.5			35.5	5.0			
452990	3.5	359.5	1.4	50.3	4,178.7	0.869		30.0	11.0
All Other General Merchandise Stores	19.0	35.5	19.0		35.5	35.5			
453110	0.3	1.1	0.1	1.7	27.9	0.112		5.0	7.0
Florists	5.0	5.0	5.0			5.0			
453210	4.3	632.4	1.2	78.1	4,027.6	0.875	5.7	30.0	7.0
Office Supplies and Stationery Stores	25.5	35.5	14.0		35.5	35.5			
453220	0.6	14.9	0.2	12.3	491.1	0.464		5.0	7.0
Gift, Novelty and Souvenir Stores	5.0	5.0	5.0			5.0			
453310	0.6	5.2	0.3	9.9	191.5	0.457		5.0	7.0
Used Merchandise Stores	5.0	5.0	5.0			5.0			
453910	1.4	452.3	0.3	55.4	1,050.8	0.684		19.0	7.0
Pet and Pet Supplies Stores	7.0	35.5	5.0		35.5	19.0			
453920	0.7	10.5	0.5	8.9	94.2	0.462		5.0	7.0
Art Dealers	5.0	5.0	5.0			5.0			
453930	2.6	48.7	1.3	20.2	481.0	0.592		14.0	13.0
Manufactured (Mobile) Home Dealers	14.0	25.5	14.0			5.0			
453991	1.6	7.0	0.3	11.7	190.7	0.531		5.0	7.0
Tobacco Stores	10.0	5.0	5.0			5.0			
453998	0.8	6.9	0.3	6.9	206.9	0.443	4.2	5.0	7.0
All Other Miscellaneous Store Retailers (except Tobacco Stores)	5.0	5.0	5.0			5.0			
454111	4.5	70.3	1.4			0.822		30.0	25.0
Electronic Shopping	25.5	35.5	19.0			35.5			

TABLE 3—SIZE STANDARDS SUPPORTED BY EACH INDUSTRY FACTOR—Continued

[Millions of dollars]

(1) NAICS	(2) Simple average firm size	(3) Weighted average firm size	(4) Average assets size	(5) Four-firm ratio (%)	(6) Four-firm average size	(7) Gini coefficient	(8) Federal contract factor (%)	(9) Revised size standard	(10) Current size standard
454112	13.4	320.7	.....	.....	.....	0.933	.....	35.5	25.0
Electronic Auctions	35.5	35.5	.....	.....	.....	35.5	.....	.....	.....
454113	10.0	249.6	3.1	.....	.....	0.907	.....	35.5	25.0
Mail Order Houses	35.5	35.5	35.5	.....	.....	35.5	.....	.....	.....
454210	1.4	30.6	0.5	20.7	365.5	0.658	.....	10.0	7.0
Vending Machine Operators	7.0	14.0	5.0	.....	.....	19.0	.....	.....	.....
454319	0.3	0.7	.....	15.3	2.5	0.098	.....	5.0	7.0
Other Fuel Dealers	5.0	5.0	.....	.....	.....	5.0	.....	.....	.....
454390	1.1	22.3	0.3	15.0	807.0	0.596	.....	7.0	7.0
Other Direct Selling Establishments	7.0	10.0	5.0	.....	.....	7.0	.....	.....	.....

As can be seen in Table 3, the results of SBA analyses of industry and Federal contracting data would support reducing the current size standards for 23 of 76 industries in the Retail Trade Sector. However, SBA believes that lowering size standard for those industries would not be in the best interests of small businesses in these difficult times when the economy is in a deep recession.

Aiming to promote economic recovery and to preserve and create jobs the U.S. Congress passed and the President signed the American Recovery and Reinvestment Act of 2009 (Recovery Act). The purposes and goals of the Recovery Act are to promote economic recovery and to preserve and create jobs. Under the Recovery Act, SBA has changed its various programs to assist small businesses, including the following: (1) Temporary reduction or elimination of fees in the 7(a) and 504 loan guarantee programs; (2) creation of a temporary 90 percent guarantee loan program; (3) creation of a temporary Secondary Market Guarantee Authority to provide a Federal guarantee for pools of first lien 504 loans that are to be sold to third-party investors; (4) new authority for refinancing community development loans under the 504 program; (5) revision of the job creation goals of the 504 program; (6) simplification of the maximum leverage limits and aggregate investment limits required of Small Business Investment Companies; (7) temporary authority to provide loans on a deferred basis to viable small business concerns that have a qualifying small business loan and are experiencing immediate financial hardship; (8) temporary increase in the surety bond maximum amount; (9) establishment of a Secondary Market Lending Authority to make loans to systemically important broker dealers in SBA's 7(a) secondary market; and (10) application of SBA's Certified Development Company (CDC) alternative size standard to its 7(a) Business Loan Program (*see* 13 CFR 121.301).

SBA believes that to reduce size standards and thereby reduce the number of firms that can participate in its financial and other assistance programs would run counter to what it is trying to do for small businesses. Again, the non-manufacturer size standard of 500 employees applies for purposes of Federal procurement of supplies. Reducing size eligibility for Federal financial and other assistance would not preserve or create more jobs; rather, it would have the opposite effect. SBA intends for the proposed size standards, if adopted, to remain in effect unless and until it receives information or data that suggests a change is needed.

Evaluation of Federal Contracting and SBA Loan Data

Besides industry structure, SBA also evaluates Federal contracting data to assess the extent to which small businesses are successful in getting Federal contracts under the existing size standards. However, the available data on Federal contracting are limited to identifying businesses as small or other than small, with no information on exact size of businesses receiving Federal contracts in order to conduct a more precise analysis. Moreover, a procurement for supplies should be classified under a manufacturing NAICS code. Consequently, the available data pertains to procurements that have been misclassified by procuring agencies.

Given limited data, for the current comprehensive size review, SBA has decided to designate a size standard at one level higher than their current size standard for industries where the small business share of total Federal contracting dollars is between 10 and 30 percentage points lower than their shares in total industry receipts and at two levels higher than the current size standard if the difference is higher than 30 percentage points.

SBA has chosen not to designate a size standard for the Federal contracting factor alone that is higher than two levels above the current size standard because doing so would result in most cases of designating a size standard more than twice the current size standard. Given the limitations of the FPDS data, and the complex relationships among a number of variables affecting small business participation in the Federal marketplace, SBA believes that a larger adjustment to size standards based on Federal contracting activity should be based on a more detailed analysis of the impact of any subsequent revision to the current size standard. In limited situations, however, SBA may conduct a more extensive examination of Federal contracting experience to support a different size standard than indicated by this general rule to take into consideration significant and unique aspects of small business competitiveness in the Federal contract market. SBA welcomes comment on its methodology of incorporating the Federal contracting factor in the size standard analysis and suggestions for alternative methods and other relevant information on small business experience in Federal contract market.

Only nine industries in Sector 44–45, Retail Trade, received an average of $100 million or more annually in Federal contracting dollars during fiscal years 2006–2008. Those are the industries that have a Federal contracting factor in column 8 of Table 3. In seven of these nine industries, because the small business share of Federal contracting dollars was already higher than the small business share of industry's total receipts (positive values in column 8 of Table 3), no size standard was estimated for the Federal contracting factor. However, in two of these nine industries, namely NAICS 444130, Hardware Stores, and NAICS 446110, Pharmacies and Drug Stores, for

which small business share of Federal contracting dollars was more than 10 percent lower than small business share of industry's total receipts, a separate size standard was estimated for the Federal contracting factor. The latest data show that Federal contracting activity is insignificant for most of the industries in Sector 44–45 and, for a few industries where it is significant small businesses seem to be doing well in most cases in terms of their share in the Federal marketplace relative to their share in industry's total sales.

Before deciding on an industry's size standard, SBA also considers the impact of new or revised standards on SBA's loan programs. SBA examined 7(a) Loan Program data for fiscal years 2006–2008 to assess whether the existing or proposed size standards need further adjustments to ensure credit opportunities for small businesses though that program. For the Retail Trade industries, primarily small businesses that are much smaller than the current size standards use the 7(a) Loan Program. Based on that analysis, no size standard in Sector 44–45, Retail Trade, needs an adjustment based on this factor.

Other Considerations

Alternative Size Standards for New Car (NAICS 441110) and Used Car Dealers (NAICS 441120) Industries: SBA proposes to increase to the existing size standard for the New Car Dealers industry from $29 million to $30 million in annual receipts and to retain the current standard of $23 million in annual receipts for the Used Car Dealers industry.

However, based on industry data, SBA believes that an employee-based size standard might also be appropriate for these two industries, in lieu of one based on annual receipts. Industry associations have also suggested this as an alternative. They cite the variation in prices of car models for creating inequity in size eligibility under the receipt-based standard. For example, two dealers selling the same number of units will have different receipt levels depending on the models they sell.

SBA has traditionally applied a receipts-based measure to determine the size of a small business for most industries, including Retail Trade. Receipts is the preferred measure because it represents the value of a firm's output. Other measures of size are used for industries where receipts may skew the value added contributed by the firm in the production of goods and services. For example, number of employees is a better measure of size than receipts for industries in which firms have relatively low operational costs (labor and overhead, for example) in relation to their total receipts. This applies to the Wholesale Trade industries in which the value of the product sold greatly exceeds the cost of labor and capital used to generate a given level of receipts. Similarly, in the manufacturing industries, two manufacturers with the same number of employees may produce significantly different levels of receipts depending on the stage of manufacturing in the production process. Thus, SBA believes that number of employees more accurately reflects the value added by each manufacturer than the level of receipts.

Car dealers have characteristics very similar to wholesale trade firms. A large proportion of the receipts of a car dealer account for the value of a manufactured product. A car dealer obtains a relatively small share of the total value of each unit sold, but generates significant receipts per employee. Furthermore, an unintended consequence of using receipts can arise from the variation in values of the car models sold—using receipts might exclude from eligibility for small business programs those car dealers that sell a greater proportion of high-valued automobiles than other dealers that sell lower priced models.

SBA estimates the average revenue (sales) per employee in 2008 at $660,000 and $520,000 for New Car Dealers and Used Car Dealers, respectively, based on an analysis of data from the special tabulation of the 2002 Economic Census (as referenced above) with adjustment for inflation since 2002. Based on these values, the proposed receipts-based size standard of $30 million for New Car Dealers would convert to a range of 45 to 50 employees. At the 50-employee size standard level, about 70 percent of firms in the New Car Dealers industry would be considered small compared to nearly 75 percent that would be considered small under the proposed $30 million receipts based standard. Thus, to ensure that firms that would be classified as small under the $30 million receipts based standard are also classified as small under an employee-based size standard, the employee-based standard should be more than 50 employees. Similarly, at the current size standard of $23 million in annual receipts would also convert to a range of 45 to 50 employees for Used Car Dealers. At the 50-employee size standard, nearly 98 percent of firms in the Car Dealers industry would be considered small, almost the same as that under the existing $23 million receipts based standard. Based on these estimates, SBA is also considering an alternative size standard of 100 employees for the New Car Dealers industry and 50 employees for the Used Car Dealers industry. SBA believes that these levels will ensure that small car dealers eligible under the receipts based size standards would also be eligible at these alternative employee based size standards.

SBA requests comments on whether an employee-based size standard for these two industries is more appropriate than a receipts-based standard and on the alternative employee-based size standards. Depending upon the feedback received, SBA may consider adopting the alternative employee size standards in the final rule.

Size Standard for Retail Aircraft Dealers: SBA has established a specific size standard of $10.0 million in average annual receipts for NAICS 441229, Retail Aircraft Dealers, as a separate category from the $7.0 million size standard for all other activities in NAICS 441229, All Other Motor Vehicle Dealers. As a sub-component of the industry, SBA has limited data on Retail Aircraft Dealers and cannot evaluate all industry factors to determine whether the current $10.0 million size standard is appropriate. The only useful source of data consists of the product line data from the Census Bureau's 2002 Economic Census publication titled ''Retail Trade, Subject Series, Product Lines, EC02–44SL–LS, October 2005.'' The product line data include information on number of establishments and receipts at sub-industry levels, based on which SBA estimated the average establishment size of Aircraft Dealers and All Other Motor Vehicle Dealers. SBA estimated average assets size by applying the sales to assets ratio for the All Other Motor Vehicle Dealers industry to average establishment size estimated from the Census Bureau's product line data. These estimates, as shown in Table 3, support an increase to the size standard for Retail Aircraft Dealers from $10 million to $19 million.

SBA also analyzed the trends on average establishment size for Retail Aircraft Dealers and All Other Motor Vehicle Dealers between 1997 and 2002 using the product line data from the 1997 and 2002 Economic Censuses. The analysis showed that from 1997 to 2002 the average establishment size for Retail Aircraft Dealers increased at a much higher rate than for the overall industry, also suggesting an increase in the current size standard.

While the data are limited on Retail Aircraft Dealers, the available data, nonetheless, support increasing its size

standard to $19 million. SBA welcomes comments on the appropriateness of the proposed size standard and alternative data sources for Retail Aircraft Dealers that may be used to more fully evaluate the size standard. Comments on an alternative higher or lower size standard should provide specific data or other information supporting the basis for that position.

Size Standards for the Heating Oil Dealers (NAICS 454311) and Liquefied Petroleum Gas (Bottled Gas) Dealers (NAICS 454312) Industries: On July 22, 2008 (73 FR 42517), based on a review of the latest available data on industry characteristics and other relevant information, SBA changed the small business size standard for NAICS 454311, Heating Oil Dealers, from $11.5 million in average annual receipts to 50 employees, and the size standard for NAICS 454312, Liquefied Petroleum Gas (Bottled Gas) Dealers, from $6.5 million in average annual receipts to 50 employees. SBA believes that those employee-based size standards are still appropriate for these industries and hence SBA is not proposing their revision here.

Application of Retail Trade and Wholesale Trade Industry Size Standards to Federal Procurements and Subcontracts: This proposed rule also modifies SBA regulations to clarify the existing policy that Federal contracts and subcontracts for supplies shall not be classified with a Wholesale Trade (Sector 42) or Retail Trade (Sector 44–45) NAICS industry code. 13 CFR 121.402(b) requires a contracting officer to classify a Federal supply contract or subcontract to a Federal prime contract under an appropriate manufacturing NAICS industry code. A Retail Trade or Wholesale Trade business that supplies a manufactured product on a Federal procurement contract or on a subcontract to a Federal prime contract is deemed a ''nonmanufacturer'' and is a small business nonmanufacturer if it has 500 or fewer employees and meets other requirements set forth in the regulations. The Table of Size Standards (*see* 121.201) contains a note at the heading of the Retail Trade and Wholesale Trade Sectors stating that the industry size standards are ''Not applicable to Government procurement of supplies.'' However, SBA has observed numerous misclassifications of procurement solicitations and contract awards reported in the Federal Procurement Data System—Next Generation with Retail Trade and Wholesale Trade NAICS codes.

To better inform Federal government contracting officers and other users of the proper NAICS classification of Federal supply prime contracts, and for supply subcontracts to Federal prime contractors, SBA proposes to modify the existing note at the heading to the Wholesale Trade and Retail Trade Sectors in the Table of Size Standards (13 CFR 121.201) to read as follows: ''These NAICS codes shall not be used to classify Government acquisitions for supplies. They also shall not be used by Federal government contractors when subcontracting for the acquisition for supplies. The applicable manufacturing NAICS code shall be used to classify acquisitions for supplies. A Wholesale Trade or Retail Trade business concern submitting an offer or a quote on a supply acquisition is categorized as a nonmanufacturer and deemed small if it has 500 or fewer employees and meets the requirements of 13 CFR 121.406.''

SBA is also proposing to revise the language in 13 CFR 121.402(b) to be consistent with the revised table headings by revising the end of the regulation to read ''Acquisitions for supplies must be classified under the appropriate manufacturing NAICS code, not under a wholesale trade or retail trade NAICS code. A concern that submits an offer or quote for a contract or subcontract where the NAICS code assigned to the contract or subcontract is one for supplies, and furnishes a product it did not itself manufacture or produce, is categorized as a nonmanufacturer and deemed small if it has 500 or fewer employees and meets the requirements of 13 CFR 121.406.''

Summary of Size Standards Changes

Based on the analyses of currently available industry and Federal contracting data, SBA proposes to increase size standards for 48 of 76 industries in Sector 44–45, Retail Trade. These industries and their proposed size standards are shown in Table 4. The analyses supported retaining the existing standards for five industries in that Sector.

SBA's analyses support a decrease to the current size standard for 23 industries in Retail Trade. However, as discussed above, SBA feels that proposing to lower small business size standards would be inconsistent with its ongoing effort to promote small business assistance under the Recovery Act. Therefore, SBA proposes to retain the current size standards for those industries. SBA intends for the proposed size standards, if adopted, to remain in effect unless and until it receives information or data that suggests a change is needed.

TABLE 4—SUMMARY OF PROPOSED SIZE STANDARD REVISIONS

NAICS		Current size standard	Revised size standard
441110	New Car Dealers	$29.0	$30.0
441210	Recreational Vehicle Dealers	7.0	30.0
441221	Motorcycle, ATV, and Personal Watercraft Dealers	7.0	14.0
441222	Boat Dealers	7.0	14.0
Except	Aircraft Dealers, Retail	10.0	25.5
441310	Automotive Parts and Accessories Stores	7.0	14.0
441320	Tire Dealers	7.0	14.0
442110	Furniture Stores	7.0	19.0
442299	All Other Home Furnishings Stores	7.0	19.0
443111	Household Appliance Stores	9.0	10.0
443112	Radio, Television and Other Electronics Stores	9.0	25.5
443120	Computer and Software Stores	9.0	25.5
443130	Camera and Photographic Supplies Stores	7.0	19.0
444110	Home Centers	7.0	35.5
444120	Paint and Wallpaper Stores	7.0	25.5
444190	Other Building Material Dealers	7.0	19.0
444220	Nursery and Garden Centers	7.0	10.0
445110	Supermarkets and Other Grocery (except Convenience) Stores	27.0	30.0
446110	Pharmacies and Drug Stores	7.0	25.5
446120	Cosmetics, Beauty Supplies and Perfume Stores	7.0	25.5

TABLE 4—SUMMARY OF PROPOSED SIZE STANDARD REVISIONS—Continued

NAICS		Current size standard	Revised size standard
446130	Optical Goods Stores	7.0	19.0
446191	Food (Health) Supplement Stores	7.0	14.0
447190	Other Gasoline Stations	9.0	14.0
448110	Men's Clothing Stores	9.0	10.0
448120	Women's Clothing Stores	9.0	25.5
448130	Children's and Infants' Clothing Stores	7.0	30.0
448140	Family Clothing Stores	9.0	35.5
448150	Clothing Accessories Stores	7.0	14.0
448190	Other Clothing Stores	7.0	19.0
448210	Shoe Stores	9.0	25.5
448310	Jewelry Stores	7.0	14.0
448320	Luggage and Leather Goods Stores	7.0	25.5
451110	Sporting Goods Stores	7.0	14.0
451120	Hobby, Toy and Game Stores	7.0	25.5
451130	Sewing, Needlework and Piece Goods Stores	7.0	25.5
451140	Musical Instrument and Supplies Stores	7.0	10.0
451211	Book Stores	7.0	25.5
451220	Prerecorded Tape, Compact Disc and Record Stores	7.0	30.0
452111	Department Stores (except Discount Department Stores)	27.0	30.0
452990	All Other General Merchandise Stores	11.0	30.0
453210	Office Supplies and Stationery Stores	7.0	30.0
453910	Pet and Pet Supplies Stores	7.0	19.0
453930	Manufactured (Mobile) Home Dealers	13.0	14.0
454111	Electronic Shopping	25.0	30.0
454112	Electronic Auctions	25.0	35.5
454113	Mail Order Houses	25.0	35.5
454210	Vending Machine Operators	7.0	10.0

Evaluation of Dominance in Field of Operation

SBA has determined that for each industry in Sector 44–45, Retail Trade, no firm at or below the proposed size standard would be large enough to dominate its field of operation. A firm at the proposed size standard in each of these industries generates less than one percent of total industry receipts. This level of market share effectively precludes a firm at or below the proposed size standard from exerting a controlling effect on this industry.

Request for Comments

SBA invites public comments on the proposed rule, especially on the following areas.

1. In an effort to simplify size standards, for this proposed rule, SBA has proposed a set of eight fixed size levels for receipts based size standards: $5.0 million, $7.0 million, $10.0 million, $14.0 million, $19.0 million, $25.5 million, $30.0 million, and $35.5 million. SBA invites comments on whether simplification of size standards in this way is necessary and if these proposed fixed size levels are appropriate, or suggestions on alternative approaches to simplifying small business size standards.

2. For all industries in Sector 44–45, Retail Trade, SBA has proposed receipts based size standards ranging from $7 million to $35.5 million. SBA seeks feedback on whether the levels of size standards it proposes seem right given the economic characteristics of each industry. SBA also seeks feedback and suggestions on alternative standards, if they would be more appropriate, including whether an employee based standard for certain industries is a more suitable measure of size, and what that employee level size standard should be.

3. SBA's proposed standards are based on its evaluation of five primary factors—average firm size, average assets size (as proxy of startup costs and entry barriers), four-firm concentration ratio, distribution of firms by size, and the level and small business share of Federal contracting dollars. SBA welcomes comments on these and other factors that interested parties believe are important to consider for describing industry characteristics when SBA evaluates its size standards. Please provide relevant data sources, if available.

4. SBA derives its proposed standards by applying equal weights to each of the five primary factors in all industries. Should SBA continue with the equal weighting of each factor or should it give more weight to one or more factors? If it is more appropriate to weigh some factors more than others, SBA welcomes suggestions on specific weights for each factor along with supporting information.

5. For some industries, SBA proposes to increase the existing size standards by a large amount, while for others the proposed increase is less. Should SBA, as a policy, limit the amount of increase or decrease to a size standard? Also should SBA, as a policy, establish certain minimum or maximum values for its size standards? SBA seeks suggestions on appropriate levels of change to size standards and on their minimum or maximum levels.

6. For analytical simplicity and efficiency, SBA has refined its size standard methodology to obtain a single value as a proposed size standard instead of a range of values as was SBA's methodology in its past size regulations. SBA welcomes any comments on this procedure and suggestions for alternative methods.

Public comments on the above issues are very critical for SBA to validate its size standard methodology and move forward in a timely manner with review of size standards of other industry groups under the two-year comprehensive size review.

Compliance With Executive Orders 12866, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this

proposed rule is a ''significant'' regulatory action for purposes of Executive Order 12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis. This is not a major rule, however, under the Congressional Review Act, 5 U.S.C. 800.

Regulatory Impact Analysis

1. Is there a Need for the Regulatory Action?

SBA believes that adjustments to certain size standards in Sector 44–45, Retail Trade, are needed to better reflect the economic characteristics of small businesses in those industries. SBA's mission is to aid and assist small businesses through a variety of financial, procurement, business development, and advocacy programs. To assist effectively the intended beneficiaries of these programs, SBA must establish distinct definitions of which businesses are deemed small businesses. The Small Business Act (15 U.S.C. 632(a)) delegates to SBA's Administrator the responsibility for establishing small business definitions. The Act also requires that small business definitions vary to reflect industry differences. The supplementary information section of this proposed rule explains SBA's methodology for analyzing a size standard for a particular industry.

2. What are the Potential Benefits and Costs of this Regulatory Action?

The most significant benefit to businesses obtaining small business status as a result of this rule is eligibility for Federal small business assistance programs, including SBA's various financial assistance programs, but not for Federal procurement preference programs reserved for small businesses. Since NAICS codes in Sector 44–45, Retail Trade, may not be used for Federal government procurement programs, the proposed size standards changes in this rule will not provide any benefits to companies that participate in these programs, and there will not be any additional costs to the Federal government's procurement programs resulting from these proposed changes, if adopted in final form.

Other Federal agencies also may use SBA size standards for a variety of regulatory and program purposes. Through the assistance of these programs, small businesses become more knowledgeable, stable, and competitive businesses. In the 48 industries within Sector 44–45 for which SBA has proposed to increase their size standards, about 8,800 additional firms are estimated to obtain small business status and become eligible for these programs. In the 23 industries for which SBA's analyses indicated a lower size standard as appropriate, about 5,900 firms might have lost their small business status had SBA proposed lowering them. That number is about 2.0 percent of the total number of firms in those industries defined as small under the current standards. Thus, the net impact for the Sector as whole is about 8,800 additional firms gaining and none losing small business status under the proposed rule. This will increase the small business share of total industry receipts for the Sector from 27 percent under the current size standards to 28 percent under the proposed standards.

The benefits of increasing certain size standards to a more appropriate level would accrue to two groups: (1) Businesses that benefit by gaining small business status from the higher size standard that also use small business assistance programs; and (2) growing small businesses that may exceed the current size standards in the near future and that will retain small business status from the higher size standard.

Nearly 72 percent of Federal contracting dollars spent in Sector 44–45 during fiscal years 2006–2008 was accounted for by six of the 48 industries for which size standards have been proposed to increase. If NAICS codes in Sector 44–45 could be used for Federal contracting, SBA estimates that additional firms gaining small business status in those six industries under the proposed size standards could potentially obtain Federal contracts totaling up to between $80 million and $100 million per year. This represents nearly 2.0 percent of the $4.7 billion in average Federal contracts awarded to the Retail Trade Sector during fiscal years 2006–2008. The added competition for many of these procurements also would likely result in a lower price to the Government for procurements reserved for small businesses, but SBA is not able to quantify this benefit. However, as stated above, NAICS codes in this Sector may not be used for Federal government procurement. SBA anticipates that the contracting amounts identified in this Sector will be redistributed in the future to contracts identified by NAICS codes in Sector 31–33, Manufacturing.

Under SBA's 7(a) Guaranteed Loan Program and Certified Development Company (504) Program, SBA estimates that approximately 75 additional loans totaling between $35 million and $40 million in new Federal loan guarantees could be made to these newly defined small businesses. Because of the size of the loan guarantees, however, most loans are made to small businesses well below the size standard. Further, under the Recovery Act, effective February 17, 2009, SBA temporarily raised guarantees on its SBA's 7(a) loan program and also temporarily eliminated fees for borrowers on SBA 7(a) loans and for both borrowers and lenders on 504 Certified Development Company loans, through calendar year 2009, or until the funds are exhausted. The fee elimination is retroactive to February 17, 2009, the day the Recovery Act was signed. Furthermore, SBA is developing a mechanism for refunding fees paid on loans since then. In addition, since SBA has applied its CDC alternative size standard to its 7(a) Business Loan Program, more capital is available to small businesses. Thus, increasing the size standards will likely result in an increase in small business guaranteed loans to businesses in these industries, but it would be impractical to try to estimate the extent of their number and the total amount loaned.

The newly defined small businesses would also benefit from SBA's Economic Injury Disaster Loan (EIDL) Program. Since this program is contingent upon the occurrence and severity of a disaster, no meaningful estimate of benefits can be projected for future disasters.

To the extent that 8,800 additional firms may become small under the proposed size standards there may be some additional administrative costs to the Federal Government associated with SBA guaranteed lending programs. Among businesses in this group seeking SBA assistance, there could be some additional costs associated with compliance and verification of small business status. These additional costs are likely to be minimal because mechanisms are already in place to handle these additional administrative requirements.

The proposed size standards may have distributional effects among large and small businesses, but SBA cannot quantify its possible extent, because the data related to Federal procurement is a result of misclassification, because procurements for supplies should be coded in Sectors 31–33 rather than Sector 44–45. There will be more small businesses in Sector 44–45, but whether or not that will result in an increase in the number of small businesses in Sector 31–33 cannot be determined.

The proposed revisions to the existing size standards for Retail Trade industries are consistent with SBA's statutory mandate to assist small business. This regulatory action promotes the Administration's

objectives. One of SBA's goals in support of the Administration's objectives is to help individual small businesses succeed through fair and equitable access to capital and credit, Government contracts, and management and technical assistance. Reviewing and modifying size standards, when appropriate, ensures that intended beneficiaries have access to small business programs designed to assist them.

Executive Order 12988

For purposes of Executive Order 12988, SBA has determined that this rule is drafted, to the extent practicable, in accordance with the standards set forth in that Order.

Executive Order 13132

For purposes of Executive Order 13132, SBA has determined that this rule does not have any Federalism implications warranting the preparation of a federalism assessment.

Paperwork Reduction Act

For the purpose of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA has determined that this rule would not impose new reporting or record keeping requirements, other than those required of SBA.

Initial Regulatory Flexibility Analysis

Under the Regulatory Flexibility Act (RFA), this rule, if finalized, may have a significant impact on a substantial number of small entities in Sector 44–45, Retail Trade. As described above, this rule may affect small entities seeking SBA (7a) and 504 Guaranteed Loan Programs, SBA Economic Injury Disaster Loans, and other Federal small business programs.

Immediately below, SBA sets forth an initial regulatory flexibility analysis (IRFA) of this proposed rule addressing the following questions: (1) What is the need for and objective of the rule? (2) what is SBA's description and estimate of the number of small entities to which the rule will apply? (3) what are the projected reporting, record keeping, and other compliance requirements of the rule? (4) what are the relevant Federal rules which may duplicate, overlap or conflict with the rule? and (5) what alternatives will allow the Agency to accomplish its regulatory objectives while minimizing the impact on small entities?

(1) What is the Need for and Objective of the Rule?

Most of SBA's size standards for Retail Trade industries have not been reviewed since the early 1980s, and many have not been changed since the 1960s, except for periodic adjustments for inflation. Technology, productivity growth, international competition, mergers and acquisitions, and updated industry definitions may have changed the structure of many industries. Such changes can be sufficient to support a revision to size standards for some industries. Based an analysis of the latest data available to the Agency, SBA believes that the revised standards in this proposed rule more appropriately reflect the size of businesses in those industries that need Federal assistance.

(2) What is SBA's Description and Estimate of the Number of Small Entities to which the Rule will Apply?

If this rule is adopted in its present form, SBA estimates that approximately 8,800 additional firms will become small because of proposed increases in size standards in the 48 industries within Sector 44–45. That represents about 2.0 percent of approximately 415,000 total firms in those industries. This will result in an increase in the small business share of total industry receipts for that Sector from about 27.0 percent under the current size standards to about 28.0 percent under the proposed standards.

(3) What are the Projected Reporting, Record Keeping, and Other Compliance Requirements of the Rule and an Estimate of the Classes of Small Entities which Will Be Subject to the Requirements?

A new size standard does not impose any additional reporting, record keeping or compliance requirements on small entities. Revising size standards alters the access to SBA programs that assist small businesses, but does not impose a regulatory burden as they neither regulate nor control business behavior.

(4) What are the Relevant Federal Rules which May Duplicate, Overlap or Conflict with the Rule?

This proposed rule overlaps with other Federal rules that use SBA's size standards to define a small business. Under § 3(a)(2)(C) of the Small Business Act, 15 U.S.C. 632(a)(2)(c), Federal agencies must use SBA's size standards to define a small business, unless specifically authorized by statute. In 1995, SBA published in the **Federal Register** a list of statutory and regulatory size standards that identified the application of SBA's size standards as well as other size standards used by Federal agencies (60 FR 57988–57991, dated November 24, 1995). SBA is not aware of any Federal rule that would duplicate or conflict with establishing size standards.

However, the Small Business Act and SBA's regulations allow Federal agencies to develop different size standards if they believe that SBA's size standards are not appropriate for their programs, with the approval of SBA's Administrator (13 CFR 121.903). The Regulatory Flexibility Act authorizes an Agency to establish an alternative small business definition, after consultation with the Office of Advocacy of the U.S. Small Business Administration (5 U.S.C. 601(3). Thus, there may be instances where this rule conflicts with other rules.

(5) What Alternatives will Allow the Agency to Accomplish its Regulatory Objectives while Minimizing the Impact on Small Entities?

SBA is required to develop numerical size standards for identifying businesses eligible for Federal small business programs. Other than varying the size standards, no viable alternative exists to the systems of numerical size standards.

List of Subjects in 13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Reporting and recordkeeping requirements, Small businesses.

For the reasons set forth in the preamble, SBA proposes to amend part 13 CFR Part 121 as follows.

PART 121—SMALL BUSINESS SIZE REGULATIONS

1. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 637(a), 644, and 662(5); and Public Law 105–135, sec. 401 *et seq.*, 111 Stat. 2592.

2. Amend the table in § 121.201 as follows:

A. Revise the parenthetical phrase below the Sector 42 heading.

B. Revise all entries under Sector 44–45.

The revisions read as follows:

§ 121.201 What size standards has SBA identified by North American Industry Classification System codes?

* * * * *

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
*	*	*	*
Sector 42—Wholesale Trade			
(These NAICS codes shall not be used to classify Government acquisitions for supplies. They also shall not be used by Federal government contractors when subcontracting for the acquisition for supplies. The applicable manufacturing NAICS code shall be used to classify acquisitions for supplies. A Wholesale Trade or Retail Trade business concern submitting an offer or a quote on a supply acquisition is categorized as a nonmanufacturer and deemed small if it has 500 or fewer employees and meets the requirements of 13 CFR 121.406.)			
*	*	*	*
Sector 44–45—Retail Trade			
(These NAICS codes shall not be used to classify Government acquisitions for supplies. They also shall not be used by Federal government contractors when subcontracting for the acquisition for supplies. The applicable manufacturing NAICS code shall be used to classify acquisitions for supplies. A Wholesale Trade or Retail Trade business concern submitting an offer or a quote on a supply acquisition is categorized as a nonmanufacturer and deemed small if it has 500 or fewer employees and meets the requirements of 13 CFR 121.406.)			
Subsector 441—Motor Vehicle and Parts Dealers			
441110	New Car Dealers	$30.0	
441120	Used Car Dealers	23.0	
441210	Recreational Vehicle Dealers	30.0	
441221	Motorcycle, ATV, and Personal Watercraft Dealers	14.0	
441222	Boat Dealers	14.0	
441229	All Other Motor Vehicle Dealers	7.0	
Except,	Aircraft Dealers, Retail	25.5	
441310	Automotive Parts and Accessories Stores	14.0	
441320	Tire Dealers	14.0	
Subsector 442—Furniture and Home Furnishings Stores			
442110	Furniture Stores	19.0	
442210	Floor Covering Stores	7.0	
442291	Window Treatment Stores	7.0	
442299	All Other Home Furnishings Stores	19.0	
Subsector 443—Electronics and Appliance Stores			
443111	Household Appliance Stores	10.0	
443112	Radio, Television and Other Electronics Stores	25.5	
443120	Computer and Software Stores	25.5	
443130	Camera and Photographic Supplies Stores	19.0	
Subsector 444—Building Material and Garden Equipment and Supplies Dealers			
444110	Home Centers	35.5	
444120	Paint and Wallpaper Stores	25.5	
444130	Hardware Stores	7.0	
444190	Other Building Material Dealers	19.0	
444210	Outdoor Power Equipment Stores	7.0	
444220	Nursery and Garden Centers	10.0	
Subsector 445—Food and Beverage Stores			
445110	Supermarkets and Other Grocery (except Convenience) Stores	30.0	
445120	Convenience Stores	27.0	
445210	Meat Markets	7.0	
445220	Fish and Seafood Markets	7.0	
445230	Fruit and Vegetable Markets	7.0	
445291	Baked Goods Stores	7.0	
445292	Confectionery and Nut Stores	7.0	
445299	All Other Specialty Food Stores	7.0	
445310	Beer, Wine and Liquor Stores	7.0	
Subsector 446—Health and Personal Care Stores			
446110	Pharmacies and Drug Stores	25.5	
446120	Cosmetics, Beauty Supplies and Perfume Stores	25.5	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
446130	Optical Goods Stores	19.0	
446191	Food (Health) Supplement Stores	14.0	
446199	All Other Health and Personal Care Stores	7.0	
	Subsector 447—Gasoline Stations		
447110	Gasoline Stations with Convenience Stores	27.0	
447190	Other Gasoline Stations	14.0	
	Subsector 448—Clothing and Clothing Accessories Stores		
448110	Men's Clothing Stores	10.0	
448120	Women's Clothing Stores	25.5	
448130	Children's and Infants' Clothing Stores	30.0	
448140	Family Clothing Stores	35.5	
448150	Clothing Accessories Stores	14.0	
448190	Other Clothing Stores	19.0	
448210	Shoe Stores	25.5	
448310	Jewelry Stores	14.0	
448320	Luggage and Leather Goods Stores	25.5	
	Subsector 451—Sporting Good, Hobby, Book and Music Stores		
451110	Sporting Goods Stores	14.0	
451120	Hobby, Toy and Game Stores	25.5	
451130	Sewing, Needlework and Piece Goods Stores	25.5	
451140	Musical Instrument and Supplies Stores	10.0	
451211	Book Stores	25.5	
451212	News Dealers and Newsstands	7.0	
451220	Prerecorded Tape, Compact Disc and Record Stores	30.0	
	Subsector 452—General Merchandise Stores		
452111	Department Stores (except Discount Department Stores)	30.0	
452112	Discount Department Stores	27.0	
452910	Warehouse Clubs and Superstores	27.0	
452990	All Other General Merchandise Stores	30.0	
	Subsector 453—Miscellaneous Store Retailers		
453110	Florists	7.0	
453210	Office Supplies and Stationery Stores	30.0	
453220	Gift, Novelty and Souvenir Stores	7.0	
453310	Used Merchandise Stores	7.0	
453910	Pet and Pet Supplies Stores	19.0	
453920	Art Dealers	7.0	
453930	Manufactured (Mobile) Home Dealers	14.0	
453991	Tobacco Stores	7.0	
453998	All Other Miscellaneous Store Retailers (except Tobacco Stores)	7.0	
	Subsector 454—Nonstore Retailers		
454111	Electronic Shopping	30.0	
454112	Electronic Auctions	35.5	
454113	Mail-Order Houses	35.5	
454210	Vending Machine Operators	10.0	
454311	Heating Oil Dealers	12.5	
454312	Liquefied Petroleum Gas (Bottled Gas) Dealers	25.5	
454319	Other Fuel Dealers	7.0	
454390	Other Direct Selling Establishments	7.0	

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Dated: October 9, 2009.

Karen G. Mills,

Administrator.

[FR Doc. E9–25193 Filed 10–20–09; 8:45 am]

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SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

Small Business Size Standards: Size Standards Methodology

AGENCY: U.S. Small Business Administration.

ACTION: Notice of Availability of White Paper on Size Standards Methodology.

SUMMARY: The U.S. Small Business Administration (SBA) is advising the public that it is making available a White Paper putting forth and explaining how it establishes, reviews and modifies (when appropriate) small business size standards. The document, entitled ''Size Standards Methodology,'' is available on SBA's Web site where any interested party can review and/or download it. Elsewhere in this issue of the **Federal Register** SBA has published three proposed rules that would, if adopted, modify a number of size standards in three North American Industry Classification System (NAICS) Sectors, namely: Sector 44–45, Retail Trade; Sector 72, Accommodation and Food Services; and Sector 81, Other Services. SBA has applied ''Size Standards Methodology'' to those three proposed rules and will apply it to future regulatory actions that relate to establishing, reviewing and modifying size standards. The Agency welcomes comments on ''Size Standards Methodology'' and on the three proposed rules elsewhere in this issue of the **Federal Register**. ''Size Standards Methodology,'' is available electronically from the SBA's Web site at: *http://www.sba.gov/size.*

ADDRESSES: The size standards methodology white paper is available electronically on SBA's Web site at *http://www.sba.gov/size.* You may submit comments on ''Size Standards Methodology,'' identified by Docket number SBA–2009–0008 by one of the following methods: (1) *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments; or (2) *Mail/Hand Delivery/Courier:* U.S. Small Business Administration, Khem R. Sharma, Chief, Size Standards Division, 409 Third Street, SW., Mail Code 6530, Washington, DC 20416.

SBA will post all comments on *www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov*, please submit the information to Khem R. Sharma, Chief, Office of Size Standards, 409 Third Street, SW., Mail Code 6530, Washington, DC 20416, or send an e-mail to *sizestandards@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination of whether it will publish the information or not.

FOR FURTHER INFORMATION CONTACT: Carl J. Jordan, Program Analyst, Size Standards Division, (202) 205–6618 or *sizestandards@sba.gov.*

SUPPLEMENTARY INFORMATION: To determine eligibility for Federal small business assistance programs, SBA establishes small business definitions (referred to as size standards) for private sector industries in the United States. SBA's existing size standards use two primary measures of business size—receipts and number of employees. Financial assets, electric output, and refining capacity are used as size measures for a few specialized industries. In addition, SBA's Small Business Investment Company (SBIC) and the Certified Development Company (CDC) Programs determine small business eligibility using either the industry based size standards or net worth and net income size standards. Currently, SBA's size standards consist of 45 different size levels, covering 1,141 NAICS industries and 17 sub-industry activities. Of these size levels, 32 are based on average annual receipts, eight are based on number of employees, and five are based on other measures. In addition, SBA has established 11 other size standards for its financial and procurement programs.

Over the years, SBA has received comments that its size standards have not kept up with changes in the economy and, in particular, that they do not reflect the changes in the Federal contracting marketplace. Therefore, SBA has undertaken a complete review of all small business size standards. The last overall review of size standards occurred during the late 1970s to early 1980s. Since then, most reviews of size standards have been limited to in-depth analyses of specific industries in response to requests from the public and Federal agencies. SBA also makes periodic inflation adjustments to its monetary based size standards. The latest inflation adjustment to size standards was published in the **Federal Register** on July 18, 2008 (73 FR 41237).

SBA has, in the past, included its methodology for reviewing size standards in its proposed and final rules that related to the industry or industries under examination. In the course of its comprehensive review of all small business size standards SBA has now developed and formalized its small business size standards processes. ''Size Standards Methodology'' describes how SBA establishes, evaluates and adjusts its small business size standards pursuant to the Small Business Act (Act) and related legislative guidelines. Under the Act (Pub. L. 85–236, as amended), the SBA Administrator (Administrator) has authority to establish small business size standards for Federal government programs. Congress left to administrative discretion precisely how the Administrator should establish small business size standards or what they should be. ''Size Standards Methodology'' provides a brief review of the legal authority, early legislative history and regulatory history of small business size standards, a detailed description of the size standards methodology, and concludes with a discussion of numerous policy issues regarding the objectives and direction of size standards. An appendix at the end of the document summarizes the detailed analytical steps involved in the evaluation of size standard for an industry.

In establishing size standards, the Act and its legislative history highlight two considerations. First, size standards should vary to account for differences among industries. Second, the policies of the Agency should assist small businesses as a means of encouraging and strengthening their competitiveness in the economy. These two considerations form the basis for the SBA current methodology for establishing small business size standards.

SBA examines the structural characteristics of an industry as a way to assess industry differences and the overall degree of competitiveness of an industry and of firms within the industry. ''Size Standards Methodology'' describes more fully how SBA examines industry structure and analyzes five primary factors—average firm size, degree of competition within an industry, start up costs and entry barriers, distribution of firms by size, and small business share in Federal contracts. SBA also considers other secondary factors as they relate to the industries and the interests of small businesses, including technological

change, competition among industries, industry growth trends, and impacts on SBA programs.

SBA conducts a statistical analysis of data on the primary factors, and secondary factors as appropriate, to establish a size standard for a specific industry. As a starting point, SBA presumes $7.0 million as an appropriate size standard for the services, retail trade, construction, and other industries with receipts based size standards; 500 employees for the manufacturing, mining and other industries with employee based size standards; and 100 employees for the wholesale trade industries. These three levels, referred to as ''anchor size standards,'' are not minimum size standards, but rather benchmarks or starting points. To the extent an industry displays ''differing industry characteristics,'' a size standard higher, or in some cases lower, than an anchor size standard is supportable. ''Size Standards Methodology'' includes an extensive discussion of the statistical analyses involved in size standards determination.

SBA welcomes comments from the public on a number of issues. SBA is aware that different choices among size standards can involve complex tradeoffs among relevant variables; SBA invites comments on how to identify and weigh those variables. Suggestions are invited on alternative methodologies for determining small businesses; on how these size standards affect competition in general and within the specific industry; on alternative or additional factors that SBA should consider; on whether SBA's approach to small business size standards makes sense in the current economic environment; on whether SBA's using anchor size standards is appropriate in the current economy; on whether there are gaps in SBA's methodology because of the lack of comprehensive data; and on alternative datasets SBA should consider for a specific sector.

The concluding section of ''Size Standards Methodology'' raises a number of policy questions that SBA has to address in developing a robust methodology for establishing, evaluating and revising its small business size standards. Examples include how high of a size standard is too high? Should there be a single basis for all size standards (*i.e.*, employees or annual receipts)? Should there be a fixed number of ''bands'' of size standards or separate standard for each industry? ''Size Standards Methodology'' includes several other issues, including some that tend to be on-going questions.

SBA encourages the public to review ''Size Standards Methodology'' and to comment on it either in whole or in part.

Dated: October 9, 2009.

Karen G. Mills,

Administrator.

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SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN 3245–AF70

Small Business Size Standards: Other Services Industries

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA) proposes to increase the small business size standards for 18 industries in North American Industry Classification System (NAICS) Sector 81, Other Services, and retain the current standards for the remaining 30 industries in the Sector. As part of its ongoing initiative to review all size standards, SBA has evaluated each industry in Sector 81 to determine whether the existing size standards should be retained or revised. This proposed rule is one of a series of proposals that will examine industries grouped by an NAICS Sector. As part of this series of proposed rules SBA is publishing concurrently in this issue of the **Federal Register** a proposed rule to modify small business size standards in Sector 44–45, Retail Trade and, in Sector 72, Accommodation and Food Services. SBA has established its ''Size Standards Methodology'' and published elsewhere in this issue of the **Federal Register** a notice of its availability on SBA's Web site at *http://www.sba.gov/size.* SBA has applied ''Size Standards Methodology'' to this proposed rule.

DATES: SBA must receive comments to this proposed rule on or before December 21, 2009.

ADDRESSES: You may submit comments, identified by RIN 3245–AF70 by one of the following methods: (1) Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments; or (2) Mail/Hand Delivery/Courier: Khem R. Sharma, Chief, Size Standards Division, 409 Third Street, SW., Mail Code 6530, Washington, DC 20416.

SBA will post all comments on *www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* please submit the information to U.S. Small Business Administration, Khem R. Sharma, Chief, Size Standards Division, 409 Third Street, SW., Mail Code 6530, Washington, DC 20416, or send an e-mail to *sizestandards@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination of whether it will publish the information or not.

FOR FURTHER INFORMATION CONTACT: Carl J. Jordan, Program Analyst, Size Standards Division, (202) 205–6618 or *sizestandards@sba.gov.*

SUPPLEMENTARY INFORMATION: To determine eligibility for Federal small business assistance programs, SBA establishes small business definitions (referred to as size standards) for private sector industries in the U.S. SBA's existing size standards use two primary measures of business size—receipts and number of employees. Financial assets, electric output, and refining capacity are used as size measures for a few specialized industries. In addition, SBA's Small Business Investment Company (SBIC) and the Certified Development Company (CDC) Programs determine small business eligibility using either the industry based size standards or net worth and net income size standards. Currently, SBA's size standards consist of 45 different size levels, covering 1,141 NAICS industries and 17 sub-industry activities. Of these size levels, 32 are based on average annual receipts, eight are based on number of employees, and five are based on other measures. In addition, SBA has established 11 other size standards for its financial and procurement programs.

Over the years, SBA has received comments that its size standards have not kept up with changes in the economy and, in particular, that they do not reflect the changes in the Federal contracting marketplace. The last overall review of size standards occurred during the late 1970s to early 1980s. Since then, most reviews of size standards have been limited to in-depth analyses of specific industries in response to requests from the public and Federal agencies. SBA also makes periodic inflation adjustments to its monetary based size standards. The latest inflation adjustment to size standards was published in the **Federal Register** on July 18, 2008 (73 FR 41237).

The evaluation of the size standards in the Other Services is also necessary to account for changes in the industry classification. The development of NAICS in 1997 included significant changes in the definition of industries compared to the earlier Standard Industrial Classification (SIC) system. The NAICS update used in the 2002 Economic Census included further changes in industry definitions from the 1997 NAICS used in the 1997 Economic Census. These changes in the industry classification have led SBA to evaluate if the existing size standards for the Other Services industries are appropriate. Most of the size standards for industries in Sector 81, Other Services, have not been reviewed since the 1980s, and many have not been changed since the 1960s, except for periodic adjustments for inflation.

SBA recognizes that industrial changes over time have rendered existing size standards for some industries no longer supportable by current data. Accordingly, SBA has begun a comprehensive review of its size standards to ensure that existing size standards have supportable bases and, where necessary, to make revisions to current size standards. This proposed rule affords the public an opportunity to review and comment on the data and methodology SBA uses to evaluate and revise a size standard.

Rather than review all size standards at one time, SBA believes that a more manageable approach would be to examine a group of related industries within an NAICS Sector in phases. Except for manufacturing, an NAICS Sector generally consists of 25 to 75 industries. Once a review of size standards for industries within an NAICS Sector is completed, SBA will issue a proposed rule for those industries in which the analysis of industry data supports a change to the existing size standards. SBA expects to complete a review of all NAICS Sectors in two years.

Below is a discussion of SBA's size standards methodology, including analyses of industry structure, Federal procurement trends and other factors for industries within Sector 81, Other Services, and the impact of the proposed revisions to size standards on Federal small businesses assistance.

Size Standards Methodology

SBA has recently developed a ''Size Standards Methodology'' that it uses for developing and modifying size standards when necessary. SBA has published the document which is available at *http://www.sba.gov/size.* SBA does not apply all features of its ''Size Standards Methodology'' to all cases because not all are appropriate. However, SBA does make it available in its entirety for parties with an interest in SBA's overall approach to evaluating, establishing and modifying small business size standards. SBA always explains its analysis in the proposed and final rules that relate to size standards for specific industries. The following discussion is of SBA's size standard analysis applied to industries in Sector 81, Other Services.

SBA welcomes comments from the public on a number of issues. SBA is aware that different choices among size standards can involve complex tradeoffs among relevant variables; SBA invites comments on how to identify and weigh those variables. Suggestions are invited on alternative methodologies for determining small businesses; on how these size standards affect competition in general and within the specific industry; on alternative or additional factors that SBA should consider; on whether SBA's approach to small business size standards makes sense in the current economic environment; on whether SBA's using anchor size standards is appropriate in the current economy; on whether there are gaps in SBA's methodology because of the lack of comprehensive data; and on alternative datasets SBA should consider for a specific sector.

Congress granted SBA's Administrator discretion to establish detailed small business size standards (15 U.S.C. 632(a)(2)). Section 3(a)(3) of the Small Business Act (15 U.S.C. 632 (a)(3)) requires that size standards vary by industry to the extent necessary to reflect differing characteristics among various industries. Accordingly, the economic structure of an industry serves as the underlying basis for developing and modifying small business size standards. By examining data on economic characteristics defining the industry structure (as described below), the small business segment of an industry is identified. In addition to the industry structure, SBA also takes into consideration its program objectives and whether a size standard successfully excludes businesses that are dominant in the industry. Discussed below is SBA's analysis of the economic characteristics of each industry in Sector 81, Other Services, the impact of proposed size standards on SBA programs, and the evaluation of whether a revised size standard would exclude dominant firms in the industry from being considered as small.

Industry Analysis

For the current comprehensive size review, SBA has established three ''base'' or ''anchor'' size standards that apply to most industries—$7.0 million in average annual receipts for industries that have receipts based size standards, 500 employees for manufacturing and other industries that have employee based size standards (except for Wholesale Trade), and 100 employees for industries in the Wholesale Trade Sector. SBA established 500 employees as the anchor size standard for the manufacturing industries at SBA's inception in 1953 and shortly thereafter established a receipts based anchor size standard of $1 million in average annual receipts for the nonmanufacturing industries. The receipts based anchor size standard has been adjusted periodically for inflation. The inflation adjustment over the years has increased it to $7.0 million today. Since 1986, all industries in the Wholesale Trade Sector have had the 100-employee size standard for all non-procurement SBA programs. For procurement purposes, the size standard for a non-manufacturer is 500 employees.

These long-standing anchor size standards have gained legitimacy through practice and general public acceptance. An anchor size standard is neither a minimum nor a maximum size standard. It is a common size standard for a large number of industries that have similar economic characteristics and serves as a reference point in evaluating size standards for individual industries. SBA uses the anchor in lieu of trying to establish precise small business size standards for each industry. Otherwise, theoretically, that could require that the number of size standards be as high as the number of industries for which SBA establishes size standards. SBA presumes an anchor size standard is appropriate size standard for a particular industry unless that industry displays significantly different economic characteristics, as compared to the characteristics of industries with the anchor size standard, thereby suggesting a need for revision to an existing size standard.

When evaluating a size standard, the economic characteristics of a specific industry under review are compared to the average characteristics of industries with one of the three anchor size standards (referred to as ''anchor comparison group'') to assess industry structure and to determine whether the industry displays significant differences relative to the industries in the anchor size standard group. If the characteristics of a specific industry

under review are similar to the average characteristics of the anchor comparison group, the anchor size standard would be considered appropriate for that industry. SBA will consider adopting a size standard below the anchor size standard only when (1) all or most of the industry characteristics are significantly smaller than the average characteristics of the anchor comparison group, or (2) other industry considerations strongly suggest that the anchor size standard would be an unreasonably high size standard for the industry.

If the specific industry's characteristics are significantly higher than those of the anchor comparison group, a size standard higher than the anchor size standard may be considered appropriate. The larger the differences are between the characteristics of the industry under review and those in the anchor comparison group, the larger will be the difference between the appropriate industry size standard and the anchor size standard. To determine the level of a size standard above the anchor size standard, the characteristics of a second comparison group are analyzed. For industries with receipts based size standards, SBA has developed a second comparison group consisting of industries with the highest levels of receipts based size standards. The size standards for this group of industries range from $23 million to $35.5 million in average receipts, with the weighted average size standard for the group equaling $29 million. SBA refers to this comparison group as the ''higher level receipts based size standard group.''

The primary factors that SBA evaluates in analyzing the structural characteristics of an industry include average firm size, startup costs and entry barriers, industry competition, and distribution of firms by size (13 CFR 121.102(a) and (b)). SBA also evaluates the possible impact of both existing and revised size standards on Federal contracting assistance to small businesses as an additional primary factor. SBA generally considers these five factors as the most important ones for establishing or revising a size standard for an industry. However, SBA will also consider and evaluate other information that it believes relevant to the decision on a size standard for a particular industry (such as technological changes, growth trends, SBA financial assistance and other program factors, *etc.*). Public comments on a proposed size standard rule also provide important additional information. SBA thoroughly reviews all public comments before making a final decision on its proposed size standard. Below is a brief description of each of the five primary evaluation factors. A more detailed description of this analysis is provided in the ''SBA Size Standards Methodology'' paper which is available at *http://www.sba.gov/size.*

1. *Average firm size.* SBA computes two measures of average firm size: simple average firm size and weighted average firm size. For industries with receipts based standards (including Other Services industries), the simple average firm size is calculated as total receipts of an industry divided by the total number of firms in that industry. The weighted average firm size is computed as the sum of weighted simple average firm size in different receipts size classes where weights are the shares of total industry receipts for respective size classes. The simple average firm size weighs all firms within an industry equally regardless of their size. The weighted average overcomes that limitation by giving more weights to larger firms.

If the average firm size of an industry under review is significantly higher than the average firm size of industries in the anchor comparison industry group, this would generally support a size standard higher than the anchor size standard. Conversely, if the industry's average firm size is similar to or significantly lower than that of the anchor comparison industry group, it would be a basis to adopt the anchor size standard or, in rare cases, a standard lower than the anchor.

2. *Startup costs.* Startup costs reflect a firm's initial size in an industry. New entrants to an industry must have sufficient capital to start and maintain a viable business. If firms entering a particular industry have greater capital requirements than firms do in industries in the anchor comparison group, this will form a basis for establishing a size standard higher than the anchor standard. In lieu of data on actual startup costs, SBA uses average assets size as a proxy measure to assess the levels of capital requirements for new entrants to an industry.

SBA calculates the average assets size within a particular industry by applying the sales to total assets ratios from the Risk Management Association's Annual Statement Studies, 2006–2008 to the average receipts size of firms in that industry. An industry with a significantly higher level of average assets size than that of the anchor comparison group is likely to have higher startup costs, which would support a size standard higher than the anchor size standard. Conversely, if the industry has a significantly smaller average assets size compared to the anchor comparison group, the anchor size standard, or in rare cases one lower than the anchor, would be considered appropriate.

3. *Industry competition.* Industry competition is generally assessed by measuring the share of total industry receipts obtained by firms that are among the largest in an industry. In this proposed rule, SBA evaluates the share of industry receipts generated by the four largest firms in the industry. This is referred to as the ''four-firm concentration ratio.'' SBA then compares the four-firm concentration ratio for an industry under review to the average four-firm concentration ratio for industries in the anchor comparison group. If a significant share of economic activity within the industry is concentrated among a few relatively large companies, SBA would establish a size standard relatively higher than the anchor size standard. SBA would not consider the four-firm concentration ratio as an important factor in assessing a size standard if its value for an industry under review is less than 40 percent. For industries in which the four largest firms account for 40 percent or more of an industry's total receipts, SBA examines the average size of the four largest firms in determining a size standard.

4. *Distribution of firms by size.* SBA examines the shares of industry total receipts accounted for by firms of different receipts and employment size classes in an industry. This is an additional factor SBA evaluates in assessing competition within an industry. If the preponderance of an industry's economic activity is attributable to smaller firms, this would indicate that small businesses are competitive in that industry and supports adopting the anchor size standard. A size standard higher than the anchor size standard would be supported for an industry in which the distribution of firms indicates that most of the economic activity is concentrated among the larger firms.

Concentration among firms is a measure of inequality of distribution. To evaluate the degree of inequality of distribution within an industry, SBA computes the Gini coefficient by constructing the Lorenz curve. The Gini coefficient values vary between zero and one. If receipts are distributed perfectly equally among all the firms in an industry, the value of the Gini coefficient would equal to zero. If an industry's total receipts are attributed to a single firm, the Gini coefficient would equal to one.

SBA compares the degree of inequality of distribution for an industry under review with that for industries in the anchor comparison group. If an industry shows a higher degree of inequality of distribution (*i.e.*, higher Gini coefficient) compared to industries in the anchor comparison industry group this would, all else being equal, warrant a higher size standard than the anchor. Conversely, for industries with similar or more equal distribution (*i.e.*, similar or lower Gini coefficient values) than the anchor group, the anchor standard, or in some cases a standard lower than the anchor, would be adopted.

5. *Impact on SBA programs.* SBA examines the possible impact a size standard change may have on the level of Federal small business assistance. This assessment most often focuses on the share of Federal contracting dollars awarded to small businesses in the industry in question. In general, if the share of Federal contracting dollars awarded to small businesses in an industry that receives a significant amount of Federal contracting dollars is significantly less than the small business share of the industry's total receipts, a justification would exist for considering a size standard higher than the existing size standard. The disparity between the small business Federal market share and industry-wide share may be attributed to a variety of reasons, such as extensive administrative and compliance requirements associated with Federal contracts, the different skill set required on Federal contracts as compared to typical commercial contracting work, and the size of contracting requirements of Federal customers. These, as well as other factors, are likely to influence the type of firms within an industry that compete for Federal contracts and, hence, the firms receiving such contracts are expected to possess different characteristics than the average characteristics for all firms in that industry. By comparing the small business Federal contracting share with the industry-wide small business share, SBA includes in its size standards analysis the latest Federal contracting trends. This analysis may indicate a size standard larger than the current standard.

For this proposed rule, SBA considered Federal procurement trends in the size standards analysis only if (1) the small business share of Federal contracting dollars is at least 10 percentage points lower than the small business share of total industry receipts and (2) the amount of total Federal contracting averages $100 million or more during fiscal years 2006–2008 (the latest years for which complete Federal procurement data are available). SBA has selected these thresholds because they reflect a significant level of contracting in which a revision to a size standard may have an impact on expanding small business opportunities.

Another factor that SBA evaluates is the impact of a proposed size standard on SBA's loan programs, that is, the volume of SBA guaranteed loans within an industry and the size of firms obtaining those loans. This factor is examined to assess whether the existing or the proposed size standard for a particular industry may be restricting the level of financial assistance to small firms in that industry. If the analysis shows a reduction in financial assistance to small businesses, a higher size standard would be supportable. If small businesses have already been receiving significant amounts of financial assistance through SBA's loan programs, or if the financial assistance has been provided mainly to businesses that are much smaller in size than the existing size standard, consideration of this factor for determining the size standard may not be necessary.

Sources of Industry and Program Data

The primary source of data for SBA's industry analysis is a special tabulation of the 2002 Economic Census (see *http://www.census.gov/econ/census02/*) prepared by the U.S. Bureau of the Census (Census Bureau) for SBA. The special tabulation provides SBA with industry-specific data on the number of firms, number of establishments, number of employees, annual payroll and annual receipts of companies by the size of firm reporting the data to Census. That is, the data are by the size class of the total company; however, the data itself, within a particular size class, represents the company's total data in that industry only. The special tabulation enables SBA to evaluate average firm size, the four-firm concentration ratio, and distribution of firms by receipts and employment size.

In some cases, where Census data were not available due to disclosure prohibitions, SBA either estimated missing values using available relevant data or, examined data at a higher level of industry aggregation, such as at the 2- or 3-digit NAICS level. In some instances, SBA had to base its analysis only on those factors for which data were available or missing values could be estimated. Data sources and estimation procedures SBA uses in its size standards analysis are documented in detail in the ''SBA Size Standards Methodology'' paper, which is available at *http://www.sba.gov/size.*

Sales to total assets ratios used to calculate average assets size are from the Risk Management Association's Annual Statement Studies, 2006–2008.

To evaluate Federal contracting trends, SBA examined Federal contract award data for fiscal years 2006–2008 from the U.S. General Service Administration's Federal Procurement Data System—Next Generation (FPDS–NG). SBA's internal data on its guaranteed loan programs for fiscal years 2006–2008 were analyzed to assess the impact on financial assistance to small businesses.

Dominant in Field of Operation

Section 3(a) of the Small Business Act (15 U.S.C. 632(c)) defines a small business concern as one that is (1) independently owned and operated, (2) not dominant in its field of operation, and (3) within a specific small business definition or size standard established by the SBA Administrator. SBA considers as part of its evaluation of a size standard whether a business concern at a proposed size standard would be considered dominant in its field of operation. For this, SBA generally examines the industry's market share of firms at the proposed standard or other factors that may indicate whether a firm can exercise a major controlling influence on a national basis in which significant numbers of business concerns are engaged. If SBA's analysis indicates that a proposed size standard would include a dominant firm, a lower size standard would be considered to exclude the dominant firm from being defined as small.

Selection of Size Standards

To simplify size standards, for the ongoing comprehensive size standards review, SBA has proposed to select a size standard for an industry from a limited number of receipts based size standard levels. For many years, SBA has been concerned about the complexity of determining small business status caused by a large number of varying receipts based size standards (see 69 FR 13130, March 4, 2004, and 57 FR 62515, December 31, 1992). Currently, there are 32 different levels of receipts based size standards, ranging from $0.75 million to $35.5 million, with many of those levels applying to one or just a few industries only. SBA believes that such a large number of variations with small variations are both unnecessary and difficult to justify analytically. Simplifying the administration of SBA's

size standards to a fewer number of size standard levels will produce more common size standards for businesses operating in multiple related industries and greater consistency in the size standards among industries that are similar in their economic characteristics.

This proposed rule, therefore, applies one of eight receipts based size standards to each industry in Sector 81, Other Services. These eight ''fixed'' size standard levels are $5 million, $7 million, $10 million, $14 million, $19 million, $25.5 million, $30.0 million and $35.5 million. These eight receipts based size standard levels are established by taking into consideration the minimum, maximum, and the more commonly used receipts based size standards. Currently, the more commonly used receipts based size standards cluster around the following six levels –$2.5 million to $4.5 million, $7 million, $9.0 million to $10 million, $12.5 million to $14.0 million, $25.0 million to $25.5 million, and $33.5 million to $35.5 million. SBA has selected $7 million as one of eight fixed levels of receipts based size standards because this is also an anchor standard for receipts based standards. A lower or minimum receipts based size level is established at $5 million. Excluding monetary standards for agriculture and those based on net commissions (such as real estate brokers and travel agents), $5 million is in the close neighborhood of the current minimum receipts based standard of $4.5 million. Among the higher levels size clusters, $10 million, $14 million, $25.5 million, and $35.5 million are selected as other four levels of the fixed size standards. Because of a large gap between two of the size standard intervals, SBA has established intermediate levels of $19 million between $14 million and $25.5 million, and $30 million between $25.5 million and $35.5 million. These two intermediate size levels reflect roughly similar proportional differences between the two successive size standard levels.

In a further effort to simplify size standards, SBA may propose a common size standard for certain closely related group of industries. Although the size standard analysis may support a specific size standard level for each industry, SBA believes that establishing different size standards for closely related industries may not be appropriate. For example, in cases where many of the same businesses operate in the same two industries, establishing the common size standard would better reflect the industry marketplace than establishing separate size standards for each of those industries. This situation has led SBA to establish a common size standard for the information technology (IT) services industries (NAICS 541511, NAICS 541112, NAICS 541513 and NAICS 541519), even though the industry data might support a distinct size standard for each industry. Businesses engaged in IT related services typically perform activities in two or more other related industries. Consequently, SBA has continued to use a common size standard for Computer and Office Machine Repair Maintenance industry in the Other Services Sector (NAICS 811211) and Computer Systems Design and Related Services sector (NAICS 541511–541519). Whenever SBA proposes a common size standard for closely related industries it will provide a justification for that in the proposed rule.

Evaluation of Industry Structure

SBA has evaluated the structure of each industry in the Other Services Sector to assess the appropriateness of the current size standards. As described above, SBA compared data on the economic characteristics of each industry in that Sector to the average characteristics of industries in two comparison groups. The first comparison group is comprised of all industries with $7.0 million size standards—referred to as the ''receipts based anchor comparison group.'' Because the goal of SBA's size review is to assess whether a specific industry's size standard should be at or different from the anchor size standard, this is the most logical set of industries to group together for the industry analysis. In addition, this group includes a sufficient number of firms to provide a meaningful assessment and comparison of industry characteristics.

If the characteristics of an industry under review are similar to the average characteristics of industries in the anchor comparison group, the anchor size standard would be considered an appropriate standard for that industry. If an individual industry's structure is significantly different from that of the anchor group, a size standard lower or higher than the anchor size standard would be selected. The level of the new size standard is determined based on the difference between the characteristics of the anchor comparison group and a second industry comparison group. As described above, the second comparison group for receipts based standards consists of industries with the highest receipts based size standards, ranging from $23 million to $35.5 million, with the average size standard for the group equaling $29 million. SBA refers to this group of industries as the ''higher level receipts based size standard comparison group.'' Differences in industry structure between an industry under review and the industries in the two comparison groups are determined by comparing data on each of the industry factors, including average firm size, average assets size, four-firm concentration ratio, and the Gini coefficient of distribution of firms by size. Table 1 shows two measures of the average firm size (simple and weighted), average assets size, four-firm concentration ratio, average receipts of the four largest firms, and the Gini coefficient for both anchor level and higher level comparison groups for receipts based size standards.

TABLE 1—AVERAGE CHARACTERISTICS OF RECEIPTS BASED COMPARISON GROUPS

Receipts based comparison group	Avg. firm size ($ million)		Avg. assets size ($ million)	Avg. four-firm concentration ratio (%)	Avg. receipts of four largest firms ($ million) [a]	Gini coefficient
	Simple Average	Weighted Average				
Anchor Level	1.19	17.64	0.71	18.7	189.9	0.599
Higher Level	4.77	52.27	2.05	22.3	639.4	0.725

[a] To be used for industries with a four-firm concentration ratio of 40% or greater.

Derivation of Size Standards Based on Industry Factors

For each of the industry factors shown in Table 1, SBA derives a separate size standard based on the amount of differences between their values for an industry under review and those for the two comparison groups. An estimated size standard that is supported by each industry factor is derived by comparing its value for a specific industry under review to the corresponding value for the two comparison groups. If the industry value for a particular factor is near that for the anchor comparison group, the $7.0 million anchor size standard would be considered appropriate for that factor.

If an industry's value for a factor is significantly above or below the anchor comparison group value, a size standard above or below the $7.0 million anchor size would be warranted. The level of the new size standard in these cases is derived based on the proportional difference between the industry value and the values for the two comparison groups.

For example, if an industry's simple average receipts size equals $3.0 million, SBA's analysis would support a size standard of $19 million. The $3.0 million level is 50.6 percent between the average firm size of $1.19 million for the anchor comparison group and $4.77 million for the higher level comparison group (($3.00 million − $1.19 million) ÷ ($4.77 million − $1.19 million) = 0.506 or 50.6%). This proportional difference is applied to the difference between the $7.0 million anchor size standard and average size standard of $29 million for the higher level size standard group and then added to $7.0 million to estimate a size standard of $18.12 million ([{$29.0 million − $7.0 million} * 0.506] + $7.0 million = $18.12 million). The final step rounds the estimated size standard of $18.12 million to the nearest fixed size standard level, in this case to $19 million.

SBA applies the above method of calculation to derive a size standard for each industry factor. Detailed formulas involved in these calculations are presented in ''SBA Size Standards Methodology'' which is available at *http://www.sba.gov/size.* Table 2 shows ranges of values for each industry factor and the levels of size standards supported by those values.

TABLE 2—VALUES OF INDUSTRY FACTORS AND SUPPORTED SIZE STANDARDS

If simple avg. receipts size ($ million)	*Or if* weighted avg. receipts size ($ million)	Or if avg. assets size ($ million)	*Or if* avg. receipts of largest four firms ($ million)	*Or if* Gini coefficient	Then size standard is ($ million)
<1.03	<16.07	<0.65	<169.4	<0.593	5.0
1.03 to1.43	16.07 to 20.00	0.65 to 0.80	169.4 to 220.5	0.593 to 0.608	7.0
1.44 to 2.00	20.01 to 25.51	0.81 to 1.02	220.6 to 292.0	0.609 to 0.628	10.0
2.01 to 2.74	25.52 to 32.59	1.03 to 1.29	292.1 to 384.0	0.629 to 0.653	14.0
2.75 to 3.67	32.60 to 41.65	1.30 to 1.64	384.1 to 501.5	0.654 to 0.686	19.0
3.68 to 4.57	41.66 to 50.30	1.65 to 1.97	501.6 to 613.8	0.687 to 0.718	25.5
4.58 to 5.38	50.31 to 58.17	1.98 to 2.28	613.9 to 716.1	0.719 to 0.746	30.0
>5.38	>58.17	>2.28	>716.1	>0.746	35.5

Table 3 shows the results of analyses of industry data and latest Federal contracting trends for each industry in Sector 81, Other Services. Each NAICS industry row in columns 2, 3, 4, 6, 7, and 8 shows two numbers. The upper number is the value for the industry factor shown on the top of the column, while the lower number is the size standard supported by that factor. For the four-firm concentration ratio, a size standard is estimated based on the average receipts of the top four firms if its value is 40 percent or more. If the four-firm concentration ratio for an industry is less than 40 percent, no size standard is estimated for that factor and column 5 is left blank. The value for Federal contracting factor in column 8 is shown only for industries that averaged $100 million or more annually in Federal contracting dollars during fiscal years 2006–2008. A size standard for that factor is derived only if the small business share of total Federal contracting dollars is 10 percentage points less than the small business share of industry's total receipts. Otherwise column 8 is also left blank. Column 9 shows the proposed or revised size standard for each industry in the Other Services Sector, calculated as the average of size standards supported by each industry factor and rounded to the nearest fixed size level. Analytical details involved in the averaging procedure are described in the SBA ''Size Standards Methodology'' paper which is available at *http://www.sba.gov/size.* For comparison, the current size standards for industries in Sector 81 are also shown in column 10 of Table 3.

TABLE 3—SIZE STANDARDS SUPPORTED BY EACH INDUSTRY FACTOR

[In millions of dollars]

(1) NAICS	(2) Simple average firm size	(3) Weighted average firm size	(4) Average assets size	(5) Four-firm ratio (%)	(6) Four-firm average size	(7) Gini coefficient	(8) Federal contract factor (%)	(9) Revised size standard	(10) Current size standard
811111	$0.4	$1.3	$0.1	1.9	$150.8	0.154	.....	$5.0	$7.0
General Automotive Repair	$5.0	$5.0	$5.0	.....	.....	$5.0	.....	.....	.....
811112	$0.4	$1.4	$0.1	4.6	$14.3	0.142	.....	$5.0	$7.0
Automotive Exhaust System Repair	$5.0	$5.0	$5.0	.....	.....	$5.0	.....	.....	.....
811113	$0.4	$1.0				0.066		$5.0	$7.0
Automotive Transmission Repair	$5.0	$5.0				$5.0			
811118	$0.4	$2.0	$0.1	5.8	$39.5	0.210	−86.6	$7.0	$7.0

TABLE 3—SIZE STANDARDS SUPPORTED BY EACH INDUSTRY FACTOR—Continued

[In millions of dollars]

(1) NAICS	(2) Simple average firm size	(3) Weighted average firm size	(4) Average assets size	(5) Four-firm ratio (%)	(6) Four-firm average size	(7) Gini coefficient	(8) Federal contract factor (%)	(9) Revised size standard	(10) Current size standard
Other Automotive Mechanical and Electrical Repair and Maintenance	$5.0	$5.0	$5.0			$5.0	$14.0		
811121	$0.7	$2.3	$0.2	2.5	$142.2	0.252		$5.0	$7.0
Automotive Body, Paint, and Interior Repair and Maintenance	$5.0	$5.0	$5.0			$5.0			
811122	$0.8	$51.3	$0.3	27.6	$260.8	0.533		$10.0	$7.0
Automotive Glass Replacement Shops	$5.0	$30.0	$5.0			$5.0			
811191	$0.8	$13.2		17.3	$169.5	0.473		$5.0	$7.0
Automotive Oil Change and Lubrication Shops	$5.0	$5.0				$5.0			
811192	$0.4	$2.0	$0.5	6.1	$78.2	0.262		$5.0	$7.0
Car Washes	$5.0	$5.0	$5.0			$5.0			
811198	$0.7	$11.8	$0.2	24.0	$95.6	0.535	−18.5	$7.0	$7.0
All Other Automotive Repair and Maintenance	$5.0	$5.0	$5.0			$5.0	$10.0		
811211	$0.4	$6.9		27.4	$101.7	0.482		$5.0	$7.0
Consumer Electronics Repair and Maintenance	$5.0	$5.0				$5.0			
811212	$1.2	$18.1	$0.4	22.4	$356.8	0.678	−25	$14.0	$25.0
Computer and Office Machine Repair and Maintenance	$7.0	$7.0	$5.0			$19.0	$30.0		
811213	$1.3	$11.5				0.587	−38.0	$10.0	$7.0
Communication Equipment Repair and Maintenance	$7.0	$5.0		23.8	$120.5	$5.0	$14.0		
811219	$1.9	$30.6	$0.8	42.4	$540.1	0.731	−11.6	$19.0	$7.0
Other Electronic and Precision Equipment Repair and Maintenance	$10.0	$14.0	$7.0		$25.5	$30.0	$10.0		
811310	$0.8	$6.5	$0.3	4.8	$233.8	0.494	−27.4	$7.0	$7.0
Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance	$5.0	$5.0	$5.0			$5.0	10.0		
811411	$0.3	$0.6		3.7	$6.0	0.064		$5.0	$7.0
Home and Garden Equipment Repair and Maintenance	$5.0	$5.0				$5.0			
811412	$0.8	$52.4	$0.2	0.0	$0.0	0.646		$14.0	$7.0
Appliance Repair and Maintenance	$5.0	$30.0	$5.0			$14.0			
811420	$0.2	$0.7		2.1	$6.8	0.067		$5.0	$7.0
Reupholstery and Furniture Repair	$5.0	$5.0				$5.0			
811430	$0.1	$0.5		7.7	$3.6	0.044		$5.0	$7.0
Footwear and Leather Goods Repair	$5.0	$5.0				$5.0			
811490	$0.3	$1.6	$0.1	0.0	$0.0	0.263		$5.0	$7.0
Other Personal and Household Goods Repair and Maintenance	$5.0	$5.0				$5.0			
812111	$0.1	$7.7		16.2	$20.4	0.207		$5.0	$7.0
Barber Shops	$5.0	$5.0				$5.0			
812112	$0.2	$23.0	$0.1	10.4	$391.6	0.246		$5.0	$7.0
Beauty Salons	$5.0	$10.0	$5.0			$5.0			
812113	$0.1	$0.3		1.9	$4.2	0.019		$5.0	$7.0
Nail Salons	$5.0	$5.0				$5.0			
812191	$1.3	$101.0		60.2	$253.9	0.802		$19.0	$7.0
Diet and Weight Reducing Centers	$7.0	$35.5			$10.0	35.5			
812199	$0.2	$1.8		5.5	$27.5	0.175		$5.0	$7.0
Other Personal Care Services	$5.0	$5.0				$5.0			
812210	$1.0	$48.9	$0.6	19.4	$536.7	0.353		$7.0	$7.0
Funeral Homes and Funeral Services	$5.0	$25.5	$5.0			$5.0			
812220	$0.7	$54.8	$1.4	36.6	$295.8	0.668		$19.0	$7.0
Cemeteries and Crematories	$5.0	$30.0	$19.0			$19.0			

TABLE 3—SIZE STANDARDS SUPPORTED BY EACH INDUSTRY FACTOR—Continued

[In millions of dollars]

(1) NAICS	(2) Simple average firm size	(3) Weighted average firm size	(4) Average assets size	(5) Four-firm ratio (%)	(6) Four-firm average size	(7) Gini coefficient	(8) Federal contract factor (%)	(9) Revised size standard	(10) Current size standard
812310	$0.3	$36.3	$0.2	28.6	$247.6	0.427		$7.0	$7.0
Coin-Operated Laundries and Drycleaners	$5.0	$19.0	$5.0			$5.0			
812320	$0.3	$1.7	$0.1	2.6	$50.9	0.187		$5.0	$4.5
Drycleaning and Laundry Services (except Coin-Operated)	$5.0	$5.0	$5.0			$5.0			
812331	$3.9	$38.3	$1.9	31.6	$243.8	0.768		$30.0	$14.0
Linen Supply	$25.5	$19.0	$25.5			$35.5			
812332	$9.7	$157.3	$5.7	61.1	$938.1	0.864		$35.5	$14.0
Industrial Launderers	$35.5	$35.5	$35.5		$35.5	$35.5			
812910	$0.2	$2.0		6.3	$23.3	0.118		$5.0	$7.0
Pet Care (except Veterinary) Services	$5.0	$5.0				$5.0			
812921	$1.7	$103.5	$0.7	45.3	$354.3	0.725		$19.0	$7.0
Photo Finishing Laboratories (except One-Hour)	$10.0	$35.5	$7.0		$14.0	$30.0			
812922	$0.5	$74.5		34.0	$61.3	0.391		$14.0	$7.0
One-Hour Photo Finishing	$5.0	$35.5				$5.0			
812930	$2.8	$122.2	$2.7	47.4	$819.1	0.833		$35.5	$7.0
Parking Lots and Garages	$19.0	$35.5	$35.5		$35.5	$35.5			
812990	$0.4	$11.8	$0.2	19.7	$248.3	0.422		$5.0	$7.0
All Other Personal Services	$5.0	$5.0	$5.0			$5.0			
813211	$3.5	$47.6	$15.0	15.3	$1,021.8	0.795		$30.0	$7.0
Grantmaking Foundations	$19.0	$25.5	$35.5			$35.5			
813212	$3.1	$18.4	$2.3	24.0	$464.2	0.730		$25.5	$7.0
Voluntary Health Organizations	$19.0	$7.0	$35.5			$30.0			
813219	$4.7	$84.5		14.6	$432.8	0.821		$35.5	$7.0
Other Grant Making and Giving Services	$30.0	$35.5				35.5			
813311	$2.3	$189.8		46.5	$460.7	0.794		$25.5	$7.0
Human Rights Organizations	$14.0	$35.5			$19.0	35.5			
813312	$1.1	$43.6	$1.5	22.8	$249.5	0.644		$14.0	$7.0
Environment, Conservation and Wildlife Organizations	$7.0	$25.5	$19.0			14.0			
813319	$0.8	$8.2	$0.7	11.8	$109.9	0.537		$5.0	$7.0
Other Social Advocacy Organizations	$5.0	$5.0	$7.0			$5.0			
813410	$0.5	$5.7	$0.7	2.6	$96.4	0.393		$5.0	$7.0
Civic and Social Organizations	$5.0	$5.0	$7.0			$5.0			
813910	$1.0	$13.8	$0.9	3.9	$168.7	0.601		$7.0	$7.0
Business Associations	$7.0	$5.0	$10.0			$7.0			
813920	$1.6	$17.2	$1.6	6.4	$176.6	0.672		$14.0	$7.0
Professional Organizations	$10.0	$7.0	$19.0			$19.0			
813990	$0.7	$19.0	$0.8	8.3	$315.6	0.465		$7.0	$7.0
Other Similar Organizations (except Business, Professional, Labor, and Political Organizations)	$5.0	$7.0	$10.0			$5.0			

As can be seen in Table 3, the results of SBA analyses of industry and Federal contracting data would support reducing the current size standards for 20 of 48 industries in the Other Services Sector. However, SBA believes that lowering size standard for those industries would not be in the best interests of small businesses in these difficult times when the economy is in a deep recession.

Aiming to promote economic recovery and to preserve and create jobs the U.S. Congress passed and the President signed the American Recovery and Reinvestment Act of 2009 (Recovery Act). The purposes and goals of the Recovery Act are to promote economic recovery and to preserve and create jobs.

Under the Recovery Act, SBA has changed its various programs to assist small businesses, including the following: (1) Temporary reduction or elimination of fees in the 7(a) and 504 loan guarantee programs; (2) creation of a temporary 90 percent guarantee loan program; (3) creation of a temporary Secondary Market Guarantee Authority to provide a Federal guarantee for pools of first lien 504 loans that are to be sold to third-party investors; (4) new authority for refinancing community development loans under the 504 program; (5) revision of the job creation goals of the 504 program; (6) simplification of the maximum leverage limits and aggregate investment limits required of Small Business Investment Companies; (7) temporary authority to provide loans on a deferred basis to viable small business concerns that have a qualifying small business loan and are experiencing immediate financial hardship; (8) temporary increase in the surety bond maximum amount; (9)

establishment of a Secondary Market Lending Authority to make loans to systemically important broker dealers in SBA's 7(a) secondary market; and 10) application of SBA's Certified Development Company (CDC) alternative size standard to its 7(a) Business Loan Program (see 13 CFR 121.301).

SBA believes that to reduce size standards and thereby reduce eligibility for those programs, or to reduce the number of firms that can participate in financial and Federal contracting assistance programs would run counter to what it is trying to do for small businesses. Reducing size eligibility for Federal contracting opportunities would not preserve or create more jobs; rather, it would have the opposite effect. Therefore, SBA has decided not to propose to reduce the size standards for those industries. SBA has decided to retain the current size standards for those industries. Further, SBA does not anticipate that it will propose to lower size standards after the Recovery Act terminates on September 30, 2010. SBA intends for the proposed size standards, if adopted, to remain in effect unless and until it receives information or data that suggests a change is needed.

Evaluation of Federal Contracting and SBA Loan Data

Besides industry structure, SBA also evaluates Federal contracting data to assess the extent to which small businesses are successful in getting Federal contracts under the existing size standards. However, the available data on Federal contracting are limited to identifying businesses as small or other than small, with no information on exact size of businesses receiving Federal contracts in order to conduct a more precise analysis.

Given limited data, for the current comprehensive size review, SBA has decided to designate a size standard at one level higher than their current size standard for industries where the small business share of total Federal contracting dollars is between 10 and 30 percentage points lower than their shares in total industry receipts and at two levels higher than the current size standard if the difference is higher than 30 percentage points.

SBA has chosen not to designate a size standard for the Federal contracting factor alone that is higher than two levels above the current size standard because doing so would result in most cases of designating a size standard more than twice the current size standard. Given the limitations of the FPDS data, and the complex relationships among a number of variables affecting small business participation in the Federal marketplace, SBA believes that a larger adjustment to size standards based on Federal contracting activity should be based on a more detailed analysis of the impact of any subsequent revision to the current size standard. In limited situations, however, SBA may conduct a more extensive examination of Federal contracting experience to support a different size standard than indicated by this general rule to take into consideration significant and unique aspects of small business competitiveness in the Federal contract market. SBA welcomes comment on its methodology of incorporating the Federal contracting factor in the size standard analysis and suggestions for alternative methods and other relevant information on small business experience in the Federal contract market.

Five industries in Sector 81, Other Services, received an average of $100 million or more annually in Federal contracting dollars during fiscal years 2006–2008. These industries include NAICS 811118, NAICS 811198, NAICS 811213, NAICS 811219, and NAICS 811310. Those are the industries that have a Federal contracting factor in column 8 of Table 3. In each of these five industries, the small business share of Federal contracting dollars was more than 10 percentage points lower than small business share of industry's total receipts. Therefore, as shown in Table 3, a separate size standard was estimated for the Federal contracting factor for industries. In all cases, the estimated size standard for the Federal contracting market was higher than the current standard. The latest data show that Federal contracting activity is insignificant for most of the industries in Sector 81 and, for a few industries where it is significant, small businesses seem to be struggling in the Federal marketplace relative to their share in industry's total sales.

Before deciding on an industry's size standard, SBA also considers the impact of new or revised standards on SBA's loan programs. SBA examined 7(a) Loan Program data for fiscal years 2006–2008 to assess whether the existing or proposed size standards need further adjustments to ensure credit opportunities for small businesses though that program. For the Other Services industries, primarily small businesses that are much smaller than the current size standards use the 7(a) Loan Program. Based on that analysis and SBA's decision not to reduce any size standards in the proposed rule under the current economic conditions, no size standard needs an adjustment.

Other Considerations

SBA has decided not to review the size standard for NAICS 811212, the Computer and Office Machine Repair and Maintenance industry, at this time and will continue to apply the current $25 million size standard. The history of the Computer and Office Machine Repair industry explains the reasons for this decision. Under the former Standard Industrial Classification (SIC) System, SBA had established a common size standard for all industries in Sector 737, ''Computer Programming, Data Processing, and Other Computer Related Services'' (56 FR 38364, August 13, 1991 and 57 FR 27907, June 23, 1992). In 1997, the NAICS replaced the SIC System and moved most of the industries in Sector 737 industry to the Sector 54, ''Professional, Scientific, and Technical Services.'' However, the Computer Maintenance and Repair activity was moved to Sector 81 and was combined with Computer and Office Machine Repair Maintenance services to form NAICS 811212. Because Computer Maintenance and Repair was the largest component of the new industry, SBA continued to apply the size standard for computer services (64, FR 57188. October 22, 1999 and 65 FR 30836, May 15, 2000). SBA continues to believe that a common size standard should apply to all of the computer services related industries.

SBA plans to analyze the industries within the NAICS Sector 54 in the near future and will examine at that time whether to retain the current $25 million size standard for the Computer Services related industries (NAICS 541511–541519) or to propose a different size standard. SBA welcomes comments on whether it should continue to apply the same size standard for computer services to the Computer and Office Machine Repair Maintenance industry or consider a different size standard based on its industry characteristics.

SBA does not have industry data for three industries in Sector 81—Religious Organizations (NAICS 813110), Labor Unions and Similar Labor Organizations (NAICS 813930), and Political Organizations (NAICS 813940). SBA's primary source of industry data is a special tabulation of 2002 Economic Census obtained from the Census Bureau. However, the Census Bureau does not collect data on these industries as part of the Economic Census (See ''Religious, Grantmaking, Civic, Professional, and Similar Organizations, 2002'', Other Services (Except Public

Administration), Industry Series, EC02–811–03, November 2004). In the absence of relevant industry data on organizations operating in these industries, SBA is proposing to retain the $7 million current size standard. Although entities in these industries are not-for-profit concerns, a need exists for a numerical size standard for purposes of the Regulatory Flexibility Act. SBA welcomes comments on the suitability of continuing the $7 million size standard for these industries and possible sources of alternative data.

Summary of size standards changes

Based on the analyses of currently available data industry structure and Federal contracting data, SBA proposes to increase size standards for 18 of 47 industries in Sector 81, Other Services, reviewed in this proposed rule. These industries and their proposed size standards are shown in Table 4. The analyses supported retaining the existing standards for 10 industries in that Sector.

SBA's analyses supported a decrease to the current size standard for 19 industries in Other Services. However, as discussed above, SBA feels that proposing to lower small business size standards would be inconsistent with its ongoing effort to promote small business assistance under the Recovery Act. Therefore, SBA proposes to retain the current size standards for those industries. SBA intends for the proposed size standards, if adopted, to remain in effect unless and until it receives information or data that suggests a change is needed.

TABLE 4—SUMMARY OF PROPOSED SIZE STANDARD REVISIONS

NAICS	Current size standard ($million)	Revised size standard (million)
811122—Automotive Glass Replacement Shops	$7.0	$10.0
811213—Communication Equipment Repair and Maintenance	$7.0	$10.0
811219—Other Electronic and Precision Equipment Repair and Maintenance	$7.0	$19.0
811412—Appliance Repair and Maintenance	$7.0	$14.0
812191—Diet and Weight Reducing Centers	$7.0	$19.0
812220—Cemeteries and Crematories	$7.0	$19.0
812320—Dry-cleaning and Laundry Services (except Coin-Operated)	$4.5	$5.0
812331—Linen Supply	$14.0	$30.0
812332—Industrial Launderers	$14.0	$35.5
812921—Photo Finishing Laboratories (except One-Hour)	$7.0	$19.0
812922—One-Hour Photo Finishing	$7.0	$14.0
812930—Parking Lots and Garages	$7.0	$35.5
813211—Grantmaking Foundations	$7.0	$30.0
813212—Voluntary Health Organizations	$7.0	$25.5
813219—Other Grant Making and Giving Services	$7.0	$35.5
813311—Human Rights Organizations	$7.0	$25.5
813312—Environment, Conservation and Wildlife Organizations	$7.0	$14.0
813920—Professional Organizations	$7.0	$14.0

Evaluation of Dominance in Field of Operation

SBA has determined that for each industry in Sector 81, Other Services, no firm at or below the proposed size standard would be large enough to dominate its field of operation. A firm at the proposed size standard in each of these industries generates less than one percent of total industry receipts. This level of market share effectively precludes a firm at or below the proposed size standard from exerting a controlling effect on this industry.

Request for Comments

SBA invites public comments on the proposed rule, especially on the following areas.

1. In an effort to simplify size standards, for this proposed rule, SBA has proposed a set of eight fixed size levels for receipts based size standards: $5.0 million, $7.0 million, $10.0 million, $14.0 million, $19.0 million, $25.5 million, $30.0 million, and $35.5 million. SBA invites comments on whether simplification of size standards in this way is necessary and if these proposed fixed size levels are appropriate, or suggestions on alternative approaches to simplifying small business size standards.

2. For industries in Sector 81, Other Services, SBA has proposed receipts based size standards ranging from $5 million to $35.5 million. SBA seeks feedback on whether the levels of size standards it proposes seem right given the economic characteristics of each industry. SBA also seeks feedback and suggestions on alternative standards, if they would be more appropriate, including whether an employee based standard for certain industries is a more suitable measure of size, and what that employee level should be.

3. SBA's proposed standards are based on its evaluation of five primary factors—average firm size, average assets size (as proxy of startup costs and entry barriers), four-firm concentration ratio, distribution of firms by size, and the level and small business share of Federal contracting dollars. SBA welcomes comments on these and other factors that interested parties believe are important to consider for describing industry characteristics when SBA evaluates its size standards. Please provide relevant data sources, if available.

4. SBA derives its proposed standards by applying equal weights to each of the five primary factors in all industries. Should SBA continue with the equal weighting of each factor or should it give more weight to one or more factors in size standard determination of certain industries? If it is more appropriate to weigh some factors more than others, SBA welcomes suggestions on specific weights for each factor along with supporting information.

5. For some industries, SBA proposes to increase the existing size standards by a large amount, while for others the proposed increase is less. Should SBA, as a policy, limit the amount of increase or decrease to a size standard? Also should SBA, as a policy, establish certain minimum or maximum values for its size standards? SBA seeks suggestions on appropriate levels of change to size standards and on their minimum or maximum levels.

6. For analytical simplicity and efficiency, SBA has refined its size standard methodology to obtain a single value as a proposed size standard instead of a range of values as was SBA's methodology in its past size regulations. SBA welcomes any comments on this procedure and suggestions for alternative methods.

Public comments on above issues are very critical for SBA to validate its size standard methodology and move forward in a timely manner with review of size standards of other industry groups under the two-year comprehensive size review.

Compliance With Executive Orders 12866, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this proposed rule is a ''significant'' regulatory action for purposes of Executive Order 12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis. This is not a major rule, however, under the Congressional Review Act, 5 U.S.C. 800.

Regulatory Impact Analysis

1. Is there a need for the regulatory action?

SBA believes that adjustments to certain size standards in Sector 81, Other Services, are needed to better reflect the economic characteristics of small businesses in those industries. SBA's mission is to aid and assist small businesses through a variety of financial, procurement, business development, and advocacy programs. To assist effectively the intended beneficiaries of these programs, SBA must establish distinct definitions of which businesses are deemed small businesses. The Small Business Act (15 U.S.C. 632(a)) delegates to SBA's Administrator the responsibility for establishing small business definitions. The Act also requires that small business definitions vary to reflect industry differences. The supplementary information section of this proposed rule explains SBA's methodology for analyzing a size standard for a particular industry.

2. What are the potential benefits and costs of this regulatory action?

The most significant benefit to businesses obtaining small business status as a result of this rule is eligibility for Federal small business assistance programs, including SBA's financial assistance programs, economic injury disaster loans, and Federal procurement preference programs for small businesses. Federal procurement provides opportunities for small businesses under SBA's business development programs, such as 8(a), Small Disadvantaged Businesses (SDB), small businesses located in Historically Underutilized Business Zones (HUBZone), women owned small businesses, and service disabled veteran owned small businesses (SDVOSB). Other Federal agencies also may use SBA size standards for a variety of regulatory and program purposes. Through the assistance of these programs, small businesses become more knowledgeable, stable, and competitive businesses.

Of 18 industries in Sector 81 for which SBA has proposed to increase their size standards, 12 are for-profit industries and six are non-profits. In the 12 for-profit industries for which SBA has proposed to increase their size standards, about 325 additional firms are estimated to obtain small business status and become eligible for these programs. That represents 0.6 percent of total firms and 5.6 percent of total sales in those industries. In the six non-profit industries, about 1,175 additional firms, representing 4.2 percent of total firms and 16.9 percent of total sales in those industries, are estimated to qualify as small organizations (a non-profit cannot qualify as a small business). 13 CFR 121.105. In the 19 industries (including non-profits) for which SBA's analyses indicated a lower size standard is appropriate, about 1,850 firms, representing 0.6 percent of total firms and 5.1 percent of total sales in those industries, might have lost their small business status, had SBA proposed lowering their size standards. Thus, the net impact for the Sector as a whole is about 1,400 additional firms gaining and none losing small business status under the proposed rule. This will increase the small business share of total industry receipts for the Sector from 59.0 percent under the current size standards to 63.5 percent under the proposed standards.

The benefits of increasing certain size standards to a more appropriate level would accrue to three groups: (1) Businesses that benefit by gaining small business status from the higher size standard that also use small business assistance programs; (2) growing small businesses that may exceed the current size standards in the near future and that will retain small business status from the higher size standard; and (3) Federal agencies that award contracts under procurement programs that require small business status.

More than 40 percent of total Federal contracting dollars received by industries in Sector 81 (excluding NAICS 811212 and those in Subsector 813)) during fiscal years 2006–2008 was accounted for by two of the 18 industries for which size standards have been proposed to increase, namely NAICS 811213 and NAICS 811219. SBA estimates that additional firms gaining small business status in those two and other industries in Subsectors 811 and 812 under the proposed size standards could potentially obtain Federal contracts totaling up to between $25 million and $30 million per year under the small business set-aside program, the 8(a), HUBZone, and SDVOSB Programs, or unrestricted procurements. The added competition for many of these procurements also would likely result in a lower price to the Government for procurements reserved for small businesses, but SBA is not able to quantify this benefit.

Under SBA's 7(a) Guaranteed Loan Program and Certified Development Company (504) Program, SBA estimates that approximately 10 additional loans totaling between $4 million and $5 million in new Federal loan guarantees could be made to these newly defined small businesses. Because of the size of the loan guarantees, however, most loans are made to small businesses well below the size standard. Moreover, under the Recovery Act, effective February 17, 2009, SBA is temporarily raising guarantees on its SBA 7(a) loan program and also temporarily eliminating fees for borrowers on SBA 7(a) loans and for both borrowers and lenders on 504 Certified Development Company loans, through calendar year 2009, or until the funds are exhausted. The fee elimination is retroactive to February 17, 2009, the day the Recovery Act was signed. Furthermore, SBA is developing a mechanism for refunding fees paid on loans since then. In addition, since SBA has applied its CDC alternative size standard to its 7(a) Business Loan Program, more capital is available to small businesses. Thus, increasing the size standards will likely result in an increase in small business guaranteed loans to businesses in these industries, but it would be impractical to try to estimate the extent of their number and the total amount loaned.

The newly defined small businesses would also benefit from SBA's Economic Injury Disaster Loan (EIDL) Program. Since this program is contingent upon the occurrence and severity of a disaster, no meaningful estimate of benefits can be projected for future disasters.

To the extent that 325 additional firms in Subsectors 811 and 812 that become small under the proposed size standards could become active in Federal procurement programs, this may entail some additional administrative costs to the Federal Government associated with additional bidders for Federal small business procurement opportunities, additional firms seeking SBA guaranteed lending programs, additional firms eligible for enrollment in Central Contractor Registration's Dynamic Small Business Search database, and additional firms seeking certification as 8(a) or HUBZone firms or qualifying for SDB status. Among businesses in this group seeking SBA assistance, there could be some additional costs associated with compliance and verification of small business status and protests of small business status. These additional costs are likely to be minimal because mechanisms are already in place to handle these additional administrative requirements.

The costs to the Federal Government may be higher on some Federal contracts. With a greater number of businesses defined as small, Federal agencies may choose to set aside more contracts for competition among small businesses rather than using full and open competition. The movement from unrestricted to set-aside contracting is likely to result in competition among fewer bidders. In addition, higher costs may result if additional full and open contracts are awarded to HUBZone and SDB businesses because of a price evaluation preference. The additional costs associated with fewer bidders, however, are likely to be minor since, as a matter of law, procurements may be set aside for small businesses or reserved for the 8(a) or HUBZone Programs only if awards are expected to be made at fair and reasonable prices.

The proposed size standards may have distributional effects among large and small businesses. Although the actual outcome of the gains and losses among small and large businesses cannot be estimated with certainty, several likely impacts can be identified. There will likely be a transfer of some Federal contracts to small businesses from large businesses. Large businesses may have fewer Federal contract opportunities as Federal agencies decide to set aside more Federal contracts for small businesses. Also, some Federal contracts may be awarded to HUBZone or SDB concerns instead of large businesses since those two categories of small businesses may be eligible for an evaluation adjustment for contracts competed on a full and open basis. Similarly, currently defined small businesses may obtain fewer Federal contracts due to the increased competition from more businesses defined as small. This transfer may be offset by a greater number of Federal procurements set aside for all small businesses. The number of newly defined and expanding small businesses that are willing and able to sell to the Federal Government will limit the potential transfer of contracts away from large and currently defined small businesses. The potential distributional impacts of these transfers may not be estimated with any degree of precision because the data on the size of businesses receiving a Federal contract are limited to identifying small or other than small businesses, without regard to the exact size of the business.

As mentioned above, in addition to the estimated 325 businesses that may qualify as small if this proposed rule is adopted, an additional 1,175 non-profit organizations may also be designated as small organizations within the industries in Subsector 813—Religious, Grantmaking, Civic, Professional and Similar Organizations. Non-profit organizations do not qualify for SBA small business programs or for Federal contracts reserved for small business (13 CFR 121.105). However, Federal agencies pursuant to the Regulatory Flexibility Act must consider the impact of their regulations on small entities, which by definition include small businesses, small organizations, and small governmental jurisdictions (5 U.S.C. 601(b)). SBA's Office of Advocacy advises Federal agencies to use SBA's numerical size standards by NAICS industry when assessing the impact of a regulation on small organizations.

The proposed revisions to the existing size standards for the Other Services industries are consistent with SBA's statutory mandate to assist small business. This regulatory action promotes the Administration's objectives. One of SBA's goals in support of the Administration's objectives is to help individual small businesses succeed through fair and equitable access to capital and credit, Government contracts, and management and technical assistance. Reviewing and modifying size standards, when appropriate, ensures that intended beneficiaries have access to small business programs designed to assist them.

Executive Order 12988

For purposes of Executive Order 12988, SBA has determined that this rule is drafted, to the extent practicable, in accordance with the standards set forth in that Order.

Executive Order 13132

For purposes of Executive Order 13132, SBA has determined that this rule does not have any Federalism implications warranting the preparation of a federalism assessment.

Paperwork Reduction Act

For the purpose of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA has determined that this rule would not impose new reporting or recordkeeping requirements, other than those required of SBA.

Initial Regulatory Flexibility Analysis

Under the Regulatory Flexibility Act (RFA), this rule, if finalized, may have a significant impact on a substantial number of small entities in Sector 81, Other Services. As described above, this rule may affect small entities seeking Federal contracts, SBA (7a) and 504 Guaranteed Loan Programs, SBA Economic Injury Disaster Loans, and other Federal small business programs.

Immediately below, SBA sets forth an initial regulatory flexibility analysis (IRFA) of this proposed rule addressing the following questions: (1) What is the need for and objective of the rule? (2) what is SBA's description and estimate of the number of small entities to which the rule will apply? (3) what are the projected reporting, recordkeeping, and other compliance requirements of the rule? (4) what are the relevant Federal rules which may duplicate, overlap or conflict with the rule? and (5) what alternatives will allow the Agency to accomplish its regulatory objectives while minimizing the impact on small entities?

(1) What is the need for and objective of the rule?

Most of SBA's size standards for the Other Services industries have not been reviewed since the early 1980s, and many have not been changed since the 1960s, except for periodic adjustments for inflation. Technology, productivity growth, international competition, mergers and acquisitions, and updated industry definitions may have changed the structure of many industries. Such changes can be sufficient to support a revision to size standards for some industries. Based on an analysis of the latest data available to the Agency, SBA believes that the revised standards in this proposed rule more appropriately reflect the size of businesses in those industries that need Federal assistance.

(2) What is SBA's description and estimate of the number of small entities to which the rule will apply?

If this rule is adopted in its present form, SBA estimates that approximately 1,400 additional firms will become small because of proposed increases in size standards in the 18 industries within Sector 81. That represents about 1.8 percent of approximately 75,500 total firms in those industries. This will result in an increase in the small business share of total industry receipts for that Sector from 59.0 percent under the current size standards to 63.5 percent under the proposed standards.

(3) What are the projected reporting, record keeping, and other compliance requirements of the rule and an estimate of the classes of small entities which will be subject to the requirements?

A new size standard does not impose any additional reporting, recordkeeping or compliance requirements on small entities. Revising size standards alters the access to SBA programs that assist small businesses, but does not impose a regulatory burden as they neither regulate nor control business behavior.

(4) What are the relevant Federal rules which may duplicate, overlap or conflict with the rule?

This proposed rule overlaps with other Federal rules that use SBA's size standards to define a small business. Under section 3(a)(2)(C) of the Small Business Act, 15 U.S.C. 632(a)(2)(c), Federal agencies must use SBA's size standards to define a small business, unless specifically authorized by statute. In 1995, SBA published in the **Federal Register** a list of statutory and regulatory size standards that identified the application of SBA's size standards as well as other size standards used by Federal agencies (60 FR 57988–57991, dated November 24, 1995). SBA is not aware of any Federal rule that would duplicate or conflict with establishing size standards.

However, the Small Business Act and SBA's regulations allow Federal agencies to develop different size standards if they believe that SBA's size standards are not appropriate for their programs, with the approval of SBA's Administrator (13 CFR 121.903). The Regulatory Flexibility Act authorizes an Agency to establish an alternative small business definition, after consultation with the Office of Advocacy of the U.S. Small Business Administration (5 U.S.C. 601(3). Thus, there may be instances where this rule conflicts with other rules.

(5) What alternatives will allow the Agency to accomplish its regulatory objectives while minimizing the impact on small entities?

SBA is required to develop numerical size standards for identifying businesses eligible for Federal small business programs. Other than varying the size standards, no viable alternative exists to the systems of numerical size standards.

List of Subjects in 13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Reporting and recordkeeping requirements, Small businesses.

For the reasons set forth in the preamble, SBA proposes to amend 13 CFR Part 121 as follows.

PART 121—SMALL BUSINESS SIZE REGULATIONS

1. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 637(a), 644, and 662(5); and Pub. L. 105–135, sec. 401 *et seq.,* 111 Stat. 2592.

2. Amend the table in § 121.201 by revising all entries under Sector 81 to read as follows:

§ 121.201 What size standards has SBA identified by North American Industry Classification System codes?

* * * * *

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
	Sector 81—Other Services (Except Public Administration)		
Subsector 811—Repair and Maintenance			
811111	General Automotive Repair	$7.0	
811112	Automotive Exhaust System Repair	$7.0	
811113	Automotive Transmission Repair	$7.0	
811118	Other Automotive Mechanical and Electrical Repair and Maintenance	$7.0	
811121	Automotive Body, Paint and Interior Repair and Maintenance	$7.0	
811122	Automotive Glass Replacement Shops	$10.0	
811191	Automotive Oil Change and Lubrication Shops	$7.0	
811192	Car Washes	$7.0	
811198	All Other Automotive Repair and Maintenance	$7.0	
811211	Consumer Electronics Repair and Maintenance	$7.0	
811212	Computer and Office Machine Repair and Maintenance	$25.0	
811213	Communication Equipment Repair and Maintenance	$10.0	
811219	Other Electronic and Precision Equipment Repair and Maintenance	$19.0	
811310	Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance.	$7.0	
811411	Home and Garden Equipment Repair and Maintenance	$7.0	
811412	Appliance Repair and Maintenance	$14.0	
811420	Reupholstery and Furniture Repair	$7.0	
811430	Footwear and Leather Goods Repair	$7.0	
811490	Other Personal and Household Goods Repair and Maintenance	$7.0	
Subsector 812—Personal and Laundry Services			
812111	Barber Shops	$7.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
812112	Beauty Salons	$7.0	
812113	Nail Salons	$7.0	
812191	Diet and Weight Reducing Centers	$19.0	
812199	Other Personal Care Services	$7.0	
812210	Funeral Homes and Funeral Services	$7.0	
812220	Cemeteries and Crematories	$19.0	
812310	Coin-Operated Laundries and Drycleaners	$7.0	
812320	Drycleaning and Laundry Services (except Coin-Operated)	$5.0	
812331	Linen Supply	$30.0	
812332	Industrial Launderers	$35.5	
812910	Pet Care (except Veterinary) Services	$7.0	
812921	Photo Finishing Laboratories (except One-Hour)	$19.0	
812922	One-Hour Photo Finishing	$14.0	
812930	Parking Lots and Garages	$35.5	
812990	All Other Personal Services	$7.0	
Subsector 813—Religious, Grantmaking, Civic, Professional and Similar Organizations			
813110	Religious Organizations	$7.0	
813211	Grantmaking Foundations	$30.0	
813212	Voluntary Health Organizations	$25.5	
813219	Other Grantmaking and Giving Services	$35.5	
813311	Human Rights Organizations	$25.5	
813312	Environment, Conservation and Wildlife Organizations	$14.0	
813319	Other Social Advocacy Organizations	$7.0	
813410	Civic and Social Organizations	$7.0	
813910	Business Associations	$7.0	
813920	Professional Organizations	$14.0	
813930	Labor Unions and Similar Labor Organizations	$7.0	
813940	Political Organizations	$7.0	
813990	Other Similar Organizations (except Business, Professional, Labor, and Political Organizations).	$7.0	

* * * * *

Dated October 9, 2009.

Karen G. Mills,

Administrator.

[FR Doc. E9–25199 Filed 10–20–09; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230 and 240

[Release Nos. 33–9073; 34–60825; IC–28946; File No. S7–22–09]

RIN 3235–AK25

Amendments to Rules Requiring Internet Availability of Proxy Materials

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing changes to the proxy rules under the Securities Exchange Act of 1934 to improve the notice and access model for furnishing proxy materials to shareholders. Specifically, we are proposing revisions to our rules to provide additional flexibility regarding the format of the Notice of Internet Availability of Proxy Materials that is sent to shareholders. We are also providing guidance about the current requirement for the Notice to identify the matters intended to be acted on at the shareholders' meeting. In addition to the proposed changes and guidance regarding the format of the Notice, we are proposing a new rule that will permit issuers and soliciting shareholders to include explanatory materials regarding the process of receiving and reviewing proxy materials and voting. Finally, we are proposing revisions to the timeframe for delivering a Notice to shareholders when a soliciting person other than the issuer relies on the notice-only option.

DATES: Comments should be received on or before November 20, 2009.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–22–09 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–22–09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Steven G. Hearne, Special Counsel in the Office of Rulemaking, Division of Corporation Finance, at (202) 551–3430, or with respect to registered investment companies, Sanjay Lamba, Senior Counsel, in the Office of Disclosure Regulation, Division of Investment Management, at (202) 551–6784, 100 F Street, NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is proposing amendments to Rule 14a–16 [1] under the Securities Exchange Act of 1934 [2] and Rule 498 [3] under the Securities Act of 1933.[4]

I. Background

As part of a continuing review of the proxy disclosure and solicitation process, we have been exploring ways to improve the disclosures shareholders receive when they are asked to make a voting decision and the process followed when those votes are solicited. In May 2009, we voted to propose changes to our proxy rules to require issuers to include shareholder nominated directors in issuer proxy statements if certain conditions are met.[5] We also recently proposed amendments to our proxy rules to enhance the compensation and corporate governance disclosures that issuers are required to make and to address certain proxy solicitation matters.[6] We also approved changes proposed by the New York Stock Exchange (''NYSE'') to its Rule 452 that eliminated broker discretionary voting for uncontested elections of directors at shareholder meetings.[7]

One of the other ways we identified to improve the proxy solicitation process is to revise our notice and access proxy rules to further facilitate informed shareholder participation in the proxy voting process. In 2007 we amended the proxy rules by adopting a notice and access model that required all issuers and other soliciting persons to post their proxy materials on an Internet Web site and furnish notice of the materials' availability to shareholders.[8] The notice and access model was intended to establish procedures that would promote use of the Internet as a reliable and cost-efficient means of making proxy materials available to shareholders. Even though we recently adopted these requirements, we believe based on our experience that it is important to propose these limited modifications in order to advance the regulatory goals of the notice and access model.

Under the notice and access model, an issuer or other soliciting person may choose to provide proxy materials to shareholders under either of two options, the ''notice-only option'' and the ''full set delivery option.'' [9] An issuer or other soliciting person is permitted to provide proxy materials to some shareholders via the notice-only option and to other shareholders via the full set delivery option. Under both options, the issuer or other soliciting person must make its proxy materials available on an Internet Web site.

The notice-only option permits the issuer or other soliciting person to send only a Notice of Internet Availability of Proxy Materials (''Notice'') to shareholders. The Notice must include, among other things, the Internet Web site address where shareholders can access the proxy materials and a description of the means by which a shareholder can request paper or electronic copies of the materials.[10] Under this option, an issuer must send the Notice to shareholders at least 40 days prior to the shareholder meeting to which the proxy materials relate.[11] A soliciting person other than the issuer must send the Notice to shareholders by the later of 40 days prior to the meeting or 10 days after the issuer first sends its Notice or proxy materials to shareholders.[12] An issuer or other soliciting person must then provide copies of the proxy materials upon the request of shareholders receiving the Notice.[13] The full set delivery option permits an issuer or other soliciting person to send the traditional full set of proxy materials in paper to shareholders accompanied by the Notice, or to include the information required in the Notice in the proxy materials.[14]

According to Broadridge Financial Solutions, Inc. (''Broadridge''), 1,312 corporate issuers used the notice-only option for distribution to some portion of their beneficial owners under the notice and access model in the 2009 proxy season.[15] While issuers may enjoy significant cost savings using the notice-only option under the notice and access model, we are concerned by statistics indicating lower shareholder response rates to proxy solicitations when the notice-only option is used.[16] According

[1] 17 CFR 240.14a–16.

[2] 15 U.S.C. 78a *et seq.*

[3] 17 CFR 230.498.

[4] 15 U.S.C. 77a *et seq.*

[5] *See* Facilitating Shareholder Director Nominations, Release No. 33–9046 (June 10, 2009) [74 FR 29024].

[6] *See* Proxy Disclosure and Solicitation Enhancements, Release No. 33–9052 (July 10, 2009) [74 FR 35076].

[7] *See* Order Approving Proposed Rule Change, as modified by Amendment No. 4, to Amend NYSE Rule 452 and Corresponding Listed Company Manual Section 402.08 to Eliminate Broker Discretionary Voting for the Election of Directors, Except for Companies Registered under the Investment Company Act of 1940, and to Codify Two Previously Published Interpretations that Do Not Permit Broker Discretionary Voting for Material Amendments to Investment Advisory Contracts with an Investment Company, Release No. 34–60215 (July 1, 2009) [74 FR 33293].

[8] *See* Internet Availability of Proxy Material, Release No. 34–55146 (Jan. 22, 2007) [72 FR 4148] (''Internet Availability of Proxy Material Adopting Release'') and Shareholder Choice Regarding Proxy Materials, Release No. 34–56135 (July 26, 2007) [72 FR 42221]. The rules were phased-in over a two year period. Large accelerated filers, not including registered investment companies, were required to use the model with respect to proxy solicitations commencing on or after January 1, 2008. All other companies (including registered investment companies), and soliciting persons, were required to use the model for proxy solicitations commencing on or after January 1, 2009.

[9] The process of distributing proxy materials to beneficial owners differs from the process for direct delivery of the materials by an issuer to its record holders. Beneficial owners are owners whose names do not appear directly in issuers' stock registers because they hold their securities through a broker, bank, trustee, or similar intermediary. The proxy rules, specifically Exchange Act Rule 14a–13, Rule 14b–1 and Rule 14b–2 [17 CFR 240.14a–13, 240.14b–1 and 240.14b–2], impose obligations on issuers and intermediaries to ensure that beneficial owners receive proxy materials and are given the opportunity to participate in the shareholder voting process. Under the proxy rules, intermediaries are required to forward the proxy materials, other than the proxy card, along with a request for voting instructions. The request for voting instructions is prepared by the intermediary and the beneficial owner returns the voting instructions to the intermediary. The intermediary is required to vote the beneficial owners' shares in accordance with each owner's voting instructions when formally executing the proxy card. In the absence of voting instructions from the beneficial owner, the intermediary may vote the beneficial owner's shares in its own discretion under certain circumstances. *See* NYSE Rule 452.

[10] *See* Exchange Act Rule 14a–16(b) and (d) [17 CFR 240.14a–16(b) and (d)].

[11] *See* Exchange Act Rule 14a–16(a) [17 CFR 240.14a–16(a)].

[12] *See* Exchange Act Rule 14a–16(*l*) [17 CFR 240.14a–16(*l*)].

[13] *See* Exchange Act Rule 14a–16(j) [17 CFR 240.14a–16(j)].

[14] *See* Exchange Act Rule 14a–16(n) [17 CFR 240.14a–16(n)].

[15] *See* Broadridge Notice & Access, Statistical Overview of Use with Beneficial Shareholders (as of May 31, 2009) at *http://www.broadridge.com/notice-and-access/NAStatsStory.pdf* (''Broadridge Statistical Overview''). Broadridge is the largest provider of brokerage processing services with respect to beneficial owners holding through a broker or similar intermediary and has provided detailed statistical information on the use of the notice and access model. The Broadridge Statistical Overview is generally limited to comparisons between issuers that have used the notice-only option for distribution to *some portion* of their beneficial owners and issuers that *exclusively* used the full set delivery option and comparisons between the first and second years of use of the notice-only option. The data that is currently publicly available and directly comparable to the data in the May 31, 2009 Broadridge Statistical Overview does not provide a comparison to an issuer's experience in the year prior to using the notice-only option for distribution.

[16] The Commission has long had an interest in facilitating shareholder participation in corporate

Continued

to Broadridge, the percentage of ''retail'' shares [17] voted by shareholders in issuers using the notice-only option for distribution to some portion of their beneficial owners is lower than the percentage in issuers that exclusively use the full-set delivery option to provide proxy materials to their shareholders.[18] In addition, when comparing between shareholders in issuers that used both the notice-only and full set delivery options, the response rates of retail shares voted by shareholders that received notice-only was half that of shareholders that received full set delivery.[19] With regard to the effect on voting by retail account holders, rather than retail shares voted, statistics provided by Broadridge indicate even lower voting response rates for retail accounts that received notice-only instead of full-set delivery.[20] The available data do not necessarily exclude the possibility that factors other than requirements of our notice and access rules may contribute to the different voting response rates, although the available data do not identify them.

We are exploring the reasons for the difference in retail share and account voting response rates and whether our rules are creating difficulties or affecting voting rates. We note that there appears to have been some confusion among shareholders regarding the operation of the notice and access model.[21] The legend required to be put on the Notice does not appear to have provided clear guidance for some shareholders as to how those shareholders could access the proxy materials online or request a paper copy of the proxy materials and vote their shares. For example, the Commission's staff has received reports of some shareholders attempting to indicate their voting instructions by returning a marked copy of the Notice.[22] Disclosing the matters to be acted on in the Notice in the same format as the matters listed in the proxy may have resulted in some shareholders misunderstanding the purpose of the Notice. There may be other reasons why shareholder participation under the notice and access model, especially by individual shareholders, is lower, and we are soliciting comment on why the participation rates are lower and how best to advance the Commission's regulatory interest in informed shareholder participation.

We are proposing revisions to remove regulatory impediments that may be reducing shareholder response rates to proxy solicitations. The revisions are intended to permit issuers and other soliciting persons to more effectively use the notice and access model. The proposed amendments are described below. We are also soliciting comment on ways to improve the mechanics of the notice and access model and other ways to increase informed shareholder participation in the proxy solicitation process.[23] We intend to continue monitoring implementation of the notice and access rules and may propose additional revisions in order to achieve greater shareholder participation.

II. Proposed Amendments

A. Improving Clarity of the Notice

Exchange Act Rule 14a–16(d) [24] currently imposes strict requirements regarding the content of the Notice, and requires the Notice to be presented in a prescribed format.[25] The rule requires the Notice to contain a prominent legend indicating that the document is an important notice regarding the Internet availability of proxy materials for a specified shareholder meeting. Among other things, the Notice also must indicate that it presents only an overview of the more complete proxy materials available to the shareholders on the Internet and must include a statement encouraging shareholders to access and review the proxy materials at a specified Web site address. In addition, the Notice must explain how a shareholder may request a paper or e-mail copy of the proxy materials. Rule 14a–16(d)(3) further requires the Notice to contain ''[a] clear and impartial identification of each separate matter intended to be acted on and the soliciting person's recommendations regarding those matters, but no supporting statements.'' [26] The intent behind the specific Notice requirements was to inform shareholders of the availability of proxy materials and to notify them of the matters to be considered and voted on at the meeting. The specific limitations on the type of information that can be included in the Notice were included because we do not intend the Notice to become a means of persuading shareholders how to vote or to deliver marketing or other materials

governance and in fair corporate suffrage. *See, for example,* the testimony of Chairman Ganson Purcell in 1943, Securit[ies] and Exchange Commission Proxy Rules: Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 Before the House Comm. on Interstate and Foreign Commerce, 78th Cong., 1st Sess., at 17–19 (1943) and more recently Security Holder Director Nominations, Release No. 34–48626 (Oct. 14, 2003) [68 FR 60784], Shareholder Proposals Relating to the Election of Directors, Release No. 34–56161 (July 27, 2007) [72 FR 43488], and Release No. 33–9046 in note 5 above.

[17] The term ''retail,'' as used in the Broadridge Statistical Overview, does not refer to shares or accounts that are managed by an advisor and that have previously consented to the electronic delivery of their proxy materials. *See* Broadridge Statistical Overview at 1. When not referring specifically to the Broadridge statistics, this release uses the term individual shareholders to more broadly refer to non-institutional shareholders generally.

[18] According to the Broadridge Statistical Overview, when comparing the 11-month period from July 1, 2008 to May 31, 2009, response rates were 4.11% less for retail shares voted in issuers that used the notice-only option for distribution to *some portion* of their beneficial owners (27.69%) compared to issuers that *exclusively* used the full set delivery option (31.8%).

[19] According to the Broadridge Statistical Overview, for companies that used a mixed approach—using the notice-only option for some retail shareholders and the full set delivery option for the remaining shareholders—the percentage of retail shares voted by shareholders that received notice-only was 13.48% during the 11-month period from July 1, 2008 to May 31, 2009. In comparison, the percentage of retail shares voted by shareholders of the same set of issuers that received full set delivery during the same period was 28.63%.

[20] The percentage of retail accounts that responded when receiving notice-only under the mixed approach during the 11-month period from July 1, 2008 to May 31, 2009 was only 4.10%. In comparison, for companies that used a mixed approach, the percentage of retail accounts that responded after receiving full-set delivery during the same period was 21.44%. To the extent that retail account data represent individual shareholders, the data indicates a large difference in voting by individual shareholders that receive full-set delivery as opposed to those that receive notice only. It is important to note, however, that issuers (absent specific instructions from a shareholder) have the flexibility under the notice and access model to determine which shareholders will receive notice-only or full set delivery of proxy materials. As a result, when making such determinations, it is possible that consideration is given to the historical response rates of particular shareholders or certain similarly situated shareholders. Consequently, the subset of retail investors that only receive the Notice may be stratified to include those shareholders that are least likely to respond to the materials. Among the other potential reasons for the difference in these response rates may be an issuer's consideration of the number of shares held in an account (*e.g.,* all accounts holding 500 shares or more will receive a full set of proxy materials) when deciding whether to furnish notice-only or full set delivery of proxy materials.

[21] Our Office of Investor Education and Advocacy has received complaints about the notice and access model and members of our staff have heard about the experience of some issuers with the notice and access model from informal meetings with Broadridge and issuer representatives.

[22] *Id.*

[23] For example, when the amendments to NYSE Rule 452 were approved, we noted our support for the establishment of an Investor Education Sub-Committee of the NYSE Proxy Working Group to develop and encourage the NYSE and its member firms to implement an investor education effort to inform investors about the amendments to NYSE Rule 452, the proxy voting process, and the importance of voting. *See* Release No. 34–60215 in Note 7 above. Our Office of Investor Education and Advocacy is also considering ways to educate investors about these matters.

[24] 17 CFR 240.14a–16(d).

[25] 17 CFR 240.14a–16(d)(1).

[26] 17 CFR 240.14a–16(d)(3).

that may distract shareholders from the Notice.

Exchange Act Rule 14a–16(f) imposes a strict prohibition on the types of materials that may accompany the Notice when an issuer or other soliciting person elects to follow the notice-only option. Specifically, for companies other than registered investment companies, the Notice under this option must be sent separately from other types of shareholder communications and may not accompany any other document or materials, except for a pre-addressed, postage-paid reply card for requesting a copy of the proxy materials and a copy of a notice of shareholder meeting required by state law.[27] Therefore, a soliciting person may not include additional materials to explain why the shareholder is receiving only a Notice instead of the proxy materials.

In light of our serious concerns regarding shareholder confusion and the potential that our rules may be causing a reduction in shareholder voting, we propose to revise our rules to provide issuers and other soliciting persons with additional flexibility in formatting and selecting the language to be used in the Notice. Rather than requiring the soliciting person to include a detailed legend that may seem like boilerplate language to shareholders, we are proposing to require that the information appearing on the Notice address certain topics, without specifying the exact language to be used.[28] We hope the flexibility will allow issuers and other soliciting persons to develop a more effective explanation of the importance and effect of the Notice, including to provide clearer guidance for shareholders as to how to access the proxy materials online, request a paper copy of the proxy materials, and vote their shares.

In addition, we have been informed that certain issuers are interpreting Rule 14a–16(d)(3) to require them to comply with the specific Exchange Act Rule 14a–4 [29] formatting and content requirements for disclosure of matters on the proxy card when identifying in the Notice each separate matter to be acted on at the meeting.[30] Rule 14a–16(d)(3) provides for more flexibility regarding the design of the Notice. It is not necessary that the Notice directly mirror the proxy card. Rather, the rule simply requires that the Notice identify each matter that will be considered at the meeting (*e.g.,* election of directors; ratification of auditors; approval of a stock option plan, *etc.*).

Further, in order to mitigate confusion about the Notice and to allow issuers and other soliciting persons to better engage shareholders, we propose to revise our rules to permit issuers and other soliciting persons to accompany the Notice with an explanation of the notice and access model.[31] The exception provided would be limited to the process of receiving or reviewing the proxy materials and voting. Materials designed to persuade shareholders to vote in a particular manner, change the method of delivery, or explain the basis for sending only a Notice to shareholders would not be permitted under the exception.[32] With this increased flexibility, issuers could better educate shareholders about the notice and access model. While issuers would be permitted to provide their own explanation of the process of receiving and reviewing the proxy materials and the process of voting, we expect that many issuers will use standardized materials prepared for this purpose.[33]

In addition to proposing to amend our rules to reduce possible confusion about the Notice, the Office of Investor Education and Advocacy, in consultation with the Division of Corporation Finance, has been directed to develop a program designed to educate and inform shareholders, especially individual shareholders, about the notice and access model; explain how shareholders may participate through this model; and explain shareholders' rights under this model. Although the proposed amendments to our rules would permit, rather than require, issuers and other soliciting persons to include explanatory information about the Notice, the Commission strongly encourages issuers and other soliciting persons who use the notice-only option to better inform shareholders about the notice and access model. Issuers who have experienced significant cost savings, but may also have experienced a significant decrease in participation rates, may wish to consider using those cost savings in educational efforts designed to increase informed participation by shareholders.

We are also proposing technical amendments to our rules for registered investment companies. Rule 14a–16(f)(2)(iii) currently permits a registered investment company to accompany the Notice with a prospectus or report to shareholders.[34] The Commission recently adopted rule amendments that permit mutual funds [35] to satisfy their prospectus delivery obligations by sending or giving investors key information in the form of a summary prospectus.[36] Consistent with permitting mutual funds to use a summary prospectus to satisfy their delivery obligations, we propose to revise our rules to permit mutual funds to accompany the Notice with a summary prospectus.[37]

Request for Comment

- Has use of the notice and access model made proxy materials more or less accessible to shareholders? The Commission is concerned by reports that indicate there has been a drop in shareholder response rates to proxy solicitations by individual shareholders under the notice and access model, especially when the notice-only option has been used. We are proposing

[27] Registered investment companies may also include a prospectus or a report that is required to be transmitted to shareholders by Section 30(e) of the Investment Company Act (15 U.S.C. 80a–29(e)) and the rules thereunder. *See* Exchange Act Rule 14a–16(f)(2)(iii) [17 CFR 240.14a–16(f)(2)(iii)].

[28] *See* proposed Exchange Act Rule 14a–16(d), which would limit the required legend to the line ''Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting To Be Held on [insert meeting date]'' and would require the other information currently required in the legend to be included in the Notice, but not as part of a specified legend.

[29] 17 CFR 240.14a–4.

[30] *See* note 21 above.

[31] *See* proposed Exchange Act Rule 14a–16(f)(2)(iv).

[32] As we explained in the Internet Availability of Proxy Material Adopting Release, ''The Notice is intended merely to make shareholders aware that these proxy materials are available on an Internet Web site; it is not intended to serve as a stand-alone basis for making a voting decision.'' *See* note 8 above.

[33] Through informal meetings with the staff, issuer representatives, intermediaries and proxy distribution service providers have expressed interest in developing standardized educational materials to be included with the Notice.

[34] 17 CFR 240.14a–16(f)(2)(iii). Unless otherwise specified or the context otherwise requires, the term ''prospectus'' means a prospectus meeting the requirements of Section 10(a) of the Securities Act [15 U.S.C. 77j(a)]. *See* 17 CFR 240.0–1(d).

[35] We use the term ''mutual fund'' to mean a registered investment company that is an open-end management company as defined in Section 5(a)(1) of the Investment Company Act of 1940 [15 U.S.C. 80a–5(a)].

[36] *See* Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, Release No. 33–8998 (Jan. 13, 2009) [74 FR 4546]. Although the summary prospectus is not a Section 10(a) prospectus, it may be used to satisfy any prospectus delivery obligations under Section 5(b)(2) of the Securities Act [15 U.S.C. 77e(b)(2)]. 17 CFR 230.498(c).

[37] *See* proposed amendment to Exchange Act Rule 14a–16(f)(2)(iii). We are also proposing a conforming amendment to Rule 498 under the Securities Act [17 CFR 230.498], which permits mutual funds to use a summary prospectus to satisfy their prospectus delivery obligations. Rule 498(f)(2) provides that a fund's summary prospectus shall be given greater prominence than any accompanying materials. We are proposing to amend Rule 498 to provide that a summary prospectus need not be given greater prominence than an accompanying Notice. *See* proposed amendment to Rule 498(f)(2).

changes to the Notice requirements intended to make the Notice clearer and encourage efforts to better inform shareholders about participation under the notice and access model. Do the proposed changes help in enabling issuers and other soliciting persons to make the Notice clearer? Will these changes help address concerns about confusion and other factors that may be reducing shareholder participation? What other changes to the notice and access model should we consider to address these concerns?

• What factors have caused the lower shareholder response rates by individual shareholders to proxy solicitations when the notice-only option is used under the notice and access model? If the lower shareholder response rates result primarily from the notice and access model itself, would requiring issuers to deliver paper copies of proxy materials to some subset of individual shareholders, such as shareholders that own over a certain threshold of shares or that have received paper copies of proxy materials and voted in the past, affect voting rates? Does permitting issuers to choose to which shareholders to provide notice-only and full set delivery affect voting rates? If so, how are issuers exercising their discretion over full set delivery and are they doing so appropriately? Would additional requirements affect an issuer's ability to implement the notice and access model? Are there other alternatives that would increase the voting rates under the notice and access model?

• Should we consider adding requirements that would limit an issuer's ability to use the notice-only option where the issuer has experienced a decrease in shareholder participation as a result of using the notice-only option for distribution to some portion of its shareholders? For example, should we only allow an issuer to continue to use the notice-only option if the shares voted or the voting response rate has not decreased from the most recent issuer's meeting when they provided all of their shareholders with full set delivery? Would some decrease, such as 10% or 20% be acceptable? Should we instead consider requiring shareholder participation to increase from prior years in order for an issuer to continue to use the notice-only option? Are there other participation-level conditions that we should consider?

• Will shareholders find the Notice more confusing if we do not prescribe how to describe the matters to be acted on at the meeting? Should we prescribe minimum standards for formatting? Should we instead require a legend to the effect that the Notice should not be used for voting on matters, and that a separate proxy card or Vote Instruction Form should be used for voting?

• Should we permit the Notice to be accompanied by materials to explain the process of receiving and reviewing the proxy materials and voting as proposed? Should we require that explanatory materials be included? Should we allow these explanatory materials to include any additional information? For example, should an issuer or other soliciting person be permitted to explain what the benefits of using the notice and access model would be? Should we specify by rule the topics that cannot be included? Should we include the level of detail in the explanation in this section in the text of the rule? For example, should the rule specifically provide that the explanation in the Notice may not contain materials designed to persuade shareholders to vote in a particular manner, change the methods of delivery or explain the basis for sending the Notice? Should a soliciting person be permitted to explain why it has decided to use the notice-only option?

• The Commission is aware that there has been some confusion relating to the Notice and that some shareholders have attempted to indicate their voting instructions by returning a marked copy of the Notice. What changes can we make to help shareholders better understand the Notice? Should the Commission amend its rules to prohibit issuers and other soliciting persons from including voting recommendations in the Notice as permitted under Rule 14a–16(d)(3)? Would removing recommendations increase the likelihood that a shareholder will access the proxy materials through the Internet? Does the Notice currently look too similar to a proxy card or Vote Instruction Form? Would possible confusion in the Notice be reduced if the Commission amended its rules to require identification of matters to be voted on by topic rather than identifying the specific matters as they appear on the proxy card, so that the Notice looks less like a proxy card or Vote Instruction Form?

• Has the notice and access model lowered costs for issuers and other soliciting persons resulting from the proxy solicitation process? Have any costs increased? In your response, please quantify the costs and savings of using the notice and access model, and provide supporting data where possible.

• It is our understanding from informal conversations our staff has had with issuers and proxy distribution service providers that a number of issuers were discouraged from using the notice and access model due to the difficulty of meeting the 40-day Notice mailing requirement. Would a 30-day deadline for delivery of the Notice still allow sufficient time for shareholders who prefer paper proxy materials to request and receive them through the mail? Would changing to a 30-day deadline encourage use and improve implementation of the notice and access model? If the Notice mailing requirement for the issuer were shortened, would any changes be necessary to the filing and mailing requirements for soliciting persons other than the issuer?

• Some issuers have expressed concern regarding the fees charged by proxy distribution service providers. Have the fees charged by proxy distribution service providers affected use rates of the notice and access model? Should the Commission address fees charged by service providers relating to the implementation of the notice and access model? If so, how?

• Should the Commission consider proposing suspension of the notice and access rules until a later date to provide more time for shareholders to understand and be better prepared for the notice and access model? If so, how much time would be appropriate? Would additional educational efforts be sufficient to inform shareholders about the notice and access model, or would other efforts, such as development of an on-line disclosure and voting infrastructure, be needed? If so, why?

B. Proposed Amendment to Notice Deadlines for Soliciting Persons Other Than the Issuer

Under Rule 14a–16, if a soliciting person other than the issuer chooses to use the notice-only option, the soliciting person must send its Notice to shareholders by a date that is the later of:

• 40 calendar days before the shareholder meeting to which the proxy materials relate, or

• 10 calendar days after the issuer first sends its Notice or proxy statement to shareholders. [38]

We created this 10-day period to provide soliciting persons other than the issuer desiring to rely on the notice-only option sufficient time to respond to an issuer's mailing of proxy materials and still allow shareholders receiving a Notice from the soliciting person enough time to request paper copies of

[38] 17 CFR 240.14a–16(*l*)(2)(i) and (ii).

the soliciting person's proxy materials.[39]

The current 10-calendar-day requirement for soliciting persons to send the Notice to shareholders can create potential compliance issues for soliciting persons. Under current practice, the staff of the Division of Corporation Finance reviews and provides comments on preliminary proxy materials filed by soliciting shareholders in a contested solicitation. While the staff makes great effort to review filings and address comments as quickly as possible, there may continue to be outstanding comments on a soliciting person's preliminary proxy statement more than 10 calendar days after the soliciting person has initially filed. Consequently, a soliciting person may not be in a position to send its Notice within 10 calendar days after the issuer first sends its Notice or proxy statement to shareholders.

Thus, because a soliciting person is required to send its Notice within 10 days after the issuer first sends its Notice or proxy statement, the practical effect of Rule 14a–16, as currently written, is to limit that person's ability to use the notice-only option. This is because Rule 14a–16(b)(4) requires the soliciting person to make a means to execute a proxy available to shareholders at the time the Notice is first sent to shareholders. Rule 14a–4(f), however, prohibits a person from providing a form of proxy unless it is accompanied, or preceded, by a definitive proxy statement. Because the soliciting person may not have finished revising its proxy statement and may not have filed its definitive proxy statement with the Commission by that time, the notice and access rules, combined with current staff review practice, may, in many circumstances, prevent a soliciting person other than the issuer from using the notice-only option for a proxy contest if that soliciting person's initial proxy statement filing is made in response to the issuer's definitive proxy statement filing.

To improve implementation of the notice and access model, we propose to amend Rule 14a–16(*l*)(2)(ii) to require the soliciting shareholder relying on this alternative to file a preliminary proxy statement within 10 days after the issuer files its definitive proxy statement and to send its Notice to shareholders no later than the date on which it files its definitive proxy statement with the Commission. We believe that this proposed time period would provide sufficient time for a soliciting person to prepare its proxy statement and respond to any staff comments, while still permitting the soliciting person to use the notice and access model. While the proposed rule does not provide for a specific period of time before the meeting by which a soliciting person would need to mail the Notice, the soliciting person should make the Notice and proxy materials available to shareholders with sufficient time for shareholders to review the materials and make an informed voting decision.

Request for Comment

- We are proposing to revise one of the two alternative Notice deadlines applicable to soliciting persons other than the issuer to reconcile Rule 14a–16(b)(4) with Rule 14a–4(f) and better coordinate the timing requirements with the Commission staff's review process. Is there a preferable way to revise the rule to address this issue? If so, how should we revise the rule?
- The proposed rule would require a soliciting person to send its Notice to shareholders no later than the date on which it files its definitive proxy statement with the Commission. The soliciting person, however, has control over the date that it files a definitive proxy statement. Is it necessary to impose a specific time period by which a soliciting person other than the issuer must send its Notice? If so, should we impose a specific time period after the filing of the preliminary proxy by which a soliciting shareholder must send its Notice?

III. General Request for Comment

We request and encourage any interested person to submit comments regarding:

- The proposed amendments that are the subject of this release;
- Other ways to reduce regulatory impediments to shareholder participation and thereby improve shareholder response rates to proxy solicitations using the notice and access model or otherwise improve the notice and access model;
- Additional or different changes; or
- Other matters that may have an effect on the proposals contained in this release.

We request comment from the point of view of issuers, investors, and other market participants. With regard to any comments, we note that such comments are of great assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

IV. Paperwork Reduction Act

A. Background

Certain provisions of the proposed rule amendments contain a ''collection of information'' within the meaning of the Paperwork Reduction Act of 1995.[40] The Commission is submitting this proposed amendment to the Office of Management and Budget for review in accordance with the PRA. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid control number. Compliance with the rules as they are proposed to be amended would be mandatory, however certain information collections under these rules are required and some are voluntary. Responses to the information collections would not be kept confidential and there would be no mandatory retention period for the information disclosed.

The proposed revision to Rule 14a–16 would permit issuers and other soliciting persons to include explanatory materials about the notice and access model along with the Notice. The proposed revision would still require a legend in the Notice, but would allow more flexibility in how prescribed topics are described in the legend.[41] The proposed explanatory materials would be a relatively short and straight-forward explanation of the notice and access model that could accompany the Notice. Finally, the proposed change to the filing deadline for soliciting persons other than the issuer is not expected to affect the burden estimates.

B. Regulation 14A and 14C

The titles for the collections of information for operating companies are:[42]

- Regulation 14A (OMB Control No. 3235–0059); and
- Regulation 14C (OMB Control No. 3235–0057).

We previously revised these collections of information in the release that proposed the notice and access model as a voluntary model for

[39] *See* Internet Availability of Proxy Materials, Release No. 34–52926 (Dec. 8, 2005) [70 FR 74597] (''Internet Availability of Proxy Materials Proposing Release'').

[40] 44 U.S.C. 3501 *et seq.;* 5 CFR 1320.11.

[41] We anticipate no change in the burden estimates for the change in the legend requirement. The proposed rule would require essentially the same information as is currently required in the legend to continue to be conveyed creating no additional burden.

[42] The paperwork burden from Regulation S–K is imposed through the forms that are subject to the requirements in those regulations and is reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens and for administrative convenience, we assign a one-hour burden to Regulation S–K.

disseminating proxy materials[43] and the release in which we adopted amendments requiring issuers and other soliciting persons to follow the model.[44] We submitted the revisions in both releases to the OMB for review in accordance with the PRA. We received approval for the revised information collections and now propose a further revision which we will submit to OMB.

Under the proposed amendments, an issuer or other soliciting person will be permitted, but not required, to include explanatory materials with the Notice. We expect that this information will generally consist of approximately one or two paragraphs of text. For purposes of the PRA, we estimate the annual burden if a soliciting person chooses to prepare the explanatory materials would be approximately 0.5 reporting hours per issuer or other soliciting person.[45] We estimate that 75% of the burden would be borne by the soliciting person and that 25% of the burden would be borne by outside counsel retained by the soliciting person at an average cost of approximately $400 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours.

The following table summarizes the proposed PRA burden estimates for Schedules 14A and 14C:

TABLE 1—CALCULATION OF INCREMENTAL PAPERWORK REDUCTION ACT BURDEN ESTIMATES FOR PROXY AND INFORMATION STATEMENTS

Form	Annual responses	Incremental hours/form	Incremental burden	75% Issuer	25% Professional	$400 Professional cost
	(A)	(B)	(C)=(A)*(B)	(D)=(C)*0.75	(E)=(C)*0.25	(F)=(E)*$400
Schedule 14A	7,300	0.5	3,650	2,737.5	912.5	$365,000
Schedule 14C	680	0.5	340	255	85	$34,000
Total	7,980		3,990	2,992.5	997.5	$399,000

C. Rule 20a–1

Certain provisions of the current notice and access model contain ''collection of information'' requirements within the meaning of the PRA, including preparation of Notices, maintaining Web sites, maintaining records of shareholder preferences, and responding to requests for copies. Those provisions increase the current burden for the existing collection of information entitled ''Rule 20a–1 under the Investment Company Act of 1940,[46] Solicitation of Proxies, Consents and Authorizations'' (OMB Control No. 3235–0158). Rule 20a–1 under the Investment Company Act[47] requires that the solicitation of a proxy, consent, or authorization with respect to a security issued by an investment company be in compliance with Regulation 14A,[48] Schedule 14A,[49] and all other rules and regulations adopted under Section 14(a) of the Exchange Act.[50] It also requires a fund's investment adviser, or a prospective adviser, to transmit to the person making a proxy solicitation the information necessary to enable that person to comply with the rules and regulations applicable to the solicitation.

The notice and access model requires all registered investment companies to post their proxy materials on an Internet Web site and furnish Notice of the materials' availability to shareholders.[51] The Notices, the proxy materials posted on the Web site, and copies of the proxy materials sent in response to shareholder requests are not kept confidential.

For purposes of the PRA, we estimate that the annual burden required to prepare and transmit a Notice to be approximately 1.5 reporting hours. This estimate is based on the PRA burden for issuers other than investment companies to prepare and transmit a Notice. We estimate that 75% of the burden is prepared by the investment company and that 25% of the burden is prepared by outside counsel retained by the investment company at an average cost of approximately $400 per hour. Based on the number of proxy filings from registered investment companies received by the Commission during 2008, we would expect approximately 1,225 Notices to be filed annually. We estimate that the total annual reporting burden for rule 20a-1 should be increased by approximately 1,378 hours[52] and that the annual cost would be increased by approximately $735,000[53] for the services of outside professionals to comply with the disclosure provisions of the existing notice and access model.

In addition, registered investment companies must permit shareholders to make permanent elections to receive proxy materials in paper or by e-mail. An investment company issuer must maintain records as to which of its shareholders have made such an election. We believe that many investment company issuers already maintain similar records to keep track of their shareholders who have affirmatively consented to electronic delivery consistent with past Commission guidance,[54] as well as their shareholders who have consented to householding of proxy materials pursuant to Rule 14a–3(e).[55] For purposes of the PRA, we estimate that a typical investment company issuer will spend an additional five hours per year, or a total of 6,125 hours, to

[43] *See* Internet Availability of Proxy Materials Proposing Release in note 39 above.

[44] *See* the Internet Availability of Proxy Material Adopting Release in note 8 above.

[45] As we have previously indicated, according to Broadridge, it processes more than 95% of proxy materials that are sent to beneficial owners on behalf of intermediaries. *See* the Internet Availability of Proxy Materials Adopting Release in note 8 above. We believe that issuers likely will rely on proxy distribution service providers to provide the explanatory materials and that issuers and intermediaries would provide explanatory materials that are substantially the same to the beneficial owners that hold through intermediaries, creating no additional annual burden to prepare an intermediary's Notice.

[46] 15 U.S.C. 80a–1 *et seq.*

[47] 17 CFR 270.20a–1.

[48] 17 CFR 240.14a–1 *et seq.*

[49] 17 CFR 240.14a–101.

[50] 15 U.S.C. 78n(a).

[51] *See* the Internet Availability of Proxy Material Adopting Release in note 8 above.

[52] 1,225 Notices × 1.5 hours per Notice × .75 = 1,378 hours.

[53] 1,225 Notices × $400 per hour × 1.5 hours per Notice × .25 = $735,000.

[54] Use of Electronic Media for Delivery Purposes, Release No. 33–7233 (Oct. 6, 1995) [60 FR 53458] provided guidance on electronic delivery of prospectuses, annual reports to security holders and proxy solicitation materials under the Securities Act, the Exchange Act, and the Investment Company Act.

[55] 17 CFR 240.14a–3(e).

maintain these records.[56] Because this is an internal recordkeeping requirement, we do not expect a cost for hiring outside counsel.

Further, the notice and access model also requires an intermediary to prepare its own Notice and provide it to beneficial owners. We expect that all of the factual information required to appear in the Notice will become available as part of the ordinary preparations for a shareholder meeting. This Notice would be substantially the same as a registered investment company's Notice, but will be modified by the intermediaries to provide information that is relevant to beneficial owners rather than registered holders. According to Broadridge, it processes more than 95% of proxy materials that are sent to beneficial owners on behalf of intermediaries, reducing the need to create multiple intermediary Notices. In addition, the investment company issuer or other soliciting person will provide the majority of information required in the intermediary's Notice. Therefore, we estimate that the additional burden to prepare an intermediary's Notice will be approximately one hour, or a total annual burden of 1,225 hours for all investment company proxy solicitations.[57]

Finally, intermediaries must also maintain records to keep track of which beneficial owners have made a permanent election to receive proxy materials in paper or by e-mail. Like registered investment companies, intermediaries already maintain records of shareholders' affirmative consents to electronic delivery and householding of proxy materials. In addition, intermediaries maintain records as to whether their beneficial owner customers have objected, or not objected, to disclosure of their identities to the investment company issuer. Like investment company issuers, we believe this will result in an additional annual burden of five hours, or a total of 6,125 hours, for intermediaries.[58]

We estimate that the total annual PRA reporting burden for Rule 20a–1 should be increased by 14,853 hours and $735,000 in professional costs to reflect compliance with the existing notice and access model. We request comment and supporting empirical data on the burden and cost of sending copies of proxy materials under the notice and access model for registered investment companies.

Under the proposed amendments to the notice and access model, a registered investment company or other soliciting person will be permitted, but not required, to include explanatory materials with the Notice. We expect that this information will generally consist of approximately one or two paragraphs of text. For purposes of the PRA, we estimate the annual burden if a soliciting person chooses to prepare the explanatory materials would be approximately 0.5 reporting hours per investment company. We estimate that 75% of the burden would be borne by the investment company and that 25% of the burden would be borne by outside counsel retained by the investment company at an average cost of approximately $400 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours. We estimate that the proposed amendments will increase the PRA burden estimates under Rule 20a–1 by approximately 459 hours and $61,250 in professional costs.

D. Solicitation of Comments

We request comments in order to evaluate: (1) Whether the proposed revision to the collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (2) the accuracy of our estimate of the burden of the proposed revisions to the collection of information; (3) whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.[59]

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–22–09. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–22–09, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE., Washington, DC 20549–0213. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

V. Cost-Benefit Analysis

A. Proposed Amendments

The proposed amendments are designed to improve implementation of the notice and access model. The proposed amendments to Exchange Act Rule 14a–16 would revise the legend requirements in the rule to make them more flexible, revise the deadline applicable to soliciting persons other than the issuer to reconcile the rules and better coordinate them with the Commission staff's review process, and permit issuers and other soliciting persons to accompany the Notice with explanatory materials regarding the process of receiving and reviewing the proxy materials and voting.[60]

We expect that the economic effect of the proposed amendments, if adopted, would be to:

- Facilitate participation by shareholders who may be confused by the operation of the notice and access model;
- Provide flexibility to soliciting persons in describing the notice and access model; and
- Facilitate participation by some soliciting persons who may currently be effectively precluded from using the notice-only option.

[56] 1,225 filings with an estimated one filing per issuer or soliciting person × 5 hours = 6,125 hours. This estimate is based on the PRA burden for issuers other than investment companies to maintain these records.

[57] 1,225 notices × 1 hour per Notice = 1,225 hours. We do not include a cost to intermediaries for hiring outside counsel because we expect that the substantive contents of an intermediary's Notice would be provided by the issuer or other soliciting person. The estimates assume that Broadridge will continue to process over 95% of the proxy solicitations on behalf of intermediaries, thereby eliminating the need for each intermediary to prepare a separate Notice.

[58] This estimate is based on the PRA burden for intermediaries for issuers other than investment companies to maintain records.

[59] 44 U.S.C. 3506(c)(2)(B).

[60] We do not expect our proposed conforming amendment, which would permit mutual funds to accompany the Notice with a summary prospectus, to have a substantive impact on a mutual fund's decision otherwise permitted under Rule 498 of the Securities Act to provide a summary prospectus instead of a statutory prospectus to its shareholders.

B. Benefits

As discussed above, by permitting some additional flexibility in designing the Notice and permitting explanatory materials regarding the process of receiving and reviewing the proxy materials and voting to accompany the Notice, we expect that the proposal would improve understanding of the notice and access model for participating shareholders. Improved understanding of the model would reduce confusion and may thereby improve the efficiency and effectiveness of the proxy voting system. However, to the extent that issuers send notices to shareholders that are less likely to respond, these benefits may be limited.

Revising one of the two alternative Notice deadlines applicable to soliciting persons other than issuers to reconcile the rules' timing requirements with the Commission staff's review process would facilitate use of the notice-only option by soliciting persons who may otherwise be precluded from using the notice-only option because of their inability to meet the deadline for sending the Notice. This would help lower costs for those persons by reducing impediments for certain soliciting persons to participate in the proxy process.

C. Costs

Eliminating the specific limitations of the legend requirement may result in some soliciting persons providing a more confusing notice or seeking to include soliciting, marketing or other materials that may distract shareholders from the Notice. These activities would increase the cost of shareholder participation in the proxy process, and could distort votes and outcomes.[61] In addition, an issuer or other soliciting person that chooses to include explanatory materials in the same mailing with the Notice would incur the cost of preparing that information. We expect that this information generally would be no more than a few paragraphs long. For purposes of the PRA, we estimate that the proposal would cause an annual increase in the compliance burden for issuers and other soliciting persons preparing explanatory materials of approximately 3,450 hours of in-house personnel time and approximately $460,000 for the services of outside professionals.

D. Request for Comments

We request comment on all aspects of the cost-benefit analysis, including identification of any additional costs or benefits of, or suggested alternatives to, the proposed amendments. We also request that those submitting comments provide, to the extent possible, empirical data and other factual support for their views.

VI. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Section 23(a) of the Exchange Act[62] requires the Commission, when making rules and regulations under the Exchange Act, to consider the impact a new rule would have on competition. Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 2(b) of the Securities Act,[63] Section 3(f) of the Exchange Act[64] and Section 2(c) of the Investment Company Act[65] require the Commission, when engaging in rulemaking that requires it to consider whether an action is necessary or appropriate in the public interest, to also consider whether the action would promote efficiency, competition, and capital formation.

The amendments would permit some additional flexibility in designing the Notice, permit issuers and other soliciting persons to accompany the Notice with explanatory materials regarding the process of receiving and reviewing the proxy materials and voting, and revise one of the two deadlines applicable to soliciting persons other than the issuer to reconcile our rules and better coordinate the timing requirements with the Commission staff's review process. The proposed amendments are designed to reduce regulatory impediments and thereby increase shareholder participation, improve implementation of the notice and access model, and enhance investor understanding of the operation of the notice and access model. These changes are intended to improve the efficiency and effectiveness of the proxy process.

We do not anticipate any effect on competition or capital formation as a result of these proposed revisions.

The Commission solicits comment on whether the proposed amendment, if adopted, would affect efficiency, competition, and capital formation.

VII. Initial Regulatory Flexibility Analysis

This Initial Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to proposed revisions to Exchange Act Rule 14a–16 that would permit some additional flexibility in designing the Notice, permit issuers and other soliciting persons to accompany the Notice with explanatory materials regarding the process of receiving and reviewing the proxy materials and voting, and revise one of the timing requirements applicable to soliciting persons other than the issuer to reconcile our rules and better coordinate the requirement with the Commission staff's review process.

A. Reasons for, and Objectives of, the Proposed Action

The proposed amendments are designed to improve implementation of the notice and access model. Based on our monitoring of the effects of the notice and access model on the proxy solicitation process and the experiences that issuers and shareholders have had with the notice and access model to date, we believe that several revisions to the existing rules would improve the operation of the model without adversely affecting soliciting persons or shareholders' abilities to effectively participate in the proxy process.

Improved notice design and shareholder education should help to mitigate the difference in shareholder participation in the proxy voting process observed in the use of the notice and access model to the extent the difference was caused by our regulations. The proposed amendment to the timing requirements for soliciting persons other than the issuer to file their preliminary proxy statements is designed to better enable soliciting shareholders other than the issuer to use the notice-only option.

B. Legal Basis

We are proposing amendments to the forms and rules under the authority set forth in Sections 6, 7, 10, and 19 of the Securities Act of 1933, as amended, Sections 3(b), 13, 14, 15, and 23(a) of the Exchange Act, as amended, and Sections 8, 20(a), 24(a), 24(g), 30, and 38 of the Investment Company Act, as amended.

[61] Since intermediaries and their agents already have systems to prepare and deliver proxy materials and the nature of the proposed changes are relatively small, we do not expect the intermediaries' role in sending explanatory material to beneficial owners to affect their costs associated with the rule. In any event, since soliciting persons reimburse intermediaries for their reasonable expenses forwarding proxy materials, we do not expect intermediaries to incur costs associated with the rule.

[62] 15 U.S.C. 78w(a).

[63] 15 U.S.C. 77b(b).

[64] 15 U.S.C. 78c(f).

[65] 15 U.S.C. 80a–2(c).

C. Small Entities Subject to the Proposed Rules

The proposals would affect issuers that are small entities. Exchange Act Rule 0–10(a)[66] defines an issuer to be a ''small business'' or ''small organization'' for purposes of the Regulatory Flexibility Act if it had total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,100 public companies, other than investment companies, that may be considered small entities.

For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[67] Approximately 178 registered investment companies meet this definition. Moreover, approximately 34 business development companies may be considered small entities.

Paragraph (c)(1) of Rule 0–10 under the Exchange Act[68] states that the term ''small business'' or ''small organization,'' when referring to a broker-dealer, means a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to § 240.17a–5(d); and is not affiliated with any person (other than a natural person) that is not a small business or small organization. The Commission has estimated that there were approximately 910 broker-dealers that qualified as small entities as defined above.[69] Small Business Administration regulations define ''small entities'' to include banks and savings associations with total assets of $165 million or less.[70] The Commission estimates that the rules might apply to approximately 9,475 banks, approximately 5,816 of which could be considered small banks with assets of $165 million or less. The proposals may affect these entities because they are intermediaries that are required under the Commission's proxy rules to forward proxy materials, including the Notice or any explanatory materials, on to shareholders who beneficially own their shares through the intermediaries.[71]

We request comment on the number of small entities that would be impacted by our proposals, including any available empirical data.

D. Reporting, Recordkeeping and Other Compliance Requirements

The proposed amendments would allow soliciting persons more time to use the notice-only model before a shareholder meeting and permit, but do not require, issuers to include additional, explanatory material in their Notice.

E. Duplicative, Overlapping or Conflicting Federal Rules

We believe that there are no rules that conflict with or duplicate the proposed rules.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, we considered the following alternatives:

- The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
- The clarification, consolidation or simplification of disclosure for small entities;
- The use of performance standards rather than design standards; and
- An exemption for small entities from coverage under the proposals.

The Commission has considered a variety of reforms to achieve its regulatory objectives.

The proposed amendments, if adopted, would apply to all issuers and other soliciting persons, including small entities, that choose to rely on the notice-only option. The amendments are intended to improve the operation of the notice and access model by providing additional flexibility in designing the Notice, permitting issuers and other soliciting persons to accompany the Notice with explanatory materials regarding the notice and access model, and revising one of the timing requirements applicable to soliciting persons other than the issuer to reconcile our rules and better coordinate the requirement with the Commission staff's review process.

We considered the use of performance standards rather than design standards in the proposed rules. The proposal contains both performance standards and design standards. We are proposing revising existing design standards, such as the deadline applicable to soliciting persons other than the issuer, to the extent that we believe necessary. However, to the extent possible, we are proposing rules that impose performance standards to provide issuers, other soliciting persons and intermediaries with the flexibility to devise the means through which they can comply with such standards. For example, the proposed amendments regarding explanatory materials do not specify the content of such information.

We are requesting comment on whether separate requirements for small entities would be appropriate. The purpose of the amendments is to improve the implementation of the notice and access model based on our experience with the model to date. Exempting small entities would not be consistent with this goal. The establishment of any differing compliance or reporting requirements or timetables or any exemptions for small business issuers may not be in keeping with the objectives of the proposed rules.

G. Solicitation of Comment

We encourage comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- The number of small entities that may be affected by the proposed amendments;
- The existence or nature of the potential impact of the proposed amendments on small entities discussed in the analysis; and
- How to quantify the impact of the proposed amendments.

Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposals are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

VIII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of

[66] 17 CFR 240.0–10(a).

[67] 17 CFR 270.0–10.

[68] 17 CFR 240.0–10(c)(1).

[69] These numbers are based on a review by the Commission's Office of Economic Analysis of 2005 FOCUS Report filings reflecting registered broker-dealers. This number does not include broker-dealers that are delinquent on FOCUS Report filings.

[70] 13 CFR 121.201.

[71] An intermediary is not required to forward proxy materials to beneficial owners unless the issuer or other soliciting person provides assurance of reimbursement of the intermediary's reasonable expenses incurred in connection with forwarding those materials. 17 CFR 240.14b–2(c)(2)(i). Therefore, any costs imposed on intermediaries by the rules will be borne by the issuer or other soliciting person.

1996,[72] a rule is ''major'' if it has resulted, or is likely to result in:

- An annual effect on the U.S. economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment, or innovation.

We request comment on whether the proposed amendments to Exchange Act Rule 14a–16 would be a ''major rule'' for purposes of the Small Business Regulatory Enforcement Fairness Act. We solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment, or innovation.

IX. Statutory Authority and Text of Rule and Form Amendments

We are proposing the amendments pursuant to Sections 6, 7, 10, and 19 of the Securities Act of 1933, as amended, Sections 3(b), 13, 14, 15, and 23(a) of the Securities Exchange Act of 1934, as amended, and Sections 8, 20(a), 24(a), 24(g), 30, and 38 of the Investment Company Act of 1940, as amended.

List of Subjects in 17 CFR Parts 230 and 240

Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulation is proposed to be amended as follows.

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The authority citation for Part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l*, 78m, 78n, 78o, 78t, 78w, 78*ll*(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

2. Amend § 230.498 by revising paragraph (f)(2) to read as follows:

§ 230.498 Summary Prospectuses for open-end management investment companies.

* * * * *

(f) * * *

(2) *Greater prominence.* If paragraph (c) or (d) of this section is relied on with respect to a Fund, the Fund's Summary Prospectus shall be given greater prominence than any materials that accompany the Fund's Summary Prospectus, with the exception of other Summary Prospectuses, Statutory Prospectuses, or a Notice of Internet Availability of Proxy Materials under § 240.14a–16 of this chapter.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

3. The authority citation for Part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

4. Amend § 240.14a–16 by:

a. Revising paragraph (d)(1).

b. Redesignating paragraphs (d)(2) through (d)(8) as paragraphs (d)(5) through (d)(11);

c. Adding new paragraphs (d)(2) through (d)(4);

d. Removing the word ''and'' at the end of paragraph (f)(2)(ii);

e. Revising paragraph (f)(2)(iii);

f. Adding paragraph (f)(2)(iv); and

g. Revising paragraph (*l*)(2)(ii).

The revisions and additions read as follows:

§ 240.14a-16 Internet availability of proxy materials.

* * * * *

(d) * * *

(1) A prominent legend in bold-face type that states ''Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting To Be Held on [insert meeting date]'';

(2) An indication that the communication presents only an overview of the more complete proxy materials, which contain important information and are available on the Internet or by mail and encouraging a security holder to access and review the proxy materials before voting;

(3) The Internet Web site address where the proxy materials are available;

(4) Instructions regarding how a security holder may request a paper or e-mail copy of the proxy materials at no charge, including the date by which they should make the request to facilitate timely delivery, and an indication that they will not otherwise receive a paper or e-mail copy;

* * * * *

(f) * * *

(2) * * *

(iii) In the case of an investment company registered under the Investment Company Act of 1940, the company's prospectus, a summary prospectus that satisfies the requirements of § 230.498(b) of this chapter, or a report that is required to be transmitted to stockholders by section 30(e) of the Investment Company Act (15 U.S.C. 80a–29(e)) and the rules thereunder; and

(iv) An explanation of the process of receiving and reviewing the proxy materials and voting as detailed in this section.

* * * * *

(*l*) * * *

(2) * * *

(ii) The date on which it files its definitive proxy statement with the Commission, provided its preliminary proxy statement is filed no later than 10 calendar days after the date that the registrant files its definitive proxy statement.

* * * * *

Dated: October 14, 2009.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–25232 Filed 10–20–09; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR PARTS 162 and 163

[USCBP–2009–0029]

RIN 1505–AC00

Use of Sampling Methods and Offsetting of Overpayments and Over-Declarations in CBP Audit Procedures; Sampling Under Prior Disclosure

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

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs and Border Protection (CBP) regulations to provide further guidance for the use of sampling methods in CBP audits and prior disclosure cases. It also provides guidance for the offsetting of overpayments and over-declarations when an audit involves a calculation of lost revenue or monetary penalties

[72] Public Law 104–121, Title II, 110 Stat. 857 (1996).

under 19 U.S.C. 1592. The proposed amendment also includes the deletion of a superfluous term from the audit procedures regulations.

DATES: Written comments must be received on or before December 21, 2009.

ADDRESSES: You may submit comments, identified by docket number, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments via docket number USCBP–2009–0029.
- *Mail:* Trade and Commercial Regulations Branch, Regulations and Rulings, U.S. Customs and Border Protection, 799 9th Street, NW. (Mint Annex), Washington, DC 20229.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Submitted comments may also be inspected during regular business days between the hours of 9 a.m. and 4:30 p.m. at the Trade and Commercial Regulations Branch, Regulations and Rulings, U.S. Customs and Border Protection, 799 9th Street, NW., 5th Floor, Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325–0118.

FOR FURTHER INFORMATION CONTACT: *For Legal Aspects:* Alan Cohen, Penalties Branch, Regulations and Rulings, Office of International Trade (202) 325–0062; For Audit and Operational Aspects: Matthew Krimski, Regulatory Audit, Office of International Trade, (202) 863–6004.

SUPPLEMENTARY INFORMATION: This proposed rule is organized as follows:

I. Public Participation
II. Background
III. Proposed Amendments Concerning Statistical Sampling
A. What is Statistical Sampling?
B. General Requirements Applicable to Statistical Sampling
C. Benefits for CBP from Statistical Sampling
D. Statistical Sampling Used by Audited Persons under CBP Supervision
E. Private Party Reviews and Use of Sampling in Prior Disclosure Cases
F. Proposed Amendments Concerning Statistical Sampling
IV. Proposed Amendments Concerning Offsetting Overpayments and Over-Declarations Identified by CBP Auditors for Purposes of Lost Revenue or Monetary Penalty Calculations under 19 U.S.C. 1592
A. The Trade Act of 2002
B. Offsetting Prior to the Trade Act of 2002
C. Offsetting after the Trade Act of 2002
D. Offsetting and Statistical Sampling
E. Proposed Amendments Concerning Offsetting
V. Amendment to Prior Disclosure Regulations
VI. Other Changes
VII. Statutory and Regulatory Reviews
A. Regulatory Flexibility Act
B. Executive Order 12866
C. Paperwork Reduction Act
D. Signing Authority

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the proposed rule. CBP also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. Comments that will provide the most assistance to CBP in developing these regulations will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change. *See* **ADDRESSES** above for information on how to submit comments.

II. Background

CBP is authorized to conduct audits under 19 U.S.C. 1509 (section 1509) (sometimes referred to in this document as CBP audits or CBP 1509 audits). The statute authorizes CBP to examine the records of (including conducting an audit of) parties subject to its authority for the following purposes: ascertaining the correctness of any entry; determining the liability of any person for duty, fees, and taxes due, or which may be due, the United States; determining liability for fines and penalties; or insuring compliance with the laws of the United States administered by CBP. Under section 1509(b), specific procedures are set forth for conducting a formal audit authorized under the statute.

In this document, CBP proposes to amend the CBP regulations (19 CFR part 163) pertaining to audit procedures. These proposed amendments concern the use of statistical sampling methods and the offsetting of overpayments of duties and fees or over-declarations of quantities or values against underpayments or under-declarations under certain prescribed circumstances. The proposed change regarding sampling methods is designed to reflect in the regulations a practice recognized in both government and industry as the most practical and expeditious way to accurately assess the voluminous number of entry transactions often encountered per audit in the modern commercial importation environment. The proposed change regarding offsetting reflects the amendment made by the Trade Act of 2002 to 19 U.S.C. 1509(b) pertaining to CBP audit procedures. The proposed amendments also include a corresponding change to 19 CFR part 162 (the prior disclosure regulations, 19 CFR 162.74) and the removal of the term ''compliance assessments'' from 19 CFR part 163 as the term has become superfluous as a result of CBP policy changes with respect to audits.

III. Proposed Amendments Concerning Use of Statistical Sampling

A. What Is Statistical Sampling?

Statistical sampling is a generally accepted auditing tool used in the private sector and by government auditors by which an audit, review, or examination of a voluminous universe of records is made more manageable through the selection of samples from that universe. These methods have become a dependable means of conducting audits for a variety of business purposes. Government agencies use statistical sampling methods when conducting audits authorized by applicable law.

More specifically, statistical sampling methodology requires random selection of items from a defined universe of items and statistical evaluation of sample results. Once the audit objective, sampling objective, and category of sampling have been defined, and the universe of entries/transactions has been analyzed in accordance with generally accepted statistical sampling concepts, the auditors will determine the sample size, sample selection technique, and sample review procedure. The results revealed by examination of the samples can then be applied to the entire universe of records, permitting conclusions to be drawn about the universe with a high degree of confidence. The sampling plan, and its preparation, is fully documented. The audit is conducted according to the sampling plan. After the audit has been completed, the basic sampling parameters, as well as the conclusions

indicated by the sampling plan's results, are disclosed in an audit report.

The use of sampling in CBP 1509 audits has produced benefits for both CBP and the trade community. Sampling produces greater efficiency in the audit process by reducing audit related costs for the auditee with respect to time (including less audit time at the auditee's premises and less time for the auditee to pull supporting documents and records) and allowing CBP to best use its resources to conduct the audit.

B. General Requirements Applicable to Use of Statistical Sampling

CBP audits are conducted in accordance with Government Accountability Office (GAO) Government Auditing Standards, and GAO generally recognizes the validity of statistical sampling approaches when properly applied, as do auditors, accountants, and statisticians within and outside the government. Private persons conducting reviews and employing statistical sampling, whether an audited person authorized by CBP to conduct self-testing in connection with a CBP 1509 audit or a private party performing an independent review and calculation of lost revenue for prior disclosure purposes (both discussed in this document), must employ a sampling plan and sampling procedures that are consistent with generally recognized sampling approaches. The sampling procedures must be executed in accordance with the sampling plan. A number of commercial statistical sampling programs are available for guidance on sampling.

C. Benefits for CBP from Statistical Sampling

Auditing has become an indispensable tool in CBP's mission to administer and enforce the customs laws and regulations. CBP conducts various kinds of commercial audits of parties engaged in various aspects of international trade. These parties, to name a few, include importers of goods, manufacturers of goods imported under provisions of the North American Free Trade Agreement (NAFTA), and drawback claimants. Audits are also conducted in furtherance of investigations of alleged criminal and civil violations of the customs and related laws. Frequently, in performing these audits, CBP encounters a universe of transactions that is too voluminous to review, on an entry-by-entry basis, in a timely or cost-effective manner. Thus, to accomplish its mission, CBP employs statistical sampling techniques to review these voluminous transactions efficiently and to produce accurate results.

D. Statistical Sampling Used by Audited Persons under CBP Supervision

In some circumstances, CBP may authorize persons being audited to conduct certain reviews or tests of their own entries/transactions within the scope of a CBP 1509 audit. CBP auditors refer to this as ''self-testing'' and recognize it as a valuable tool to employ during certain audits. Self-testing within the context of a CBP 1509 audit is performed by the audited person under CBP supervision.

Self-testing occurs when CBP and the person being audited agree, prior to or during the audit, to have the audited person conduct its own review of certain entries/transactions under CBP review (*i.e.,* within the time period and scope of the audit, which, in some circumstances within the auditor's discretion, may be modified to accommodate the self-testing and serve CBP's purpose). If satisfied with the accuracy and soundness of the review, CBP may accept the results. This approach is generally used to determine the extent of certain problematic entries/transactions and to calculate lost revenue. The audited person authorized to conduct self-testing may employ statistical sampling when approved in advance by CBP auditors, subject to the requirements outlined further below. (Note that ''self-testing'' by a person being audited differs from the situation where a private party uses sampling in its own, independent examination of certain entries/transactions conducted in connection with a prior disclosure claim (discussed immediately below). This private party independent review and sampling occurs outside the context of a CBP 1509 audit.)

E. Private Party Reviews and Use of Sampling in Prior Disclosure Cases

In some instances, a private party will submit a prior disclosure claim consisting of an independent review of certain entries/transactions and a calculation of lost revenue.[1] (Under the prior disclosure regulations, 19 U.S.C. 1592(c)(4), 19 U.S.C. 1593a(c)(3), and 19 CFR 162.74, an importer may disclose to CBP, before or without knowledge of the commencement of a formal investigation, all facts regarding its false statements or omissions that resulted in a loss of duties, taxes, and fees or loss of revenue to the government through its violation(s) of 19 U.S.C. 1592 or 1593a.) The private party may employ statistical sampling in this review and calculation. The private party's review and calculation, including the time period and scope of the review, the sampling plan, and the sampling plan's execution, are subject to CBP review and approval.[2] A prior disclosure will only be approved (or considered perfected) when the sampling plan and its execution are approved by CBP.

F. Proposed Amendments Concerning Statistical Sampling

Statistical sampling is an important tool available to CBP auditors for examining customs entries/transactions (as is traditional entry-by-entry examination of all entries/transactions). Because the CBP regulations do not explicitly provide for the use of statistical sampling in audits, CBP proposes to amend the regulations to set forth the circumstances and requirements for the use of sampling methods by CBP and, where appropriate, audited persons authorized by CBP to conduct self-testing in a CBP 1509 audit or private parties conducting an independent review for prior disclosure purposes.

More specifically, the proposed changes provide the following:

(1) CBP has the sole discretion concerning whether to employ statistical sampling in any given case, authorize a person being audited to perform self-testing and use statistical sampling, or accept the statistical sampling used by a private party conducting an independent review and calculation of lost revenue in a prior disclosure case.

(2) During the audit, at the audit opening conference (or thereafter in

[1] Generally, the terms ''lost duties'' (or ''lost duty'') and ''lost revenue'' are used interchangeably in this document, although CBP notes that 19 U.S.C. 1592, applicable to penalties for false statements made in an entry, pertains explicitly to lost duties, taxes, and fees, 19 U.S.C. 1593a, applicable to penalties for false statements made in a drawback claim, pertains explicitly to lost revenue, and 19 U.S.C. 1509(b)(6)(A), applicable to offsetting, discussed later in this document, pertains explicitly to overpayments of duties and fees and calculations of lost revenue or monetary penalties under 19 U.S.C. 1592, thereby using both terms. In some instances, ''lost duties'' (with or without the additional ''taxes and fees'') may be used in reference to 19 U.S.C. 1592 and ''lost revenue'' may be used in reference to 19 U.S.C. 1593a. CBP further notes that sampling may be employed in a CBP audit conducted for purposes of either 19 U.S.C. 1592 or 19 U.S.C. 1593, while offsetting under 19 U.S.C. 1509(b)(6) may be applied in a CBP audit only for calculating lost duties (or lost revenue, as set forth in the statute) under 19 U.S.C. 1592. Finally, sampling by a private party is not limited to use in a CBP audit context; offsetting by CBP or a private party, as set forth in this document, is so limited.

[2] The appropriate CBP Fines, Penalties and Forfeitures (FP&F) office may approve the sampling in some circumstances; in others, FP&F may forward the prior disclosure that employs sampling to RA for review and approval of the sampling.

those instances where self-testing is authorized by CBP at some point after the conference), CBP will explain the sampling method and how the sampling results would be applied in determining lost revenue and overpayments (see the following section for discussion of offsets for overpayments). An audited person, including one employing self-testing, who accepts the sampling plan also waives its ability to challenge the validity and methodology of the sampling plan at a later date. Having accepted the sampling plan, the audited person is limited to challenging only alleged computational or clerical errors. Once CBP approves the specifics of the sampling plan, and the person being audited agrees to waive its ability to challenge the validity of the sampling plan at a later date, the audit (or self-testing) may proceed in accordance with that plan. CBP's authority to conduct the audit or to employ sampling is not dependent on the audited person's acceptance of the specifics of the sampling plan.

(3) The same waiver provision applies to a situation involving a private party conducting an independent review and lost revenue calculation for purposes of prior disclosure, where CBP elects to conduct a CBP audit after submission of the prior disclosure claim. In this instance, before commencing the audit, CBP will explain the specifics of the audit, as above in paragraph (2), and the waiver provision applies.

(4) CBP reserves the right in any case to conduct a full entry-by-entry audit if it deems such an audit appropriate.

IV. Proposed Amendments Concerning Offsetting Overpayments and Over-Declarations Identified by CBP Auditors for Purposes of Lost Revenue or Monetary Penalty Calculations Under 19 U.S.C. 1592

A. The Trade Act of 2002

CBP is updating the regulations to reflect an amendment to section 1509(b) (section 1509(b)) made by Section 382 of the Trade Act of 2002 (the Act; Pub. L. 107–210, 116 Stat. 933 (2002)). Section 382 of the Act amended section 1509(b) by adding the following paragraph (6):

> (6)(A) If, during the course of any audit conducted under this subsection, the Customs Service [now CBP] identifies overpayments of duties or fees or over-declarations of quantities or values that are within the time period and scope of the audit that the Customs Service [CBP] has defined, then in calculating the loss of revenue or monetary penalties under section 592 [of the Tariff Act of 1930, as amended; 19 U.S.C. 1592], the Customs Service [CBP] shall treat the overpayments or over-declarations on finally liquidated entries as an offset to any underpayments or under-declarations also identified on finally liquidated entries, if such overpayments or over-declarations were not made by the person being audited for the purpose of violating any provision of law.
>
> (B) Nothing in this paragraph shall be construed to authorize a refund not otherwise authorized under section 520 [of the Tariff Act of 1930, as amended, 19 U.S.C. 1520].

The explanation of the amendment to section 1509(b) made by Section 382 of the Trade Act of 2002 (the Act; Pub. L. 107–210, 116 Stat. 933 (2002) is contained in House Report 107–320. The House Report states:

> Explanation of the provision
>
> This provision would require that when conducting an audit, Customs [now CBP] must recognize and offset overpayments and overdeclarations of duties, quantities and values against underpayments and under-declarations. As an example, if during an audit Customs [CBP] finds that an importer has underpaid duties associated with one entry of merchandise by $100 but has also overpaid duties from another entry of merchandise by $25, then any assessment by Customs [CBP] must be the difference of $75.

CBP notes that the above explanation is qualified by the statute's explicit limitation on offsetting to identified overpayments/over-declarations and under-payments/under-declarations that are within the time period and scope of the audit as defined by CBP.

B. Offsetting Prior to the Trade Act of 2002

Prior to the Act's amendment of section 1509(b), the ''finality of liquidation'' rule (19 U.S.C. 1514) precluded offsetting (also called netting) when CBP issued a claim for lost duties, taxes, and fees under 19 U.S.C. 1592(d).[3] Thus, prior to the Act, once a liquidation had become final with respect to an entry that was overpaid, CBP was bound by the liquidation and could not offset an overpayment against the underpayments that formed the basis of the penalty action. (*See United States* v. *Snuggles, Inc.,* 20 C.I.T. 1057, 937 F. Supp. 923 (C.I.T. 1996).) In contrast, imposition of a penalty and/or a demand for lost duties, taxes, or fees relative to violative entries identified and included in a penalty case is authorized under section 1592 notwithstanding the provisions of 19 U.S.C 1514.

C. Offsetting After the Trade Act of 2002

The reason for the offsetting amendment to section 1509(b) made by Section 382 of the Trade Act of 2002 (the Act; Pub. L. 107–210, 116 Stat. 933 (2002)) is contained in House Report 107–320. The House Report states:

> Reason for change
>
> A government audit should be an even-handed and neutral evaluation of a person's compliance with the law. The government should treat overpayments/overdeclarations and underpayments/underdeclarations equally, and if both are found during an audit, they should be used to offset each other. The Committee redrafted this provision on the basis of concerns from Customs [now CBP]. It is the Committee's intention that this provision shall not affect in any way Customs' [CBP's] current authority to define an audit's scope, time period, and methodology.

CBP notes that this quoted language from the House Report clearly indicates that offsetting is limited to identified overpayments/over-declarations and underpayments/under-declarations that fall within the time period and scope of the audit as defined by CBP.

As a result of the Act's amendment to section 1509(b) permitting offsetting, CBP is now authorized under the statute to account for overpayments of duties and fees and over-declarations of quantities or values when calculating loss of duties, taxes, or fees (referred to as ''loss of revenue'' in the statute) and monetary penalties levied under section 1592, if:

(1) The overpayments or over-declarations are identified by CBP during an audit (review or examination) conducted by CBP under section 1509(b);

(2) The audit was completed on or after August 6, 2002, the effective date of the Act;

(3) The overpayments or over-declarations relate to liquidated entries;

(4) The overpayments or over-declarations are identified by CBP as having been made within the time period and scope of the audit as defined by CBP; and

(5) The overpayments or over-declarations are determined by CBP not to have been made for the purpose of violating any provision of law, including the customs laws and laws enforced by other agencies, including but not limited to, the Internal Revenue Service.

Regarding item (1) above (the requirement that offsetting applies only where the audit is conducted under section 1509(b)), where overpayments or over-declarations are identified through a process other than an audit conducted under the statute, *e.g.,* a process conducted by an agent, import specialist, or inspection officer in the performance of his/her duties, offsets

[3] Pursuant to the ''finality of liquidation'' rule, with respect to liquidation of an entry (as opposed to other CBP decisions), a CBP decision on liquidation is final and conclusive (binding) on all parties unless timely protested under 19 U.S.C. 1514 within 180 days of the liquidation.

will not be allowed. CBP may allow offsetting when an audited person conducts self-testing under the purview of a section 1509(b) audit, provided that other requirements are met. In this instance, the private party's self-testing, and any offsetting applied, occurs within the context of a section 1509(b) audit and is subject to the CBP auditor's review and approval.

Regarding item (4) above (concerning time period and scope of the audit), CBP has the sole discretion to define the time period and scope of an audit conducted pursuant to section 1509. This includes defining the time period and scope of an audited person's self-testing conducted under CBP supervision as part of a CBP audit.

CBP emphasizes that for offsetting purposes, where statistical sampling is employed in the audit (selecting a smaller number of entries/transactions to represent a greater universe of entries/transactions), identification of underpayments and overpayments is limited to the entries/transactions actually examined (*i.e.,* viewed) by CBP auditors. It is only from these examined entries/transactions that CBP ''identifies'' overpayments or over-declarations, as required by section 1509(b)(6). (*See* ''Offsetting and statistical sampling'' section further below.)

Regarding item (5) above (concerning the restriction on offsetting relative to an overpayment or over-declaration made for the purpose of violating any law), CBP will disallow offsetting where it determines that an overpayment or over-declaration was made for the purpose of violating any law, whether or not CBP is charged with enforcing such law. Any specific intentionally made overpayment/over-declaration identified for offsetting will be disallowed. Similarly, offsetting will not be allowed to reduce underpayments made fraudulently. Thus, CBP will disallow offsetting entirely where any underpayments/under-declarations identified for offsetting were made knowingly and intentionally (*i.e.* derived from a knowing and intentional act).

The Regulatory Audit, Office of International Trade (RA) field office conducting the audit will refer all matters regarding disallowance to the appropriate FP&F office for determination. If a determination to disallow offsets is made, and a penalty notice is issued under section 1592(a) and (c), the determination to disallow offsets will be subject to review by the CBP official having the delegated authority to decide a petition for relief filed pursuant to section 1592(b) and 19 U.S.C. 1618. If a penalty notice is not issued but a demand for lost duties is issued pursuant to section 1592(d), the same determination, upon request, may be reviewed pursuant to 19 CFR 162.79b (a means by which an importer may seek Headquarters review of a demand for lost duties under 19 U.S.C. 1592 (or 19 U.S.C. 1593a which is not relevant to offsetting)).

CBP notes that offsetting may be permitted where the overpayments or over-declarations, within the time period and scope of the audit, were not made by the same acts, statements, or omissions that caused the underpayments or under-declarations; nor are such overpayments or over-declarations limited to having occurred on the same entry or entries that evidence the underpayments or under-declarations. Offsets, however, will not be allowed for duties paid on goods for which a duty allowance or preference was not timely claimed or established at the time of entry, or within the time allowed after entry, under applicable law or regulation. This payment of duties is not an overpayment within the meaning of the offset provision in this circumstance because it results from the failure to timely meet the allowance or preference qualification requirement. Where the offset provision is applied during an audit, CBP will set forth in the audit report the pertinent facts developed concerning the nature of the overpayments or over-declarations in a given case.

Finally, in accordance with section 1509(b)(6)(B), while offsetting is allowed in certain circumstances despite the finality of liquidation, where the offsetting results in a net overpayment of duties, CBP will not issue a refund unless, with respect to a given overpayment (or overpayments), a refund is otherwise authorized under 19 U.S.C. 1520 (section 1520). Section 1520 pertains to CBP's authority to refund overpaid amounts in various specified circumstances and to reliquidate an entry when an importer makes a post-entry NAFTA claim within a year of importation (19 U.S.C. 1520(d)). Also, at the time the offsetting law was enacted, section 1520(c)(1) provided for reliquidation of an entry to correct a clerical error, mistake of fact, or other inadvertence. That provision was repealed in 2004 and now resides in 19 U.S.C. 1514(a). Congress intended its reference to refunds under section 1520 in the offsetting statute enacted in 2002 (section 1509(b)(6)(B)) to include the provision for clerical error, mistake of fact, and other inadvertence. Therefore, CBP proposes to include reference to clerical error, mistake of fact, and other inadvertence under 19 U.S.C. 1514(a) in the proposed regulation as a possible basis for refunds along with section 1520.[4]

By limiting refunds to section 1520, Congress indicated that the offsetting provision of section 1509(b)(6) was not intended to, by itself, authorize a refund or alter the existing statutory scheme regarding the issuance of refunds. Therefore, overpayments properly identified in a CBP audit will be offset against properly identified underpayments, and refunds relative to overpayments will not be made under section 1509(b)(6)(B) within the audit process. Where CBP auditors identify an overpayment entry/transaction in a CBP audit that is eligible for a refund under section 1520 (an unlikely prospect but not inconceivable under section 1520(d) because of the one-year after importation filing period) or section 1514(a), as set forth above, CBP will advise the audited person to file a section 1520 claim or section 1514 protest at the appropriate CBP port office and will not include the entry/transaction's overpayment in the audit's calculation of offsetting.

Illustration: Where underpayments identified in a CBP audit amount to $1,200 and overpayments amount to $1,000, the audited person would be responsible for payment of only $200 (not $1,200) in lost revenue. If, during the course of the audit, a properly identified overpayment entry/transaction was recognized as possibly refund-eligible under either 19 U.S.C. 1514 or 19 U.S.C. 1520, as above, the audited person would be advised to file for reliquidation under the appropriate process relative to that overpayment. Thus, where underpayments identified in a CBP audit total $1,000 and identified overpayments approved for offsetting total $1,200 (not including any overpayments that are eligible for reliquidation (and refund) under sections 1514 or 1520), the audited person would not be responsible for payment of any lost revenue because the overpayments exceed the underpayments, and a refund of the net overpayment of $200 will not be paid. The audited person would be advised to seek reliquidation and a refund under

[4] Under the former section 1520(c)(1) (repealed under Pub. L. 108–429, Title II, Sec. 2105, Dec. 3, 2004), an importer could file a petition for reliquidation to correct a clerical error, mistake of fact, or other inadvertence up to one year from the date of importation. Under current section 1514(a), an importer has 180 days from the date of liquidation to file a protest to correct these errors. For this reason, it is unlikely that a CBP audit of liquidated entries will uncover an entry/transaction that is eligible for a refund under section 1514.

either 19 U.S.C. 1514 or 1520 for any overpayments eligible for such relief.

D. Offsetting and Statistical Sampling

In accordance with the previous discussion of sampling, where sampling is employed in an audit that involves offsetting, identified overpayments and over-declarations will be extrapolated from the smaller number of entries/transactions actually examined (the sample transactions/entries) over the larger universe of entries/transactions encompassed within the time period and scope of the audit in the same way that underpayments and under-declarations, *i.e.,* violative entries/transactions, will be extrapolated. (This extrapolation exercise is also referred to as ''projecting'' the sample results over the universe of entries/transactions.) However, as explained previously, where a sampling method is employed, CBP will not offset for, and therefore will not extrapolate for, a specific overpayment that is outside of the sample examined (*i.e.,* the entries/transactions actually viewed by CBP auditors), even if the overpayment otherwise falls within the time period and scope of the audit and thus within the universe of entries/transactions. To do otherwise would undermine the representative purpose inherent in the statistical sampling (extrapolation/projection) approach, just as would going outside the entries/transactions actually examined to identify another violative entry/transaction (underpayment/under-declaration) for purposes of the audit.

Illustration: CBP initially sets forth the time period and subject matter scope of the audit and thereby identifies the universe of transactions as consisting of 5,000 entries/transactions. In accordance with generally accepted statistical sampling concepts and techniques, CBP determines the entries/transactions to be examined and selects 500 entries/transactions for examination by CBP auditors. Of the 500 entries/transactions examined, CBP auditors identify 50 underpayment entries/transactions and 10 overpayment entries/transactions. These are the total representative underpayments and overpayments ''identified'' for offsetting under the statute. The relevant information obtained from these underpayment and overpayment entries/transactions is projected over the universe of 5,000 entries/transactions to extrapolate total underpayments of $8,000 and total overpayments of $2,000. The total underpayments will be offset by the total overpayments, resulting in total loss of duty in the amount of $6,000. Should the audited person point to any specific overpayments outside the 500 entries/transactions examined (even those within the time period and subject matter scope of the audit and thus within the universe of entries/transactions), such overpayments will be considered outside the sampling plan's targeted set of entries/transactions and will not be considered in the projection. (Of course, any entries/transactions outside the time period and/or scope (subject matter) of the audit also will not be considered.)

E. Proposed Amendments Concerning Offsetting

Because the CBP regulations do not reflect the change in the law made by section 382 of the Act (concerning offsets), CBP is proposing to amend the regulations pertaining to CBP audits to reflect the existing offsetting provision of section 1509(b)(6). CBP notes that the offsetting provision of the Act is self-effectuating and has had legal effect since the effective date of the Act, August 6, 2002. Thus, while the offsetting regulatory amendment is put forward as a part of this proposed regulation, the offsetting provision of 19 U.S.C. 1509(b) is already legally effective.

V. Amendment to Prior Disclosure Regulations

As discussed previously, where a private party submits a prior disclosure claim consisting of an independent review of certain entries/transactions and a loss of revenue calculation, the private party may use statistical sampling to calculate lost revenue. The sampling used is subject to the requirements of proposed § 163.11(c) (see proposed regulatory text and Section III of this document pertaining to sampling). Since the changes proposed in this rule regarding sampling impact the prior disclosure process to some extent, a corresponding amendment is proposed to the prior disclosure regulations, 19 CFR 162.74, to reference the sampling provision of § 163.11(c) and make clear that any sampling method used to calculate lost revenue is subject to CBP approval. If the sampling method is rejected as flawed, the prior disclosure claim will not be approved.

VI. Other Changes

As compliance assessments are no longer the central focus of CBP's auditing program, the proposed amendments include a proposal to remove from pertinent regulations references to compliance assessments. In this regard, ''audit'' is the preferred term, but references to a ''review'' or ''examination'' have the same meaning, provided that the action is conducted under section 1509 in furtherance of the statute's purposes.

Also, as the former Office of Investigations of the U.S. Customs Service is now part of Immigration and Customs Enforcement (ICE), CBP is proposing to add a reference to ICE in the regulation (19 CFR 163.11(f)) concerning formal investigations.

VII. Statutory and Regulatory Reviews

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires Federal agencies to examine the impact a rule would have on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people).

The entities affected by this proposed rule are importers and various other parties who are subject to a CBP audit under the CBP regulations. ''Importers'' are not defined as a ''major industry'' by the Small Business Administration (SBA) and do not have a unique North American Industry Classification System (NAICS) code; rather, virtually all industries classified by SBA include entities that import goods and services into the United States. Thus, entities affected by this proposed rule would likely consist of the broad range of large, medium, and small businesses operating under the customs laws and other laws that CBP administers and enforces. These entities include, but are not limited to, importers, brokers, and freight forwarders, as well as other businesses that operate under drawback, bonded warehouse, and foreign trade zone procedures and those conducting various activities under bond.

The proposed amendments, if adopted as final, would bring the regulations concerning audit procedures up to date with CBP practices by explicitly providing for the use of sampling methods in audits conducted by CBP under 19 U.S.C. 1509. The use of sampling methods is expected to facilitate and enhance the effectiveness of the CBP audit process for CBP and private entities, thus making the process less burdensome for both parties. Also, if adopted, the proposed amendments would bring the regulations up to date with existing law regarding the offsetting of overpayments and over-declarations for the purpose of

calculating loss of revenue or monetary penalties under 19 U.S.C. 1592.

Because these amendments to the regulations affect such a wide-ranging group of entities involved in the importation of goods to the United States, the number of entities subject to this proposed rule would be considered ''substantial.'' Additionally, these changes to the regulations would confer a small, positive economic benefit to affected entities as a result of a more efficient audit process and, in some cases, a reduction of duties found owing to the government. Neither of these benefits, however, would rise to the level of being considered a ''significant'' economic impact. We welcome comments on this conclusion. If we do not receive any comments contradicting our findings, we may certify that this rule will not have a significant economic impact on a substantial number of small entities at the final rule stage.

B. Executive Order 12866

The proposed rule, if adopted as a final rule, would not impose additional requirements or procedural burdens on persons affected and would not have an economic impact on them except in certain penalty cases in which the persons affected would realize a reduction in the amount of a penalty, or in the amount of lost revenue owed, due to the allowance of offsetting. Thus, the rule would not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities. There is no identifiable relationship between what the rule requires, permits, or accomplishes and the procedures, obligations, or responsibilities of other agencies or the obligations of affected persons to other agencies. Thus, the rule would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. The rule would not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, as the rule's provisions have nothing to do with these matters. Also, the rule would not raise novel legal policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866. Thus, the proposed amendments of this rule do not meet the criteria of a ''significant regulatory action'' as described in E.O. 12866.

C. Paperwork Reduction Act

The collections of information in part 163 of the current CBP regulations have already been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) and have been assigned OMB control number 1651–0076 (General recordkeeping and record production requirements). This proposed rule does not involve a change to the existing approved information collection. Affected persons are already required to provide relevant information or records requested by CBP during an audit procedure conducted under the authority of 19 U.S.C. 1509 (the CBP audit statute) and the CBP regulations. Records or information having to do with overpayments or over-declarations for offset purposes under paragraph (b)(6) of the statute fall within this existing requirement. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB.

D. Signing Authority

This proposed regulation is being issued in accordance with 19 CFR 0.1(a)(1) pertaining to the Secretary of the Treasury's authority (or that of his or her delegate) to approve regulations pertaining to certain revenue functions.

List of Subjects

19 CFR Part 162

Administrative practice and procedure, Customs duties and inspection, Penalties, Reporting and recordkeeping requirements.

19 CFR Part 163

Administrative practice and procedure, Customs audits, Customs duties and inspection, Imports, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, parts 162 and 163 of the CBP regulations (19 CFR Parts 162 and 163) are proposed to be amended as set forth below:

PART 162—INSPECTION, SEARCH AND SEIZURE

1. The general authority citation for part 162 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1592, 1593a, 1624; 6 U.S.C. 101; 8 U.S.C. 1324(b).

* * * * *

2. Section 162.74 is amended by adding new paragraph (j) to read as follows:

§ 162.74 Prior disclosure.

* * * * *

(j) *Prior disclosure using sampling.* (1) A private party may use statistical sampling to ''disclose the circumstances of a violation'' and for calculation of lost duties, taxes, and fees or lost revenue for purposes of prior disclosure, provided that the statistical sampling satisfies the three criteria in 19 CFR 163.11 (c)(2). When the private party submits a prior disclosure employing statistical sampling, the time period, scope, and any sampling plan employed by the private party, as well as the execution and results of the self-review, including the sampling plan, are subject to CBP review and approval. The private party submitting a prior disclosure that employs sampling under this paragraph may not contest the validity of the sampling plan or its methodology at a later date and will be limited to challenging computational and clerical errors.

(2) If a private party submits a prior disclosure claim employing sampling, CBP may review other transactions from the same time period and scope that are the subject of the prior disclosure,

PART 163—RECORDKEEPING

3. The general authority citation for part 163 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1484, 1508, 1509, 1510, 1624.

* * * * *

4. Section 163.0 is amended by removing from the second sentence the words, ''or compliance assessment''.

5. Section 163.1 is amended as follows:

A. By revising paragraph (c) as set forth below.

B. By removing paragraph (e), and redesignating existing paragraphs (f) through (l) as paragraphs (e) through (k).

§ 163.1 Definitions.

* * * * *

(c) *Audit.* ''Audit'' means an examination or review by CBP under 19 U.S.C. 1509 of records required to be maintained and/or produced by persons listed in § 163.2, or pursuant to other applicable laws or regulations administered by CBP, for the purpose of furthering any investigation or review conducted to: ascertain the correctness of any entry; determine the liability of any person for duties, taxes, and fees due, or revenue due, or which may be due the United States; determine liability for fines, penalties, and

forfeitures; ensure compliance with the laws of the United States administered by CBP; or determine that information submitted or required is accurate, complete, and in accordance with any laws and regulations administered by CBP. An audit does not include a quantity verification for a customs bonded warehouse or general purpose foreign trade zone. An audit may be as extensive or simple as CBP determines is warranted to achieve the audit's purpose under applicable laws and regulations. CBP may authorize a person being audited to conduct, under CBP supervision, self-testing of its own transactions within the time period and scope of the audit.

* * * * *

6. Section 163.6 is amended by removing the words ''or compliance assessment'' in paragraph (c)(1), first sentence, and in paragraph (c)(2), first sentence.

7. Section 163.7 is amended by removing the words ''or compliance assessment'' in paragraph (a), first sentence.

8. Section 163.11 is revised to read as follows:

§ 163.11 Audit procedures.

(a) *Conduct of a CBP audit.* In conducting an audit under 19 U.S.C. 1509(b), the CBP auditors, except as otherwise provided in paragraph (f) of this section, will:

(1) Provide notice, telephonically and in writing, to the person to be audited of CBP's intention to conduct an audit and a reasonable estimate of the time to be required for the audit;

(2) Inform the person who is to be the subject of the audit, in writing and before commencement of the audit, of that person's right to an entrance conference, at which time the objectives and records requirements of the audit, and any sampling plan to be employed or offsetting that may apply, will be explained and the estimated termination date of the audit will be set;

(3) Provide a further estimate of any additional time for the audit if, during the course of the audit, it becomes apparent that additional time will be required;

(4) Schedule a closing conference upon completion of the audit on-site work to explain the preliminary results of the audit;

(5) Complete a formal written audit report within 90 calendar days following the closing conference referred to in paragraph (a)(4) of this section, unless the Executive Director, Regulatory Audit, Office of International Trade, CBP Headquarters, provides written notice to the person audited of the reason for any delay and the anticipated completion date; and

(6) After application of any disclosure exemptions contained in 5 U.S.C. 552, send a copy of the formal written audit report to the person audited within 30 calendar days following completion of the report.

(b) *Petition procedures for failure to conduct closing conference.* Except as otherwise provided in paragraph (f) of this section, if the estimated or actual termination date of the audit passes without a CBP auditor providing a closing conference to explain the results of the audit, the person audited may petition in writing for a closing conference to the Executive Director, Regulatory Audit, Office of International Trade, Customs and Border Protection, Washington, DC 20229. Upon receipt of the request, the director will provide for the closing conference to be held within 15 days after the date of receipt.

(c) *Use of statistical sampling in calculation of loss of duties or revenue.* (1) *General.* In conducting an audit under this section, regardless of the finality of liquidation under 19 U.S.C. 1514, CBP auditors have the sole discretion to determine the time period and scope of the audit and will examine a sufficient number of transactions, as determined solely by CBP, to make a determination as to whether full duties, taxes, and fees have been paid or drawback was properly claimed. In addition to examining all transactions to identify loss of duties, taxes, and fees under 19 U.S.C. 1592 or loss of revenue under 19 U.S.C. 1593a, or to determine compliance with any other applicable customs laws, CBP auditors, at their sole discretion, may use statistical sampling methods. During the audit, CBP auditors will explain the sampling plan and how the results of the sampling will be projected over the universe of transactions for purposes of calculating lost duties, taxes, and fees or lost revenue and, where appropriate, overpayments and over-declarations eligible for offsetting under paragraph (d) of this section. The person being audited and CBP will discuss the specifics of the sampling plan before commencement of the audit that employs sampling. Once the sampling plan is accepted, the audited person waives the ability to contest the validity of the sampling plan or its methodology at a later date and will be limited to challenging computational and clerical errors. CBP's authority to conduct the audit or employ statistical sampling is not dependent on the audited person's acceptance of the specifics of the sampling plan.

(2) *When CBP uses statistical sampling.* CBP auditors have the sole discretion to use statistical sampling techniques when:

(i) Review of 100 percent of the transactions is impossible or impractical;

(ii) The sampling plan is prepared in accordance with generally recognized sampling procedures; and

(iii) The sampling procedure is executed in accordance with that plan.

(3) *Statistical sampling by audited persons under CBP supervision.* Audited persons permitted in advance by CBP to conduct self-testing of certain transactions under CBP supervision within the time period and scope of a CBP audit may use statistical sampling methods, provided that the three criteria contained in paragraph (c)(2) of this section are satisfied. CBP will determine the time period and scope of the CBP-approved and supervised self-testing and will explain any sampling plan to be employed in accordance with paragraph (c)(1) of this section. The execution and results of the self-testing and the sampling plan are subject to CBP approval, and the audited person is subject to the waiver of paragraph (c)(1) of this section.

(d) *Offset of overpayments and over-declarations in 19 U.S.C. 1592 penalty cases.* (1) *General.* In conducting any audit authorized under 19 U.S.C. 1509(b) and this section for the purpose of calculating the loss of duties, taxes, and fees or monetary penalty under any provision of 19 U.S.C. 1592, CBP auditors identifying overpayments of duties or fees or over-declarations of quantities or values that are within the time period and scope of the audit, as established solely by CBP, may treat the overpayments or over-declarations on finally liquidated entries as an offset to any underpayments or under-declarations also identified on finally liquidated entries, provided that the identified overpayments or over-declarations were not made by the person being audited for the purpose of violating any provision of law, including laws other than customs laws, or the identified underpayments or under-declarations were not made knowingly and intentionally.

(2) *When audited person conducts self-testing under CBP supervision.* Offsetting may apply to self-testing conducted by an audited person under CBP supervision (*i.e.,* during a CBP audit), provided that CBP approves the self-testing in advance and, upon review of the self-testing, including any offsetting applied, approves its execution and results.

(3) *Time period and scope determined by CBP; projection when sampling employed.* In conducting an audit under paragraph (d)(1) of this section or authorizing an audited person's self-testing as described in paragraph (d)(2) of this section, CBP will have the sole authority to determine the time period and scope of the audit. An audit employing statistical sampling will be limited to the transactions that the CBP auditors actually examine (*i.e.*, review) during the audit. The results of the sample examination, with respect to properly identified overpayments and over-declarations and properly identified underpayments and under-declarations, will be projected over the universe of transactions to determine the total overpayments and over-declarations that are eligible for offsetting and to determine the total loss of duties, taxes, and fees.

(4) *Same acts, statements, omissions, or entries not required.* Offsetting may be permitted where the overpayments or over-declarations were not made by the same acts, statements, or omissions that caused the underpayments or under-declarations, and is not limited to the same entries that evidence the underpayments or under-declarations, provided that they are within the time period and scope of the audit as established by CBP and as described in paragraph (d)(4) of this section.

(5) *Limitations.* Offsetting will not be allowed with respect to specific overpayments or over-declarations made for the purpose of violating any provision of law, including laws other than customs laws. Offsetting will not be allowed with respect to overpayments or over-declarations resulting from a failure to timely claim or establish a duty allowance or preference. Offsetting will be disallowed entirely where CBP determines that any underpayments or under-declarations identified for offsetting purposes were made knowingly and intentionally.

(6) *Audit report.* Where overpayments or over-declarations have been identified in accordance with paragraph (d)(1) of this section, the audit report will state whether they have been made within the time period and scope of the audit.

(7) *Disallowance determinations referred to FP&F.* Any determination that offsets will be disallowed where overpayments/over-declarations were made for the purpose of violating any law, or where underpayments or under-declarations were made knowingly and intentionally, will be made by the appropriate Fines, Penalties, and Forfeitures (FP&F) office to which the issue was referred. CBP will notify the audited person of a determination whether to allow offsetting in whole or in part. The FP&F office will issue a notice of penalty and/or demand for lost duties, taxes, and fees where it determines that such action is warranted. Where the FP&F office issues a notice of penalty and/or demand, the audited person may file a petition under 19 CFR part 171.

(8) *Refunds limited.* A net overpayment of duties, taxes, and fees will not be paid as a refund unless the circumstances of the overpayments meet the requirements of 19 U.S.C. 1520 or the requirements of 19 U.S.C. 1514(a) pertaining to clerical error, mistake of fact, or other inadvertence in any entry, liquidation, or reliquidation. In that event, the audited person must file a claim under the applicable statute and regulations at the appropriate CBP port office. Any such overpayment(s) will not be included in the audit's offsetting calculation.

(e) *Sampling not evidence of reasonable care.* The fact that entries were previously within the time period and scope of an audit conducted by CBP in which sampling was employed, in any circumstances described in this section, is not evidence of reasonable care by a violator in any subsequent action involving such entries.

(f) *Exception to procedures.* Paragraphs (a)(5), (a)(6), (b), (d)(7), and (d)(8) of this section do not apply once CBP and/or ICE commences an investigation with respect to the issue(s) involved.

Jayson P. Ahern,

Acting Commissioner, Customs and Border Protection.

Approved: October 15, 2009.

Timothy E. Skud,

Deputy Assistant Secretary of the Treasury.

[FR Doc. E9–25222 Filed 10–20–09; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 948

[WV–116–FOR; OSM–2009–0008]

West Virginia Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We are announcing receipt of a proposed amendment to the West Virginia regulatory program (the West Virginia program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) that includes both statutory and regulatory revisions.

West Virginia submitted a proposed amendment authorized by Committee Substitute for Senate Bill 153 to revise the West Virginia Code of State Regulations (CSR) concerning the continued oversight by the Secretary of ''approved persons'' who prepare, sign, or certify mining permit applications and related materials; regarding incidental boundary revisions (IBR) to existing permits, by clarifying that certain types of collateral activities are part of the primary mining operations and therefore subject to the same acreage limitations, while providing more relevant and exacting criteria for the Secretary to consider in evaluating an application for revision; deleting the bonding matrix forms; changing term ''Bio-oil'' to ''Bio fuel''; and clarifying standards in subsection 9.3.f that pertain to areas developed for hayland or pasture use. West Virginia submitted proposed changes as contained in Senate Bill 436 which amends WV Code 22–3–8 by changing references regarding ''the commissioner of the Bureau of Employment Programs'' and ''the executive director of the workers' compensation commissioner'' which are considered non-substantive.

West Virginia also submitted proposed changes as contained in Committee Substitute for Senate Bill 600 regarding the Special Reclamation Fund. This bill amends the State's alternative bonding requirements by eliminating the 7 cents per ton additional tax and increasing and extending the special reclamation tax from 7.4 to 14.4 cents per ton of clean coal mined. It also requires the special reclamation tax to be reviewed biannually by the Legislature. This amendment (WV–115–FOR) was announced earlier in the July 22, 2009, **Federal Register** (74 FR 36113–36116) as an interim rule and approved on a temporary basis.

West Virginia also submitted proposed changes as contained in Senate Bill 1011 which amends the WV Code by requiring surface mine reclamation plans to comport with approved master land use plans and authorizing surface mine reclamation plans to contain alternative postmining land uses. Senate Bill 1011 was passed by the Legislature on June 2, 2009, during the 1st extraordinary 2009 session, and approved by the Governor on June 17, 2009.

DATES: We will accept written comments on this amendment until 4 p.m. (local time), on November 20, 2009. If requested, we will hold a public hearing on the amendment on November 16, 2009. We will accept requests to speak at a hearing until 4 p.m. (local time), on November 5, 2009.

ADDRESSES: You may submit comments by any of the following two methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* The proposed rule has been assigned Docket ID OSM–2009–0008. If you would like to submit comments through the Federal eRulemaking Portal, go to *http://www.regulations.gov.*
- *Mail/Hand Delivery:* Mr. Roger W. Calhoun, Director, Charleston Field Office, Office of Surface Mining Reclamation and Enforcement, 1027 Virginia Street, East, Charleston, West Virginia 25301. Please include the rule identifier (WV–116–FOR) with your written comments.

Instructions: All submissions received must include the agency Docket ID (OSM–2009–0008) for this rulemaking.

For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Comment Procedures'' in the **SUPPLEMENTARY INFORMATION** section of this document. You may also request to speak at a public hearing by contacting the individual listed under **FOR FURTHER INFORMATION CONTACT**.

Docket: The proposed rule and any comments that are submitted may be viewed over the Internet at *http://www.regulations.gov.* Look for Docket ID OSM–2009–0008. In addition, you may review copies of the West Virginia program, this amendment, a listing of any scheduled public hearings, and all written comments received in response to this document at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. You may also receive one free copy of this amendment by contacting OSM's Charleston Field Office listed below:

Mr. Roger W. Calhoun, Director, Charleston Field Office, Office of Surface Mining Reclamation and Enforcement, 1027 Virginia Street, East, Charleston, West Virginia 25301, Telephone: (304) 347–7158. E-mail: *chfo@osmre.gov.*

West Virginia Department of Environmental Protection, 601 57th Street, SE., Charleston, WV 25304, Telephone: (304) 926–0490.

In addition, you may review a copy of the amendment during regular business hours at the following locations:

Office of Surface Mining Reclamation and Enforcement, Morgantown Area Office, 604 Cheat Road, Suite 150, Morgantown, West Virginia 26508, Telephone: (304) 291–4004 (By Appointment Only).

Office of Surface Mining Reclamation and Enforcement, Beckley Area Office, 313 Harper Park Drive, Suite 3, Beckley, West Virginia 25801, Telephone: (304) 255–5265.

FOR FURTHER INFORMATION CONTACT: Mr. Roger W. Calhoun, Director, Charleston Field Office, Telephone: (304) 347–7158. E-mail: *chfo@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the West Virginia Program
II. Description of the Proposed Amendment
III. Public Comment Procedures
IV. Procedural Determinations

I. Background on the West Virginia Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, ''* * * a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act.'' *See* 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the West Virginia program on January 21, 1981. You can find background information on the West Virginia program, including the Secretary's findings, the disposition of comments, and conditions of approval of the West Virginia program in the January 21, 1981, **Federal Register** (46 FR 5915). You can also find later actions concerning West Virginia's program and program amendments at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.

II. Description of the Proposed Amendment

By letter dated May 11, 2009 (Administrative Record Number WV–1522), the West Virginia Department of Environmental Protection (WVDEP) submitted an amendment to its permanent regulatory program under SMCRA (30 U.S.C. 1201 *et seq.*) and a copy of Committee Substitute for Senate Bill 153. Committee Substitute for Senate Bill 153 modified the West Virginia Code of State Regulations (CSR) concerning the continued oversight of ''approved-persons'' who prepare, sign, or certify mining permit applications and related materials. This bill also proposes to modify incidental boundary revision (IBR) requirements for existing permits by clarifying that certain types of collateral activities are part of the primary mining operations and therefore subject to the same acreage limitations, while providing more relevant and exacting criteria for the Secretary to consider in evaluating an application for revision; deleting the bonding matrix forms; changing the term from ''bio-oil'' to ''bio-fuel''; and clarifying standards for hayland and pasture use. The changes regarding the term ''Bio-oil'' to ''Bio-fuel'' in the program amendments are non-substantive in nature.

Committee Substitute for Senate Bill 153 authorized revisions to the State's Surface Mining Reclamation Regulations at 38 CSR 2. Committee Substitute for Senate Bill 153 was adopted by the Legislature on April 8, 2009, and signed into law by the Governor on April 30, 2009. West Virginia Code at paragraph 64–3–1 (e) authorized WVDEP to promulgate the revisions to its rules as legislative rules.

By letter date May 22, 2009 (Administrative Record Number WV–1521), the WVDEP submitted copies of Senate Bill 436 and Committee Substitute for Senate Bill 600. Senate Bill 436 was adopted by the West Virginia Legislature on April 3, 2009, and it was approved by the Governor on April 11, 2009. Committee Substitute for Senate Bill 600, which authorized changes to the State's alternative bonding system, was passed by the Legislature on April 10, 2009, and it was approved by the Governor on May 4, 2009, with an effective date of July 1, 2009.

Senate Bill 436 amends WV Code 22–3–8 by changing references to ''the commissioner of the Bureau of Employment Programs'' to ''executive director of the Workforce West Virginia'' and ''the executive director of the workers' compensation commissioner'' to ''Insurance Commissioner.'' The revisions authorized by Senate Bill 436 are considered non-substantive changes by the State, and it requests that they not be included in the amendment. Given the nature of the changes, OSM concurs with the State's assessment and finds them to be essentially non-substantive changes. Therefore, we are not soliciting comments on these revisions. However, though perhaps non-substantive, the revisions proposed would amend a statutory provision of the State's approved program. Therefore, we will seek comments on these revisions; if, after the comment

period, we determine that the changes are indeed non-substantive, we will approve them without specific findings.

Committee Substitute for Senate Bill 600 amended Section 22–3–11 of the West Virginia Surface Mining Control and Reclamation Act (WVSCMRA). As stated in the State's May 22, 2009, letter transmitting the amendment, Committee Substitute for Senate Bill 600 ''amends Chapter 22–3–11 of the Code of West Virginia to implement actuarial recommendations relating to the continuing fiscal viability of the Special Reclamation Fund. The legislation consolidates what has been known as ''the 7-and-7.4 tax'' (the 7.4 [cents] portion of which is currently subject to annual renewal) into a 14.4 cent[s] tax per ton of clean coal mined, reviewable every two years by the Legislature''.

By letter dated July 6, 2009 (Administrative Record Number WV 1523), WVDEP submitted a copy of Senate Bill 1011. Senate Bill 1011 amends the WV Code by requiring surface mine reclamation plans to comport with approved master land use plans and authorizing surface mine reclamation plans to contain alternative postmining land uses. Senate Bill 1011 was passed by the Legislature on June 2, 2009, during the 1st extraordinary 2009 session, and approved by the Governor on June 17, 2009.

The amendment is intended to improve the effectiveness of the West Virginia program and to render the West Virginia program no less effective than the Federal regulations. Throughout this proposed amendment, nonsubstantive changes from ''Bio-oil'' to ''Bio-fuel'' are made but not listed in this Proposed Rule Notice.

West Virginia proposes the following amendments to its regulations as authorized by Committee Substitute for Senate Bill 153:

1. CSR 38–2–3.15. Permit Applications: Approved Persons

This amendment proposes to add language regarding persons approved to prepare, sign, or certify permit applications.

Subdivision a is amended by adding (C) after 13(b)(10) to clarify when an approved person has to be a registered professional engineer or licensed land surveyor.

Subdivision 3.15.b is amended by adding ''and subject to be renewed on an annual basis.'' after writing, ''and'' is deleted and ''Approvals and renewals'' is added before ''shall.''

As amended, subdivision 3.15 reads as follows:

3.15.a. Any person approved by the Secretary, unless otherwise provided in the Act and this rule, may prepare, sign, or certify permit application, maps, plans, and design specification or other similar materials necessary to complete an application; provided, however, that for purposes of Sections 9(a)(13) and 13(b)(10)(C) of the Act an approved person shall be a registered professional engineer or licensed land surveyor.

3.15.b. The Secretary's approval shall be in writing and subject to be renewed on an annual basis. Approvals and renewals shall be granted on the basis of the following:

Although there are no specific Federal requirements governing approved persons, these proposed revisions fall under the provisions of 30 CFR 777.11, 777.13, and 780.14(c) and sections 507(b)(14) and 515(b)(10)(B)(ii) of SMCRA.

2. CSR 38–2–3.15.b.3 Permit Applications: Approved Persons

This amendment proposes to add a new subparagraph, 3.15.b.3, regarding obtaining a digital signature approved by the Secretary for an approved person to prepare, sign, or certify permit applications.

As amended, 3.15.b.3 reads as follows:

3.15.b.3. Any person seeking an approval must obtain a digital signature approved by the Secretary and maintain the capability of submitting documents bearing digital signatures to the Secretary. A digital signature shall have the same effect when affixed to documents submitted to the Secretary as a signature affixed by other means.

Although there are no specific Federal requirements governing approved persons, these proposed revisions fall under the provisions of 30 CFR 777.11, 777.13, and 780.14(c) and sections 507(b)(14) and 515(b)(10)(B)(ii) of SMCRA.

3. CSR 38–2–3.15.e Permit Applications: Disciplinary Action and Procedures

This amendment proposes to add a new subdivision, 3.15.e, regarding disciplinary action and procedures for people approved to prepare, sign, or certify permit applications.

As amended, 3.15.e reads as follows:

3.15.e. Disciplinary action and Procedures.

3.15.e.1. The Secretary may:

3.15.e.1.A. Revoke an approved person authorization;

3.15.e.1.B. Suspend an approved person authorization for a period of time, not exceeding two years, subject to such conditions as the Secretary may specify or

3.15.e.1.C. Make the continuation of a person's approved person status subject to such conditions as the Secretary may specify.

3.15.e.2. The Secretary may suspend or revoke a person's approved person status, or refuse to approve, restore, or renew any continuation of a person's approved person status, or impose conditions upon approval, restoration, or renewal, or may reprimand any approved person who has:

3.15.e.2.A. Engaged or has caused others to engage in fraud or deceit in obtaining or renewing his or her approved person status;

3.15.e.2.B. Been negligent, incompetent or committed an act of misconduct as an approved person;

3.15.e.2.C. Failed to comply with any of the provisions of Chapter 22 Article 3 of the Code of West Virginia or any of the rules promulgated thereunder;

3.15.e.2.D. Been disciplined by a professional or occupational licensing body, or by any State or Federal agency;

3.15.e.2.E. Made false statements or signed false statements, certificates or affidavits; or

3.15.e.2.F. Aided or assisted another person in violating any provision of Chapter 22 Article 3 of the Code of West Virginia or any of the rules promulgated thereunder;

Although there are no specific Federal requirements governing approved persons, these proposed revisions fall under the provisions of 30 CFR 777.11, 777.13, and 780.14(c) and sections 507(b)(14) and 515(b)(10)(B)(ii) of SMCRA.

4. CSR 38–2–3.15.f Permit Applications: Imposition of Conditions, Suspension and Revocation

This amendment proposes to add a new subdivision, 3.15.f, regarding the imposition of conditions, suspension and revocation of disciplinary action and procedures for people approved to prepare, sign, or certify permit applications.

As amended, 3.15.f reads as follows:

3.15.f. Imposition of Conditions, Suspension and Revocation.

3.15.f.1. If the Secretary takes one or more of the actions specified in subsection 3.15.e., the person adversely affected shall be notified.

3.15.f.2. Such notice shall inform the person of the conditions or provisions violated and his or her right to request a hearing for the purpose of showing cause why his or her approved person status should not be revoked, suspended, made subject to conditions, or otherwise abridged.

3.15.f.3. Upon request made in writing within fifteen days of service of the notice, the person shall be granted a hearing before the Secretary to show cause why his or her approved person status should not be suspended, revoked, made subject to conditions, or otherwise abridged.

3.15.f.4. If the approved person requests a hearing, a hearing shall be held within thirty (30) days. Within sixty (60) days following the hearing, the Secretary shall determine whether cause exists, and furnish to the approved person a written decision or order setting forth the reasons therefor.

Although there are no specific Federal requirements governing approved persons, these proposed revisions fall under the provisions of 30 CFR 777.11,

777.13, and 780.14(c) and sections 507(b)(14) and 515(b)(10)(B)(ii) of SMCRA.

5. CSR 38–2–3.28.b.1 Permit Revision

This amendment proposes to add the references ''subdivisions 3.2.b., 3.2.c., and 3.2.d. of this rule:'' for additional clarification of the public notice requirements for a significant permit revision. *As amended, subparagraph 3.28.b.1 reads as follows:*

3.28.b.1. Where the permit revision constitutes a significant departure from the terms and conditions of the existing permit which may result in a significant impact in any of the following areas, it shall be deemed to be a significant revision and be subject to the public notice requirements of subdivisions 3.2.a, 3.2.b., 3.2.c. and 3.2.d. of this rule:

These proposed revisions fall under the provisions of 30 CFR 774.13 and section 511(a)(2) of SMCRA.

6. CSR 38–2–3.29.a Incidental Boundary Revisions

This amendment proposes to delete language regarding incidental boundary revisions (IBRs) that involve the abatement of a violation where encroachment goes beyond the permit boundary, unless an equal amount of acreage covered under the IBR for encroachment is deleted from the permitted area and transferred to the encroachment area. *As amended, subdivision 3.29.a reads as follows:*

3.29.a. Incidental Boundary Revisions (IBRs) shall be limited to minor shifts or extensions of the permit boundary into non-coal areas or areas where any coal extraction is incidental to or of only secondary consideration to the intended purpose of the IBR. IBRs shall also include the deletion of bonded acreage which is overbonded by another valid permit and for which full liability is assumed in writing by the successive permittee. Incidental Boundary Revisions shall not be granted for any prospecting operations.

These proposed revisions fall under the provisions of 30 CFR 774.13 and section 511(a)(3) of SMCRA.

7. CSR 38–2–3.29.b.2 Incidental Boundary Revisions—Acreage Limitation

This amendment proposes to add language regarding the acreage limitation for underground mining and other related mining operations. Under the proposed revision, the State proposes to apply its underground mining acreage limit and waiver provisions to loadout operations, coal refuse disposal operations, and coal preparation operations. As amended, subparagraph 3.29.b.2 reads as follows:

3.29.b.2. For purposes of surface mining operations, the maximum total acreage to be permitted under one or more IBR(s) shall not exceed twenty (20) percent of the original permitted acreage or a maximum of fifty (50) acres, whichever is less, throughout the life of the permit. Acreage limitation for IBR(s) on underground mining operations and other mining operations including but not limited to loadout operations, coal refuse disposal operations and coal preparation operations shall be limited to one hundred fifty (150) percent of the original permitted acreage or a maximum of fifty (50) acres, whichever is less, throughout the life of the permit; Provided, That the Secretary may grant a waiver specifying larger acre limits where the applicant demonstrates that the nature and complexity of the operation clearly requires more than fifty (50) acres for additional facilities to include but not be limited to site development, air shafts, fan ways, vent holes, roads, staging areas, *etc.*

These proposed revisions fall under the provisions of 30 CFR 774.13 and section 511(a)(3) of SMCRA.

8. CSR 38–2–3.29.d Incidental Boundary Revisions

This amendment proposes to delete language regarding the findings the Secretary must make prior to approving IBRs. Currently, the Secretary must make six required findings prior to approving an IBR. As proposed, the State intends to delete language requiring the Secretary to find that the IBR does not constitute a change in postmining land use; will only involve lands for which the approved PHC is applicable; does not constitute a change in the mining method; and will not result in adverse environmental impacts of a larger scope or different nature from those described in the approved permit. Due to the proposed deletion of these four IBR findings, the State proposes to renumber 3.29.d.5 and 3.29.d.6 as 3.29.d.1 and 3.29.d.2, respectively. *As amended, subparagraph 3.29.d now only has two required findings and reads as follows:*

3.29.d. The Secretary shall make the following findings prior to approval of an IBR:

3.29.d.1 The IBR will facilitate the orderly and continuous conduct of mining and reclamation operations.

3.29.d.2 Except for underground operations, an area permitted under an IBR must be contiguous to the original permitted area.

These proposed revisions fall under the provisions of 30 CFR 774.13 and section 511(a)(3) of SMCRA.

9. CSR 38–2–3.29.e Incidental Boundary Revisions—Hydrologic—Consequences/Assessment—Significant or Non-significant

This amendment proposes to delete language which gives the Secretary the authority to require IBR applications to be advertised and to provide for a 10-day public comment period. The amendment also proposes to add new language regarding the review of applications for IBR's to determine if an updated probable hydrologic consequences determination or cumulative hydrologic impact assessment is required. The State also added language setting forth the basis by which an IBR is determined to be significant or non-significant. *As amended, subparagraph 3.29.e reads as follows:*

3.29.e. Each application for an IBR shall be subject to review and approval by the Secretary. Each application shall be reviewed by the Secretary to determine if an updated probable hydrologic consequences determination or cumulative hydrologic impact assessment is required. The Secretary shall make a determination, on the basis of information provided in the IBR application, whether the IBR is of a significant or non-significant nature. The following criteria shall provide guidance for making such a determination.

3.29.e.1. Where the IBR constitutes a significant departure from the terms and conditions of the existing permit which may result in a significant impact in any of the following areas, it shall be deemed to be significant and be subject to the public notice requirements of subdivisions 3.2.a., 3.2.b., 3.2.c. and 3.2.d. of this rule:

3.29.e.1.A. The health, safety, or welfare of the public;

3.29.e.1.B. The hydrologic balance in the area of operation;

3.29.e.1.C. The postmining land use;

3.29.e.1.D. The method of mining;

3.29.e.1.E. Adverse environmental impacts of a larger scope or different nature from those described in the approved permit;

3.29.e.1.F. Areas prohibited from mining pursuant to the provisions of subsection (d) section 22 of the Act; and

3.29.e.1.G. An individual's legal right to receive notice, as prescribed by the provisions of this rule.

3.29.e.2. Where the IBR constitutes only an insignificant departure from the terms and conditions of the approved existing permit, it shall be deemed to be non-significant, requiring no public notice.

These proposed revisions fall under the provisions of 30 CFR 774.13 and section 511(a)(2) of SMCRA.

10. CSR 38–2–9.3.f Revegetation Success Standards

This amendment proposes to delete ''Where the postmining land use requires legumes and perennial grasses,'' and add ''For areas to be

developed for hayland or pasture use,'' As amended, subparagraph 9.3.f reads as follows:

9.3.f. For areas to be developed for hayland or pasture use, the operator shall achieve at least a ninety (90) percent ground cover and a productivity level as set forth by the Secretary during any two years of the responsibility period except for the first year. Substandard areas shall not exceed one-fourth (¼) acre in size nor total more than ten (10) percent of the area seeded. Exceptions to this standard may be authorized by the Secretary based on the following:

These proposed revisions fall under the provisions of 30 CFR 816.116(b)(1) and 817.116(b)(1).

11. Site Specific Bonding Tables

This amendment is proposing to delete the Coal Bonding Calculations Tables 1, 2, 3, and 4 in subsection 11.5. In addition, subdivisions 11.5.c, 11.5.d, 11.5.e, and 11.5.f propose to delete language referring to the Bonding Calculations Tables. The criterion for calculating site specific bonds remains the same in the existing regulations.

Although there are no specific Federal requirements governing bonding calculations, these proposed revisions fall under the provisions of 30 CFR 800.14.

12. Section 5B–2A–3: Definitions

This amendment is proposing to add the following definitions to the West Virginia Code 5B–2A–3.

(2) ''Master land use plan'' means a plan as defined in 145 CSR 8;

(3) Is renumbered (4) and the following definition for ''Operator'' is added: ''Operator'' means the definition in section three, article three, chapter twenty-two of this code;

(4) Is renumbered (5) and the following definition for ''Renewable and alternative energy'' is added: ''Renewable and alternative energy'' means energy produced or generated from natural or replenishable resources other than traditional fossil fuels or nuclear resources and includes, without limitation, solar energy, wind power, hydropower, geothermal energy, biomass energy, biologically derived fuels, energy produced with advanced coal technologies, coalbed methane, fuel produced by a coal gasification or liquefaction facility, synthetic gas, waste coal, tire-derived fuel, pumped storage hydroelectric power or similar energy sources.

As amended, West Virginia Code 5B–2A–3 reads as follows:

(a) For the purpose of this article, the following terms have the meanings ascribed to them:

(2) ''Master land use plan'' means a plan as defined in 145 CSR 8;

(4) ''Operator'' means the definition in section three, article three, chapter twenty-two of this code;

(5) ''Renewable and alternative energy'' means energy produced or generated from natural or replenishable resources other than traditional fossil fuels or nuclear resources and includes, without limitation, solar energy, wind power, hydropower, geothermal energy, biomass energy, biologically derived fuels, energy produced with advanced coal technologies, coalbed methane, fuel produced by a coal gasification or liquefaction facility, synthetic gas, waste coal, tire-derived fuel, pumped storage hydroelectric power or similar energy sources.

Although there are no specific Federal requirements governing master land use plans, these proposed revisions fall under the provisions of SMCRA 507, 508, and 515(b), (c), (d) and (e) and 30 CFR 780.23, 784.15, 784.16, 816/817.133 and 824.

13. Section 5B–2A–5: Powers and Duties

This amendment proposes to add ''shall'' after ''assistance'' in West Virginia Code 5B–2A–5(8). *As amended, West Virginia Code 5B–2A–5(8) reads as follows:*

(8) On its own initiative or at the request of a community in close proximity to a mining operation, offer assistance to facilitate the development of economic or community assets. Such assistance shall include the preparation of a master land use plan pursuant to the provisions of section nine of this article.

Although there are no specific Federal requirements governing master land use plans, these proposed revisions fall under the provisions of SMCRA 508 and 30 CFR 780.23.

14. Section 5B–2A–6: Community Impact Statement

This amendment proposes to replace at West Virginia Code 5B–2A–6 (2) ''division's'' with ''department's''; add ''county'' after ''local''; delete ''economic'' after ''regional'' and add ''or redevelopment'' after ''development''. This amendment proposes to add new language at (9) regarding a master land use plan; and at (9)(d) regarding receipt of a community impact statement. The old (d) is relettered to (e) and in (e)(1), ''the effective date of this article'' is deleted and ''June 11, 1999'' is added.

As amended, West Virginia Code 5B–2A–6 reads as follows:

(a)(2) The operator shall provide copies of the community impact statement to the division's department's office of mining reclamation and office of explosives and blasting and to the county commissions, county clerks' offices and local, county or regional economic development or redevelopment authorities of the areas to be affected by the surface mining operations.

(b) The community impact statement, where practicable, shall not be a highly technical or legalistic document, but shall be written in a clear and concise manner understandable to all citizens. The community impact statement shall include the following:

(9) An acknowledgment of the recommendations of any approved master land use plan that pertains to the land proposed to be mined, including an acknowledgment of the infrastructure components needed to accomplish the designated post-mine land use required by the plan.

(d) Within thirty days of receipt of a community impact statement pursuant to subdivision (2), subsection (a) of this section or a revised community impact statement pursuant to subsection (c) of this section, the local, county or regional development or redevelopment authorities of the areas to be affected by the surface mining operations shall provide a written acknowledgment of the receipt of this community impact statement or revised community impact statement to the department's Division of Mining Reclamation, to the county commission or county commissions and to the office.

(e) The provisions of this section shall apply as follows:

(1) To all surface mining permits granted after June 11, 1999; and

(2) At the first renewal date of all previously issued permits: *Provided,* That the permittee shall be afforded ninety days from said date to comply with the provisions of this section.

Although there are no specific Federal requirements governing master land use plans, these proposed revisions fall under the provisions of SMCRA 507, 508, and 515(b), (c), (d) and (e) and 30 CFR 780.23, 784.15, 784.16, 816/817.133 and 824.

15. Section 5B–2A–9: Securing Developable Land and Infrastructure

This amendment proposes to delete from (f) ''Participation in a master land use plan is voluntary.'' At (f)(1) delete ''State, local, county or regional development or redevelopment authorities may'' and add ''The county commission or other governing body for each county in which there are surface mining operations that are subject to this article shall'' after ''may''; delete ''that include'' after ''needs'' and add '', including, but not limited to, renewable and alternative energy uses, residential uses, highway uses,''; add new language at the end of (f)(1) regarding designation of development or redevelopment authority and adoption of a master land use plan. (f)(2) is deleted and new language is added to (f)(2), (3)(A), (3)(B), (3)(C), and (3)(D) regarding master land

plan use; (3) is renumbered to (4) and ''subdivision (1) of this subsection'' is deleted and ''a master land use plan'' is added; ''relevant State, local,'' is deleted after ''the''; ''regional'' is deleted after ''or''; and ''its designated'' is added after ''or''; ''State, local,'' is deleted after ''respective'' and ''regional'' is deleted after ''or''; ''State, local,'' is added after ''relevant'' in (4)(ii); ''or other county governing body'' is added after ''commissions''; and (4) is renumbered to (5).

As amended, West Virginia Code 5B–2A–9(f) reads as follows:

(f) The office may secure developable land and infrastructure for a development office or county through the preparation of a master land use plan for inclusion into a reclamation plan prepared pursuant to the provisions of section ten, article three, chapter twenty-two of this code. No provision of this section may be construed to modify requirements of article three of said chapter.

(1) The county commission or other governing body for each county in which there are surface mining operations that are subject to this article shall determine land and infrastructure needs within their jurisdictions through the development of a master land use plan which incorporates post-mining land use needs, including, but not limited to, renewable and alternative energy uses, residential uses, highway uses, industrial uses, commercial uses, agricultural uses, public facility uses or recreational facility uses. A county commission or other governing body of a county may designate a local, county, or regional development or redevelopment authority to assist in the preparation of a master land use plan. A county commission or other governing body of a county may adopt a master land use plan developed after July 1, 2009, only after a reasonable public comment period;

(2) Upon the request of a county or designated development or redevelopment authority, the office shall assist the county or development or redevelopment authority with the development of a master land use plan;

(3)(A) The Department of Environmental Protection and the Office of Coalfield Community Development shall review master land use plans existing as of July 1, 2009. If the office determines that a master land use plan complies with the requirements of this article and the rules promulgated pursuant to this article, the office shall approve the plan on or before July 1, 2010;

(B) Master land use plans developed after July 1, 2009, shall be submitted to the department and the office for review. The office shall determine whether to approve a master land use plan submitted pursuant to this subdivision within three months of submission. The office shall approve the plan if it complies with the requirements of this article and the rules promulgated pursuant to this article;

(C) The office shall review a master land use plan approved under this section every three years. No later than six months before the review of a master land use plan, the county or designated development or redevelopment authority shall submit an updated master land use plan to the department and the office for review. The county may submit its updated master land use plan only after a reasonable public comment period. The office shall approve the master land use plan if the updated plan complies with the requirements of this article and the rules promulgated pursuant to this article;

(D) If the office does not approve a master land use plan, the county or designated development or redevelopment authority shall submit a supplemental master land use plan to the office for approval;

(4) The required infrastructure component standards needed to accomplish the designated post-mining land uses identified in a master land use plan shall be developed by the county or its designated development or redevelopment authority. These standards must be in place before the respective county or development or redevelopment authority can accept ownership of property donated pursuant to a master land use plan. Acceptance of ownership of such property by a county or development or redevelopment authority may not occur unless it is determined that: (i) The property use is compatible with adjacent land uses; (ii) the use satisfies the relevant county or development or redevelopment authority's anticipated need and market use; (iii) the property has in place necessary infrastructure components needed to achieve the anticipated use; (iv) the use is supported by all other appropriate public agencies; (v) the property is eligible for bond release in accordance with section twenty-three, article three, chapter twenty-two of this code; and (vi) the use is feasible. Required infrastructure component standards require approval of the relevant county commission, commissions or other county governing body before such standards are accepted. County commission or other county governing body approval may be rendered only after a reasonable public comment period;

Although there are no specific Federal requirements governing master land use plans, these proposed revisions fall under the provisions of SMCRA 507, 508, and 515(b), (c), (d) and (e) and 30 CFR 780.23, 784.15, 784.16, 816/817.133 and 824.

16. Section 22–3–10: Reclamation Plan Requirements

This amendment proposes to add new language to West Virginia Code 22–3–10(a)(3) regarding a variety of alternative uses; delete language regarding master plan for postmining land use; add new language regarding postmining land use; delete language regarding surface permit application and add language regarding master land use plan. This amendment also proposes to add new language at the end regarding the effective date of these amendments.

As amended, West Virginia Code 22–3–10(a)(3) will read as follows:

Each reclamation plan * * * shall include * * * a statement of:

(3) The use which is proposed to be made of the land following reclamation, including a discussion of the utility and capacity of the reclaimed land to support a variety of alternative uses, including, but not limited to, renewable and alternative energy uses, residential uses, highway uses, industrial uses, commercial uses, agricultural uses, public facility uses or recreational facility uses, and the relationship of the use to existing land use policies and plans and the comments of any owner of the surface, other State agencies and local governments which would have to initiate, implement, approve or authorize the proposed use of the land following reclamation;

(A) The post-mining land use proposed in any reclamation plan for lands proposed to be mined by surface mining methods shall comport with the land use that is specified in the approved master land use plan for the area as provided in section nine, article two-a, chapter five-b of this code: *Provided,* That the secretary may approve an alternative post-mining land use where the applicant demonstrates that:

(i) The proposed post-mining land use is a higher and better use than the land use specified in the approved master land use plan;

(ii) Site-specific conditions make attainment of a post-mining land use which comports with the land use that is specified in the approved master land use plan for the area impractical; or

(iii) The post-mining land use specified in the approved master land use plan would substantially interfere with the future extraction of mineable coal, as that term is defined in 110 CSR 1 or a successor rule, from the land to be mined.

(B) Existing permits with approved reclamation plans may be modified by the operator through an appropriate permit revision to include a post-mining land use which comports with the land use that is specified in the approved master land use plan for the area as provided in section nine, article two-a, chapter five-b of this code;

(C) By complying with a master land use plan that has been approved in accordance with article two-a, chapter five-b of this code, a post-mining land use satisfies the requirements for an alternative post-mining land use and satisfies the variance requirements set forth in subsection (c), section thirteen, article three, chapter twenty-two of this code if applicable to the proposed use;

(b) A reclamation plan pending approval as of the effective date of this section may be amended by the operator to provide for a post-mining land use that comports with a master land use plan that has been approved in accordance with article two-a, chapter five-b of this code.

(d) The amendments to this section by the first extraordinary session of the Legislature in 2009 are effective upon the approval of the corresponding amendments to West Virginia's State program, as that term is defined in the Federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1291, by the Federal Office of Surface Mining Reclamation and Enforcement.

Although there are no specific Federal requirements governing master land use plans, these proposed revisions fall under the provisions of SMCRA 507, 508, and 515(b), (c), (d) and (e) and 30 CFR 780.23, 784.15, 784.16, 816/817.133 and 824.

17. Section 22–3–11 Bonds

Subsection 22–3–11(h)(1) of the WVSCMRA is amended by deleting the year 2008, and adding language to provide that, ''For tax periods commencing on and after July 1, 2009, every person conducting coal surface mining shall remit a special reclamation tax * * *'' Former subparagraph (A) is revised by deleting language which provides that the special reclamation tax be remitted for the initial period of twelve months, ending June 30, 2009, and the word ''seven'' is deleted. As modified, the special reclamation tax is increased from seven and four-tenths to fourteen and four-tenths cents per ton of clean coal mined.

Former subparagraph (B) is amended by deleting language which provides that ''[A]n additional seven cents per ton of clean coal mined, the proceeds of which shall be deposited in the Special Reclamation Fund.'' This revision eliminates the additional seven cents tax which previously funded the Special Reclamation Fund.

Furthermore, language is deleted which provides that the additional seven cents tax shall be reviewed and, if necessary, adjusted annually by the Legislature upon the recommendation of the council pursuant to the provisions of section seventeen, article one of this chapter. This provision is modified to provide that, ''Beginning with the tax period commencing on July 1, 2009, and every two years thereafter, the special reclamation tax shall be reviewed by the Legislature to determine whether the tax should be continued:''

As amended, West Virginia Code 22–3–11(h)(1) reads as follows:

(h)(1) For tax periods commencing on and after July 1, 2009, every person conducting coal surface mining shall remit a special reclamation tax of fourteen and four-tenths cents per ton of clean coal mined, the proceeds of which shall be allocated by the secretary for deposit in the Special Reclamation Fund and the Special Reclamation Water Trust Fund. The tax shall be levied upon each ton of clean coal severed or clean coal obtained from refuse pile and slurry pond recovery, or clean coal from other mining methods extracting a combination of coal and waste material as part of a fuel supply. Beginning with the tax period commencing on July 1, 2009, and every two years thereafter, the special reclamation tax shall be reviewed by the Legislature to determine whether the tax should be continued: *Provided* That the tax may not be reduced until the Special Reclamation Fund and Special Reclamation Water Trust Fund have sufficient moneys to meet the reclamation responsibilities of the State established in this section.

This proposed amendment was announced earlier in the July 22, 2009, **Federal Register** (74 FR 36113–36226) as an interim rule (WV–115–FOR) and approved on a temporary basis.

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether these amendments satisfy the applicable program approval criteria of 30 CFR 732.15. If we approve these revisions, they will become part of the West Virginia program.

Written Comments

Send your written comments to OSM at one of the addresses given above. Your comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of your recommendations. We may not consider or respond to your comments when developing the final rule if they are received after the close of the comment period (*see* **DATES**) or sent to an address other than those listed above (*see* **ADDRESSES**).

Availability of Comments

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

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** until 4 p.m. (local time), on November 5, 2009. If you are disabled and need reasonable accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold a hearing. To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at the public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings will be open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the Administrative Record.

IV. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempt from review by the Office of Management and Budget under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination with Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian Tribes and have determined that the rule does not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The basis for this determination is that our decision is on a State regulatory program and does not involve a Federal regulation involving Indian lands.

Executive Order 13211—Regulations that Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

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 under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

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) Does not have an annual effect on the economy of $100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (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 determination is based upon the analysis performed under various laws and executive orders for the counterpart Federal regulations.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or Tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the analysis performed under various laws and executive orders for the counterpart Federal regulations.

List of Subjects in 30 CFR Part 948

Intergovernmental relations, Surface mining, Underground mining.

Dated: August 8, 2009.

Michael K. Robinson,

Acting Regional Director, Appalachian Region.

[FR Doc. E9–25314 Filed 10–20–09; 8:45 am]

BILLING CODE 4310–05–P

GENERAL SERVICES ADMINISTRATION

41 CFR Parts 300–70 and 302–1

[FTR Case 2009–306; Docket 2009–0011, Sequence 1]

RIN 3090–AI94

Federal Travel Regulation (FTR); FTR Case 2009–306; Relocation Allowances

AGENCY: Office of Governmentwide Policy (OGP), General Services Administration (GSA).

ACTION: Proposed rule.

SUMMARY: This proposed rule defines a process for collecting transaction-level data regarding relocation of Federal civilian employees. Specifically, this proposed rule would require that agencies that spend more than $5 million per year on travel and relocation send transaction-level data on relocation to GSA at least quarterly. GSA will store this data in a data warehouse that the agencies will be able to query to answer operational, managerial, and policy questions. In addition to the transaction-level reporting process, this proposed rule also would establish an annual reporting requirement for data regarding employee relocation and would modify the existing requirement for large agencies to collect and report data on temporary duty travel on an annual basis, instead of biennially.

DATES: Comments must be received on or before December 21, 2009.

ADDRESSES: Submit comments identified by FTR case 2009–306 by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Search for any document by typing in the FTR case number (for example, FTR case 2009–306) and clicking on the ''Go'' button.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVPR), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FTR case 2009–306 in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Henry Maury, OGP, Office of Travel, Transportation, and Asset Management, at (202) 208–7928. For information pertaining to status or publication schedules contact the Regulatory Secretariat (MVPR), Room 4041, 1800 F Street, NW., Washington, DC 20405, (202) 501–4755. Please cite FTR case 2009–306.

SUPPLEMENTARY INFORMATION:

A. Background

In 1986, Congress amended 5 U.S.C. 5707 for travel and relocation by mandating that GSA collect and report data from certain Federal agencies (Pub. L. 99–234). This mandate expired in 1991 but was permanently reinstated in 1994 by Public Law 103–329, Sec. 634(c), 5 U.S.C. 5707(c). In summary, the current statute states:

- The Administrator of General Services shall submit to the Office of Management and Budget (OMB), at least once every two years, a report on agency spending on temporary duty travel and relocation.
- The report shall be an analysis of estimated total agency payments for items such as travel, transportation, average cost and duration of trips, purposes of official travel, and estimated total agency payments for relocation.
- The report shall be based on a sampling survey of agencies that spent more than $5 million during the previous fiscal year on travel and relocation combined.
- The agencies that spent more that $5 million during the previous fiscal year shall provide the necessary information to GSA in a format prescribed by GSA.

GSA has surveyed the agencies, in accordance with this statute, several times since 1994. The results have not been useful. The governmentwide totals were clearly far less than the actual governmentwide expenditures as estimated by GSA, OMB, and the trade press.

One explanation for the lack of data is that agencies had no way to gather it at a reasonable cost. For both temporary duty travel and relocation, the agencies found it impossible to provide complete and reliable answers to the questions because they had no central repository for this data. Instead, agencies had to survey each of the thousands of locations where travel or relocation orders were authorized and, in most cases, they had to actually copy and add the values from paper copies of travel and relocation orders.

Today, all documentation for travel and relocation should be fully automated, so it should be much easier to collect complete and reliable data. For temporary duty travel, agencies are in the final stages of migrating to eTravel systems, which can provide the required data easily. For employee relocation, GSA expects shortly to publish a final rule that urges agencies to move to comprehensive, automated, relocation management systems, which again should be able to provide the data that they are required to report.

Data collection processes for travel and relocation should provide:

1. Accurate, complete, transparent, and reliable totals of expenditures that can be tracked year-to-year, on an agencywide and governmentwide basis.
2. Accurate, complete, transparent, and reliable totals of the major components of travel and relocation, such as lodging, air travel, household goods shipments, residence transaction reimbursements, *etc.,* also with enough consistency that they can be tracked year-to-year.
3. Enough detail that Federal agencies, GSA, OMB, Congress, and the public can analyze the information, identify policies that perhaps ought to be adjusted, determine whether those policy levers actually should be moved, and determine the direction and amplitude of appropriate changes in policy (a policy lever in this context is a point at which the statute or regulation allows, or should allow, GSA or agency relocation managers to make adjustments in response to changes in the market, changes in relocation patterns, *etc.*).

For example, household goods shipments have been limited to 18,000 pounds per household at least since 1966, but GSA has never had data to determine whether the current statutory weight limitation should be higher, lower, or tiered in some fashion. Transaction-level data would allow GSA to answer these questions, as well as similar questions about many other current provisions.

This proposed rule would replace the existing reporting process described in FTR part 300–70 with separate reporting requirements for temporary duty travel and employee relocation. The travel reporting requirement would remain in FTR part 300–70, but the employee relocation reporting requirement would now be in FTR part 302–1.

For temporary duty travel, GSA's Federal Acquisition Service is building a data warehouse with information derived from vouchers in the eTravel systems, Travel Management Services, banks that issue the Government's travel charge cards, and other sources. This warehouse, when it is fully operational, will allow the agencies, GSA, OMB, and Congress to answer a wide range of questions about temporary duty travel. In the meantime, this proposed rule would simplify the requirements in FTR part 300–70, stating only that GSA will provide the required data elements, report format, and due dates in an FTR bulletin. This proposed rule would also change the reporting requirement for temporary duty travel from biennial to annual.

For employee relocation, GSA and the Executive Relocation Steering Committee (ERSC, a Governmentwide body chartered and chaired by GSA) have determined that the only way to ensure the accuracy described in paragraph numbers 1 and 2, above, and to provide the detail required by paragraph number 3, is to collect transaction-level information. GSA's OGP is building a data warehouse to store this information and make it available to appropriate parties. This proposed rule would establish the basic requirements for the affected agencies to gather and send the necessary, transaction-level information to GSA.

Concurrent with this proposed rule, GSA is publishing a Notice in this **Federal Register**. The Notice announces and requests comments on this proposed rule and a proposed FTR Bulletin. The proposed FTR bulletin itself can be viewed on GSA's Web site, at *http://www.gsa.gov/relo;* it consists primarily of a data dictionary, with the list of data elements, field lengths, coding, definitions, and suggested data sources that the affected agencies would be required to report. GSA would update this FTR bulletin whenever GSA and the ERSC determine that a change is needed.

This proposed rule would also establish an annual reporting requirement for employee relocation data. At first glance, this requirement may seem redundant, since the agencies will be providing the data to GSA's data warehouse, and then presumably will be extracting summary data from that warehouse for the annual report; however, it is not redundant because it has very different objectives. The objectives of the annual reporting requirement are:

1. To have a senior executive at each agency ensure the accuracy, completeness, and reliability of the data that the agency has sent to the warehouse; and
2. To make those executives cognizant of the full extent of their agencies' relocation programs.

GSA expects to publish the details of the annual reporting requirement (data elements, format, due date, *etc.*), along with details of the transaction-level process, in a second FTR bulletin. This second bulletin will be fully coordinated with the ERSC before publication, and it will also be updated as necessary. GSA is postponing this second Bulletin because it would not be reasonable to require annual reports until a majority of agencies are sending transaction data to the data warehouse.

The statute, at 5 U.S.C. 5707(c), as summarized above, states that The Administrator of General Services shall submit to OMB, at least once every two years, a report on agency spending on temporary duty travel and relocation. GSA believes that requiring the transaction-level data collection process and annual reporting by agencies will allow GSA to compile the necessary data to fulfill the statute's intent within the timeframes prescribed. The intent of the statute is to make Federal relocation data transparent to all interested parties and, thereby, to make it much easier for OMB, GSA, and Federal agency executives to manage relocation more efficiently and effectively. It is clear from the Governmentwide Relocation Advisory Board report and from the analysis by the GSA and the ERSC that only a transaction-level reporting process can accomplish this intent.

GSA's intention is to make this rule effective on the date that the final rule is published in the **Federal Register**. GSA recognizes that many agencies will not be able to fulfill the requirements immediately. GSA also notes, however, that since 1994 (and previously, 1985–1991) 5 U.S.C. 5707(c) has required that agencies spending more than $5 million per year on travel and relocation be able to provide data to GSA, so that GSA could fulfill its reporting requirements. Several private sector companies sell systems that agencies can use to collect and send the data described in the proposed FTR Bulletin associated with this proposed rule, and a number of agencies have agency-developed systems that can be modified to collect and send the required data. GSA will work closely with the affected agencies to help them fulfill the requirement once issued as a final rule.

B. Proposed Rule

This proposed rule would change the reporting requirement for data regarding temporary duty and employee relocation from biennial to annual, and it would add a requirement that agencies submit selected data from every employee relocation transaction to the GSA relocation data warehouse.

C. Changes to Current FTR

This proposed rule would replace FTR sections 300–70.1, 300–70.2, and part 302–1, subpart B, in their entirety.

D. Executive Order 12866

This proposed rule is excepted from the definition of ''regulation'' or ''rule'' under section 3(d)(3) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993, and therefore, was not subject to review under section 6(b) of that Executive Order.

E. Regulatory Flexibility Act

This proposed rule is not required to be published in the **Federal Register** for notice and comment as per the exemption specified in 5 U.S.C. 553(a)(2); therefore, the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* does not apply.

F. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because these proposed changes to the FTR do not impose information collection requirements that require the approval of OMB under 44 U.S.C. 3501, *et seq.*

G. Small Business Regulatory Enforcement Fairness Act

This proposed rule is also exempt from congressional review under 5 U.S.C. 801 since it relates solely to agency management and personnel.

List of Subjects in 41 CFR Parts 300–70 and 302–1

Agency Reporting Requirements and General Rules.

Dated: June 29, 2009.

Stan Kaczmarczyk,

Acting Associate Administrator, Office of Governmentwide Policy.

For the reasons set forth in the preamble, pursuant to 5 U.S.C. 5701–5709, GSA proposes to amend 41 CFR Parts 300–70 and 302–1 as set forth below:

PART 300–70—AGENCY REPORTING REQUIREMENTS

1. The authority citation for 41 CFR Part 300–70 continues to read as follows:

Authority: 5 U.S.C. 5707; 5 U.S.C. 5738; 5 U.S.C. 5741–5742; 20 U.S.C. 905(a); 31 U.S.C. 1353; 40 U.S.C. 121(c); 49 U.S.C. 40118; E.O. 11609, 3 CFR, 1971–1975 Comp., p. 586.

2. Revise § 300–70.1 to read as follows:

§ 300–70.1 What are the requirements for reporting payments for employee travel and relocation?

Agencies (as defined in § 301–1.1 of this title) that spent more than $5 million on travel and transportation payments, including relocation, during the fiscal year immediately preceding the report due date, must report such total agency payments as described in this regulation.

(a) Specific information on reporting payments for temporary duty travel are in this subpart.

(b) Specific information on reporting payments for employee relocation are in Part 302–1, Subpart B.

3. Revise § 300–70.2 to read as follows:

§ 300–70.2 What information must we report, and when must we report it?

GSA provides the list of data elements, the report formats, and the due dates in a series of FTR bulletins. GSA coordinates these FTR bulletins with the affected agencies and updates them as needed. FTR bulletins are available through: *http://www.gsa.gov/ftrbulletins.*

PART 302–1—GENERAL RULES

4. The authority citation for 41 CFR part 302–1 is revised to read as follows:

Authority: 5 U.S.C. 5707(c); 5 U.S.C. 5738; 20 U.S.C. 905(a).

5. Add subpart B to part 302–1 to read as follows:

Subpart B—Reporting Requirements

Sec.
302–1.100 [Reserved]
302–1.101 [Reserved]
302–1.102 Are we required to report to GSA on employee relocation activities?
302–1.104 What data must we provide to the GSA relocation data warehouse?
302–1.105 When must we collect the data for the GSA relocation data warehouse?
302–1.106 When must we send the data to the GSA relocation data warehouse?
302–1.107 What data must we send to GSA in our annual report?
302–1.108 Who must sign the annual report?
302–1.109 May an agency report at the bureau level?

Subpart B—Reporting Requirements

§ 302–1.100 [Reserved]

§ 302–1.101 [Reserved]

§ 302–1.102 Are we required to report to GSA on employee relocation activities?

Yes, every agency that spent more than $5 million during the preceding fiscal year on travel and transportation payments, including relocation, must report to GSA on their employee

relocation activities, as provided in this subpart. Agencies that spend $5 million per year or less are also welcome to participate.

§ 302–1.103 What data collection processes will GSA employ for employee relocation?

(a) GSA collects transaction-level data, which is stored in a data warehouse and made available for analysis to appropriate officials.

(b) In addition, reporting agencies must submit annual summary reports to GSA, signed by a senior executive as specified in FTR 302–1.108.

§ 302–1.104 What data must we provide to the GSA relocation data warehouse?

GSA works with the affected agencies to develop the data elements and report format for this information, and publishes the specific requirements in a series of FTR bulletins. These bulletins provide the data dictionary and details on the reporting processes (*i.e.,* annual and transactional). FTR bulletins are available through *http://www.gsa.gov/ftrbulletins.*

§ 302–1.105 When must we collect the data for the GSA relocation data warehouse?

The affected agencies must collect the data elements listed in the data dictionary from every relocation transaction that includes one or more of the required data elements. This includes all travel authorizations for relocation, plus allowances, reimbursements, and direct payments to vendors.

§ 302–1.106 When must we send the data to the GSA relocation data warehouse?

The affected agencies must send the specified data to the GSA warehouse at least quarterly. There is no maximum frequency; agencies may send data to the warehouse daily if they choose to do so.

§ 302–1.107 What data must we send to GSA in our annual report?

GSA specifies the data elements, format, and due date for the current annual report in an FTR bulletin. FTR bulletins are available through *http://www.gsa.gov/ftrbulletins.*

§ 302–1.108 Who must sign the annual report?

The annual report must be signed by a senior executive who has the authority to ensure that the data provided to the data warehouse and in the annual report are accurate, complete, and reliable.

§ 302–1.109 May an agency report at the bureau level?

Yes, an agency may send multiple reports from different bureaus or components, so long as the sum of all those reports represents all relocation activity in the agency.

[FR Doc. E9–25334 Filed 10–20–09; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 171, 172, 173, 174, 175, 176, 177, 178, 179, 180

[Docket Nos. PHMSA–2009–0126 (HM–215K)]

[RIN 2137–AE45]

Hazardous Materials: Harmonization With the United Nations Recommendations on the Transport of Dangerous Goods Model Regulations, International Maritime Dangerous Goods Code, International Civil Aviation Organization Technical Instructions for the Safe Transport of Dangerous Goods by Air, and Transport Canada's Transport of Dangerous Goods Regulations

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Advanced notice of proposed rulemaking (ANPRM).

SUMMARY: PHMSA is considering amending the Hazardous Materials Regulations (HMR) by incorporating various amendments to international standards and modal regulations, including changes to proper shipping names, hazard classes, packing groups, special provisions, and packaging authorizations. These amendments may be necessary to harmonize the HMR with revised editions of the United Nations Recommendations on the Transport of Dangerous Goods Model Regulations and Manual of Tests and Criteria, the International Maritime Organization's Dangerous Goods Code, the International Civil Aviation Organization's Technical Instructions for the Safe Transport of Dangerous Goods by Air and Transport Canada's Transport of Dangerous Goods Regulations. In this notice, we are soliciting public comment regarding the safety consequences, regulatory burden, and cost implications of some of the more significant amendments adopted or under consideration for adoption in these international standards.

DATES: Comments must be received by January 19, 2010.

ADDRESSES:

Comments: You may submit comments identified by the docket number PHMSA–2009–0126 by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Operations, U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, Routing Symbol M–30, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* To Docket Operations, Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number for this notice at the beginning of the comment. Note that all comments received will be posted without change to the Federal eRulemaking Portal, including any personal information provided.

Privacy Act: Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, 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), which may also be found at *http://www.dot.gov.*

Docket: For access to the dockets to read background documents or comments received, go to *http://www.regulations.gov* or DOT's Docket Operations Office (*see* **ADDRESSES**).

FOR FURTHER INFORMATION CONTACT: Michael Stevens, Office of Hazardous Materials Standards, telephone (202) 366–8553, or Shane Kelley, International Standards, telephone (202) 366–0656, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., 2nd Floor, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

I. Background
II. International Standards and Modal Regulations for Review
A. Sixteenth Revised Edition of the United Nations Recommendations on the Transport of Dangerous Goods Model Regulations (UN Model Regulations)
1. Noteworthy Amendments
2. Additional Amendments

B. Fourth Revised Edition of the United Nations Recommendations on the Transport of Dangerous Goods, Manual of Tests and Criteria (UN Manual of Tests and Criteria)
C. 2011–2012 Edition of the International Civil Aviation Organization's Technical Instructions for the Safe Transport of Dangerous Goods (ICAO Technical Instructions)
D. 2010 Edition (Amendment 35–10) of the International Maritime Dangerous Goods Code (IMDG Code)
E. Amendments 6 and 7 to Transport Canada's Transport of Dangerous Goods Regulations (TDG Regulations)
F. Amendments to the International Standards and Modal Regulations Under Consideration in Separate Dockets
III. Request for Comments
IV. Regulatory Analyses and Notices
A. Executive Order 12866 and DOT Regulatory Policies and Procedures
B. Executive Order 13132
C. Executive Order 13175
D. Regulatory Flexibility Act, Executive Order 13272, and DOT Policies and Procedures
E. Paperwork Reduction Act
F. Environmental Assessment
G. Privacy Act
H. International Trade Analysis
I. Statutory/Legal Authority for the Rulemaking
J. Regulatory Identifier Number (RIN)

I. Background

On December 21, 1990, the Research and Special Programs Administration (RSPA), the predecessor agency to the Pipeline and Hazardous Materials Safety Administration (PHMSA) published a final rule (Docket HM–181; 55 FR 52402) based on the UN Model Regulations to comprehensively revise the Hazardous Materials Regulations (HMR), 49 CFR parts 171 to 180, for harmonization with the international standards. Since publication of the 1990 final rule, we have issued seven additional international harmonization final rules, (Dockets HM–215A, 59 FR 67390; HM–215B, 62 FR 24690; HM–215C, 64 FR 10742; HM–215D, 66 FR 33316; HM–215E, 68 FR 44992; HM–215G, 69 FR 76044; and HM–215J, 74 FR 2199). The rulemakings provided additional harmonization with international transportation requirements by aligning the HMR with corresponding updates of the United Nations Recommendations on the Transport of Dangerous Goods Model Regulations, United Nations Recommendations on the Transport of Dangerous Goods, Manual of Tests and Criteria, International Civil Aviation Organization's Technical Instructions for the Safe Transport of Dangerous Goods, International Maritime Dangerous Goods Code, and Transport Canada's Transport of Dangerous Goods Regulations.

The UN Model Regulations are not regulations, but rather are recommended standards issued by the UN Sub-Committee of Experts on the Transport of Dangerous Goods (UN Sub-Committee of Experts). These recommendations are amended and updated biennially and serve as the basis for many national, regional and international modal regulations.

The Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101, *et seq.*) requires PHMSA to align the HMR with international transport standards and requirements to the extent practicable (see section 5120). Harmonization of domestic and international standards becomes increasingly important as the volume of hazardous materials transported in international commerce grows and the cost of conducting international commerce increases. Harmonization facilitates international trade by minimizing the costs and other burdens of complying with multiple or inconsistent safety requirements for transportation of hazardous materials to and from the United States. By facilitating compliance with international standards, harmonization also tends to enhance safety for international movements, but only if the international standards themselves provide an appropriate level of safety. To that end, PHMSA actively participates in the development of international standards for the transportation of hazardous materials, frequently advocating the adoption in international standards of particular HMR requirements. When considering the adoption of international standards and regulations under the HMR, we review and consider each amendment on its own merit, including an assessment of its overall impact on transportation safety and the economic implications associated with its adoption into the HMR. Our goal is to harmonize without diminishing the level of safety currently provided by the HMR and without imposing undue burdens on the regulated public.

In this notice, we are soliciting comments on amendments made to or proposed for the international standards and modal regulations to aid in our review and consideration of whether the changes should be adopted into the HMR. We encourage interested parties to review the changes made to these international standards and modal regulations through the links to resources that we provide below.

II. International Standards and Modal Regulations for Review

This notice solicits comments regarding the sixteenth revised edition of the UN Model Regulations, the fourth revised edition of the UN Manual of Tests and Criteria, the 2011–2012 edition of the ICAO Technical Instructions, the 2010 edition of the IMDG Code (Incorporating Amendment 35–10), and Amendments 6 and 7 of the TDG Regulations. We are particularly interested in data and information demonstrating possible transportation safety impacts, which will help us to evaluate whether to propose adoption of any of the international revisions into the HMR. We are also seeking data and information on potential compliance costs that would result from adoption into the HMR of the international revisions.

A. Sixteenth Revised Edition of the United Nations Recommendations on the Transport of Dangerous Goods Model Regulations (UN Model Regulations)

Recently, the UN Sub-Committee of Experts issued amendments to be incorporated in the upcoming sixteenth revised edition of the UN Model Regulations. The amendments range from routine editorial corrections to significant changes to standards for classification criteria, hazard communication and authorized packaging. We are in the process of reviewing these amendments and will be considering the amendments for adoption in the HMR.

1. Noteworthy Amendments

We believe a number of the amendments to the UN Model Regulations may be of particular interest to the regulated community. We are highlighting these amendments to give interested parties an opportunity to provide comment and feedback on the transportation safety impacts, economic implications, and compliance burdens of these amendments. Information provided in response to this notice will help us determine whether to propose adoption of these amendments into the HMR. Below is a listing of important amendments to the UN Model Regulations we believe needs public input, with a brief explanation of each amendment.

- *Classification of Sour Crude Oil:* At the 33rd Session of the UN Sub-Committee of Experts in July 2008, the expert from Canada noted that the transportation of sour crude oil may pose additional risks due to its inherent characteristic of ''off-gassing'' hydrogen

sulfide, a highly toxic and flammable gas. Sour crude oil, as opposed to ''sweet'' crude oil, contains a high concentration of sulfur and is commonly found in North America. Off-gassing is the evolution of vapors from a liquid substance that is created due to temperature, packaging confinement, transport conditions (*e.g.*, sloshing), bacteria and sulfur concentration, among many other potential factors. As a result, the UN Model Regulations were amended by assigning a new identification number and shipping description for sour crude oil with a flammable primary hazard and a toxic subsidiary hazard. Additionally, a new special provision which specifies the Packing Group (PG) assignment was created for this entry based on the degree of danger presented by either the flammability or inhalation toxicity hazard of the sour crude oil. For example, sour crude oil meeting flammability criteria for Class 3, PG II, and toxicity criteria for Division 6.1, PG I, poisonous-by-inhalation, would be classified as a Class 3, PG I material. We invite commenters to provide data and information concerning the impact on domestic shippers and carriers if these requirements are adopted in the HMR. We also are interested in comments addressing which hazard communication methods (*e.g.*, package markings, shipping papers) and/or packaging requirements are most cost-effective to reduce the hazards of transporting sour crude oil. The working documents (ST/SG/AC.10/C.3/2008/12 and ST/SG/AC10/C.3/2008/96) for this issue can be found at *http://www.unece.org/trans/main/dgdb/dgsubc/c32008.html;* and an informal document discussing this issue (UN/SCETDG/34/INF.62) can be found at *http://www.unece.org/trans/main/dgdb/dgsubc/c3inf34.html.*

• *Classification of Explosives:* For several Division 1.4 explosive articles (UN0323, UN0366, UN0441, UN0445, UN0455, UN0456, UN0460, and UN0500), the UN Model Regulations have been amended to require a Type 6(d) test to determine whether an article may be assigned to Compatibility Group S. The test is performed on a single package containing an explosive substance or explosive article to determine if the package is capable of containing any explosive effects in the event of an accidental initiation or ignition of its contents. The amendments include revisions to the explosives testing standards in the UN Manual of Tests and Criteria (see below) and include a new special provision that would allow the use of the above-mentioned hazardous materials table entries only if the results of test Type 6(d) successfully demonstrate that any explosive effects are confined within a package. The initial working document (ST/SG/AC.10/C.3/2007/29) considered by the UN Sub-Committee of Experts relative to this amendment can be found at *http://www.unece.org/trans/main/dgdb/dgsubc/c32007.html.* This proposal was ultimately adopted with a number of modifications, including limiting the applicability to the aforementioned identification numbers. We invite commenters to provide data and information concerning the possible safety impacts of the new test provisions and compliance costs that would be incurred if the new test is adopted in the HMR. In addition, we invite commenters to provide suggestions or recommendations concerning whether to apply the test to already approved explosives. It should also be noted that an addendum has been added to the 2009–2010 ICAO Technical Instructions applicable to these eight explosive articles that requires successful demonstration of the Type 6(d) Test for transport aboard passenger aircraft after January 1, 2010 and allows explosives not yet subjected to the new test method to be transported aboard cargo aircraft until January 1, 2011. Addendum 3 to the 2009–2010 ICAO Technical Instructions can be found at *http://www.icao.int/anb/FLS/DangerousGoods/*, and the working paper (no. 66) presented to the ICAO Dangerous Goods Panel on the implementation of such policy can be found at *http://www.icao.int/anb/FLS/DangerousGoods/DGP/WorkingGroups/WG09/WPs/.*

• *IBC Rebottling:* Under the UN Model Regulations and the HMR, the replacement of the rigid plastic receptacle of a composite IBC is considered a ''repair'' under certain conditions and, thus, not subject to design qualification testing as a new or different design. The UN Sub-Committee of Experts issued an amendment to the UN Model Regulations that specifies a replacement bottle must be of the original tested design type but limits the replacement to a bottle from the original manufacturer. We invite comments on this amendment to the UN Model Regulations and how, if adopted in the HMR, it would impact the use of IBCs in domestic or international commerce. The working document (ST/SG/AC.10/C.3/2008/28) for this issue can be found at *http://www.unece.org/trans/main/dgdb/dgsubc/c32008.html;* an informal document discussing this issue (UN/SCETDG/32/INF.33) can be found at *http://www.unece.org/trans/main/dgdb/dgsubc/c3inf32.html*, while additional informal documents regarding this issue (UN/SCETDG/33/INF.4, 31, 60, 61 and 73) can be found at *http://www.unece.org/trans/main/dgdb/dgsubc/c3inf33.html.*

• *Limited Quantities and Consumer Commodities:* The HMR have long-recognized the relatively low risk posed by the transportation of certain hazardous materials as limited quantities or consumer commodities. Considerable efforts have recently been made internationally to harmonize multi-modal standards with regard to the transport of limited quantities, including consumer commodities. We held public meetings on this issue in February 2006 and March 2008 to discuss potential impacts on domestic stakeholders. Additionally, this issue was discussed during our pre-UN public meetings held in 2006 and 2007. There was considerable domestic interest in pursuing further harmonization internationally due to the potential for substantial savings in transportation costs and improved transportation efficiency. In this notice, we invite comments on this issue with regard to aligning the HMR with the UN Model Regulations for the domestic and international transport of limited quantities and consumer commodities. Of particular concern are any potential negative impacts on the domestic transportation of consumer commodities reclassed as ORM–D materials. While some changes adopted in the UN Model Regulations were similar to those currently in the HMR related to limited quantities and consumer commodities (*e.g.*, inner packaging limits and non-specification outer packagings allowed), some changes were not (*e.g.*, marking, labeling, package gross mass). Depending on comments received and our own evaluation, we may determine that the significance of any amendments on this issue will warrant a separate rulemaking action. The working document (ST/SG/AC.10/C.3/2008/17) for this issue can be found at *http://www.unece.org/trans/main/dgdb/dgsubc/c32008.html;* informal documents discussing this issue (UN/SCETDG/33/INF.9, 14 and 75) can be found at *http://www.unece.org/trans/main/dgdb/dgsubc/c3inf33.html.*

• *Metal Hydride Storage Systems in Conveyances:* A metal hydride storage system is a single complete hydrogen storage system that includes a receptacle, metal hydride, a pressure relief device, a shut-off valve, service equipment and internal components. The HMR currently do not prescribe

specific packaging or shipping methods for metal hydride storage systems containing hydrogen. However, PHMSA has issued a number of special permits to allow the use of these systems for transport. The UN Model Regulations, in new Packing Instruction P205, prescribe standards for the construction, qualification, marking and requalification of such systems. We invite comments on whether similar standards should be adopted in the HMR. The working documents (ST/SG/AC10/C.3/2008/72, 73 and 74) for this issue can be found at *http://www.unece.org/trans/main/dgdb/dgsubc/c32008.html.*

• *In Vitro Testing for Corrosivity:* In 1992, RSPA began recognizing an alternative test method used to determine the corrosivity of a hazardous material for transportation purposes under the terms and conditions specified in DOT–SP 10904. The UN Sub-Committee of Experts issued amendments to the UN Model Regulations adopting similar *in vitro* test methods prescribed in OECD *Guidelines for the Testing of Chemicals No. 430, In Vitro Skin Corrosion: Transcutaneous Electrical Resistance Test (TER) (2004); No. 431, In Vitro Skin Corrosion: Human Skin Model Test (2004);* and, *No. 435, In Vitro Membrane Barrier Test Method for Skin Corrosion (2006).* Because methods 430 and 431 can be used to determine corrosivity for other than transportation purposes, they cannot be used to determine the Packing Group assignment of a material that tests positive for corrosivity for the purposes of hazardous materials transportation. A negative result for corrosivity under methods 430 and 431 can, however, preclude further testing to determine Packing Group assignment using method 404, the current OECD Guideline involving *in vivo* testing or, method 435, the newly adopted OECD Guideline involving *in vitro* testing. The working document (ST/SG/AC.10/C.3/2007/50) for this issue can be found at *http://www.unece.org/trans/main/dgdb/dgsubc/c32007.html*; the informal document (UN/SCETDG/32/INF.49) on this issue can be found at *http://www.unece.org/trans/main/dgdb/dgsubc/c3inf32.html.*

2. Additional Amendments

A number of other amendments may be considered based on the changes adopted in the sixteenth revised edition of the UN Model Regulations. A complete record of amendments included in the sixteenth revised edition of the UN Model Regulations is contained in the report document ST/SG/AC.10/36/Add.1 and may be obtained and reviewed at *http://www.unece.org/trans/main/dgdb/dgcomm/ac10rep.html.* Supporting documents for the amendments can be obtained and reviewed at *http://www.unece.org/trans/main/dgdb/dgsubc/c32009.html.*

B. Fourth Revised Edition of the United Nations Recommendations on the Transport of Dangerous Goods, Manual of Tests and Criteria (UN Manual of Tests and Criteria)

The UN Sub-Committee of Experts issued several amendments to the UN Manual of Tests and Criteria. One of the amendments is discussed in detail in section II.A.1. As a result, we are soliciting comments on the potential impact of requiring an additional test for certain Division 1.4 explosive materials when determining eligibility for inclusion in Compatibility Group S. A record of all the amendments to the fourth revised edition of the UN Manual of Tests and Criteria is contained in the report document ST/SG/AC.10/36/Add.2 and may be obtained and reviewed at *http://www.unece.org/trans/main/dgdb/dgcomm/ac10rep.html.* Working documents and information documents submitted to the UN Subcommittee of Experts for consideration as amendments are available at: *http://www.unece.org/trans/main/dgdb/dgsubc/c32009.html.*

C. 2011–2012 Edition of the International Civil Aviation Organization's Technical Instructions for the Safe Transport of Dangerous Goods (ICAO Technical Instructions)

The ICAO Dangerous Goods Panel (ICAO DGP) has proposed a number of amendments to the 2011–2012 edition of the ICAO Technical Instructions and will be finalized in November 2009. When available, these amendments will be posted on the ICAO DGP Web site at *http://www.icao.int/anb/FLS/DangerousGoods/dgp/.* We will consider these amendments for adoption in the HMR under either this rulemaking or under docket HM–231A, discussed in section II.E. A record of the proposed amendments to the Packing Instructions of the 2011–2012 edition of the ICAO Technical Instructions may be reviewed at *http://www.icao.int/anb/FLS/DangerousGoods/PackingInstructions/.*

D. 2010 Edition (Amendment 35–10) of the International Maritime Dangerous Goods Code (IMDG Code)

Upon review of the Maritime Safety Committee's amendments to the IMDG Code, we will consider these amendments for adoption in the HMR. When available, information regarding future IMDG Code amendments will be posted on our website at *http://www.phmsa.dot.gov/hazmat/regs/international.*

E. Amendments 6 and 7 to Transport Canada's Transport of Dangerous Goods Regulations (TDG Regulations)

We are considering updating § 171.7, Matter Incorporated by Reference, to include Amendment 6 (SOR/2008–34) and Amendment 7 (SOR/2007–179) to the TDG Regulations and are soliciting public comment on authorizing their use under the HMR. The revised TDG Regulations, including Amendments 6 and 7, can be found and reviewed at *http://www.tc.gc.ca/tdg/clear/tofc.htm.*

F. Amendments to the International Standards and Modal Regulations Under Consideration in Separate Dockets

The following is a partial listing of those international harmonization issues that we will not be considering for adoption under this docket and a brief explanation of why the issues will be considered in separate rulemakings:

• *Requirements for Lithium Batteries:* At this time, we are not considering any amendments made to provisions for the carriage of lithium batteries in the UN Model Regulations for adoption in the HMR under this docket. Instead, we have initiated a separate rulemaking to consider a broad range of measures to enhance the safe transportation of lithium batteries by all modes (Docket No. PHMSA–2009–0095 (HM–224F)).

• *Amendments to Air Transportation Packaging Requirements:* At this time, we are not considering any amendments made to provisions for packaging of hazardous materials for transportation by aircraft made to the upcoming 2011–2012 ICAO Technical Instructions for adoption in the HMR under this docket. We are considering adoption of the amendments to packaging provisions for air transport in a separate rulemaking project under Docket No. PHMSA–2007–29364 (HM–231A). All documents submitted to the docket thus far can be found and reviewed at *http://www.regulations.gov/.*

• *Requirements for Electronic Data:* As part of a separate rulemaking project, PHMSA's Office of Hazardous Materials Safety in collaboration with DOT modal administrations, emergency response organizations and industry representatives, is exploring prospects for the electronic transfer of information in order to provide better, faster, and more accurate communication of hazard information. Under the current paper-based system, emergency response efforts can be delayed due to a lack of

timely and accurate information and poor communication between transportation partners. We are working to determine regulatory guidelines for the use of electronic communication as a complement, and potentially as an alternative, to hard copies of shipping papers. Under a PHMSA initiative titled HM–ACCESS (Hazardous Materials — Automated Cargo Communication for Efficient and Safe Shipments), we have developed a roadmap that will guide our efforts to promote the adoption of paperless systems both domestically and internationally. Additionally, we are working within the UN Sub-Committee of Experts to develop a baseline of current documentation requirements and consider potential international regulatory amendments that will facilitate the use of electronic documentation within the transportation system. Additional information on the HM–ACCESS initiative and its roadmap can be found in the docket for this rulemaking notice at *www.regulations.gov.*

• *Requirements for Radioactive Materials:* At this time, we are not considering any amendments made to provisions for Class 7 (radioactive) materials in the UN Model Regulations for adoption in the HMR under this docket. The HMR provisions for the carriage of Class 7 (radioactive) materials are normally based on changes contained in the International Atomic Energy Agency (IAEA) publication, ''IAEA Safety Standards Series: Regulations for the Safe Transport of Radioactive Materials.'' Due to their complexity, we have initiated a separate rulemaking to address changes to provisions for the transportation of radioactive materials (Docket No. PHMSA–2009–0063 (HM–250)).

III. Request for Comments

Interested parties are urged to carefully consider the implications of adopting or not adopting amendments to the international standards and modal regulations into the HMR. We urge you to consider the effects on transportation safety, transportation costs, and compliance burdens. In addition to the specific questions regarding areas of concern discussed above, we invite interested parties to submit data and information on any other amendments with regard to the following questions:

1. What safety concerns, if any, are associated with the adoption or non-adoption of amendments made to the international standards and modal regulations into the HMR?

2. What significant costs would be associated with the adoption or non-adoption of amendments made to the international standards and modal regulations into the HMR?

3. What other compliance burdens may be associated with the adoption or non-adoption of amendments made to the international standards and modal regulations into the HMR?

IV. Regulatory Analyses and Notices

PHMSA will base any future proposal for changes on the suggestions and comments provided by interested parties and our own initiatives. Additionally, any proposals would include the analyses required under the following statutes and executive orders in the event we determine that rulemaking is appropriate:

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

Executive Order (E.O.) 12866 requires agencies to regulate in the ''most cost-effective manner,'' to make a ''reasoned determination that the benefits of the intended regulation justify its costs,'' and to develop regulations that ''impose the least burden on society.'' We therefore request comments, including specific data if possible, concerning the costs and benefits that may be associated with revisions to the HMR based on the international harmonization issues presented in this notice. A rule that is considered significant under E.O. 12866 must be reviewed and cleared by the Office of Management and Budget before it can be issued.

B. Executive Order 13132

E.O. 13132 requires agencies to assure meaningful and timely input by state and local officials in the development of regulatory policies that may 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. We invite state and local governments with an interest in this rulemaking to comment on any effect that revisions to the HMR relative to international harmonization may cause.

C. Executive Order 13175

E.O. 13175 requires agencies to assure meaningful and timely input from Indian tribal government representatives in the development of rules that ''significantly or uniquely affect'' Indian communities and that impose ''substantial and direct compliance costs'' on such communities. We invite Indian tribal governments to provide comments if they believe there will be an impact.

D. Regulatory Flexibility Act, Executive Order 13272, and DOT Policies and Procedures

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*), we must consider whether a proposed rule would have a significant economic impact on a substantial number of small entities. ''Small entities'' include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. If you believe that revisions to the HMR relative to international harmonization would have a significant economic impact on small entities, please provide information on such impacts.

Any future proposed rule would be developed in accordance with Executive Order 13272 (''Proper Consideration of Small Entities in Agency Rulemaking'') and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts on small entities of a regulatory action are properly considered.

E. Paperwork Reduction Act

Section 1320.8(d), Title 5, Code of Federal Regulations requires that PHMSA provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. It is possible that new or revised information collection requirements could occur as a result of any future rulemaking action.

F. Environmental Assessment

The National Environmental Policy Act, 42 U.S.C. 4321–4375, requires that federal agencies analyze proposed actions to determine whether the action will have a significant impact on the human environment. The Counsel on Environmental Quality (CEQ) regulations order federal agencies to conduct an environmental review considering (1) the need for the proposed action, (2) alternatives to the proposed action, (3) probable environmental impacts of the proposed action and alternatives, and (4) the agencies and persons consulted during the consideration process. 40 CFR 1508.9(b). PHMSA welcomes any data or information related to environmental impacts that may result from a future harmonization rulemaking.

G. Privacy Act

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, 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 (65 FR 19477) or you may visit *http://www.dot.gov/privacy.html.*

H. International Trade Analysis

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. For purposes of these requirements, Federal agencies may participate in the establishment of international standards, so long as the standards have a legitimate domestic objective, such as providing for safety, and do not operate to exclude imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. PHMSA participates in the establishment of international standards in order to protect the safety of the American public, and we would assess the effects of any rule to ensure that it does not exclude imports that meet this objective. Accordingly, any proposals would be consistent with PHMSA's obligations under the Trade Agreement Act, as amended.

I. Statutory/Legal Authority for This Rulemaking

1. 49 U.S.C. 5103(b) authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce. Harmonization serves to facilitate international transportation; at the same time, harmonization promotes the safety of people, property, and the environment by reducing the potential for confusion and misunderstanding that could result if shippers and transporters were required to comply with two or more conflicting sets of regulatory requirements. While the intent of this rulemaking is to consider aligning the HMR with international standards, we review and consider each amendment on its own merit based on its overall impact on transportation safety and the economic implications associated with its adoption into the HMR. Our goal is to harmonize without sacrificing the current HMR level of safety and without imposing undue burdens on the regulated public. Thus, as explained in the corresponding sections above, we may not propose harmonization with certain specific provisions of the UN Recommendations, the IMDG Code, and the ICAO TI. Moreover, when proposing amendments to the HMR, consideration is given to providing exceptions for domestic transportation that minimizes compliance burden on the regulated community.

2. 49 U.S.C. 5120(b) authorizes the Secretary of Transportation to ensure that, to the extent practicable, regulations governing the transportation of hazardous materials in commerce are consistent with standards adopted by international authorities. This notice considers potential amendments to the HMR that would maintain alignment with international standards by incorporating various amendments. The continually increasing amount of hazardous materials transported in international commerce warrants the harmonization of domestic and international requirements to the greatest extent. The majority of amendments in any harmonization rule should result in cost savings and ease the regulatory compliance burden for shippers engaged in domestic and international commerce, including trans-border shipments within North America.

J. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

Issued in Washington, DC on October 15, 2009 under authority delegated in 49 CFR part 106.

Magdy El-Sibaie,

Acting Associate Administrator for Hazardous Materials Safety.

[FR Doc. E9–25358 Filed 10–20–09; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 572

[Docket No. NHTSA–09–0166]

RIN 2127–AK34

Anthropomorphic Test Devices; Hybrid III 6-Year-Old Child Test Dummy

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: Today's NPRM proposes two changes to the agency's specifications for the Hybrid III six-year-old child dummy. In Part 1 of this NPRM, to improve the durability of the dummy's femurs, we propose changes to the design of and material used for the femur assembly. In Part 2, the drawing for the abdomen insert would be corrected so that the abdominal insert dimensions on the drawing reflect the actual part. Part 2 of this rulemaking commenced in response to a petition for rulemaking submitted by Denton ATD (Denton) and First Technology Safety Systems (FTSS). This document declines the petitioners' suggestion to investigate tolerances for vinyl and rubber components of the dummy and to specify the expected time frame each part would meet the tolerances.

DATES: You should submit your comments early enough to ensure that they are received not later than December 21, 2009.

ADDRESSES: You may submit comments (identified by the Docket ID Number above) by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted

without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

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 (65 FR 19477–78).

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or the street address listed above. Follow the online instructions for accessing the dockets.

FOR FURTHER INFORMATION CONTACT: For non-legal issues, you may call Ms. Lori Summers, NHTSA Office of Crashworthiness Standards (telephone 202–366–1740) (fax 202–493–2990). For legal issues, you may call Ms. Deirdre Fujita, NHTSA Office of Chief Counsel (telephone 202–366–2992) (fax 202–366–3820). You may send mail to these officials at the National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC, 20590.

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I. Overview

This NPRM proposes two changes to the agency's specifications for the Hybrid III six-year-old child dummy (HIII–6C). In Part 1 of this NPRM, to improve the durability of the dummy's femurs, we propose changes to the design of and material used for the femur assembly. The primary modifications include the addition of a ¼-inch (6.35 millimeter (mm)) fillet between the femur clamp and the connecting segment (as defined in section II.b of this preamble) of the machined femur, removal of material from the connecting segment, and a material change from aluminum bronze to 4340 steel. These changes would be made by changing the drawings for the femur in the drawing package specified in 49 CFR Part 572, Subpart N (''Six-year-old child test dummy''), the parts list, and the ''Procedures for Assembly, Disassembly, and Inspection'' (''PADI'') document of the Hybrid III 6-year-old child crash test dummy (June 2002) incorporated by reference into that regulation. In Part 2, the drawing for the HIII–6C abdomen insert would be corrected so that the abdominal insert dimensions on the drawing reflect the actual part. We also propose to make conforming changes to the specifications and drawings of the HIII–6CW weighted child test dummy (49 CFR Part 572, Subpart S).

II. Part 1—Femur Improvements

a. Introduction

The HIII–6C is used to represent a six-year-old child in vehicle crash tests and equipment compliance tests. It is an enhanced, more biofidelic upgrade to its predecessor, the Hybrid II six-year-old dummy. The HIII–6C is used in multiple testing environments, including, but not limited to, out-of-position testing in FMVSS No. 208 (Occupant Crash Protection, 49 CFR 571.208), child restraint system (CRS) evaluation in FMVSS No. 213 (Child Restraint Systems, 49 CFR 571.213),[1] and for research purposes in the New Car Assessment Program (NCAP).

The HIII–6C can be used in its normal configuration or it can be weighted to simulate heavier children (see 49 CFR Part 572, Subpart S). The standard HIII–6C weighs 52 pounds (lb) (23.6 kilograms (kg)). The weighted version of the dummy (HIII–6CW) weighs ten pounds more at 62 lb (28.1 kg). The HIII–6CW was developed to represent larger children for purposes of testing booster seats to the requirements of FMVSS No. 213.[2]

NHTSA has become aware that femur failures, involving complete separation of the dummy leg(s) from the pelvis, have occurred in the test dummy in FMVSS No. 213 testing and in NCAP research testing.

To improve the durability of the femur, NHTSA's Vehicle Research and Test Center (VRTC), through an existing contract with dummy manufacturers First Technology Safety Systems (FTSS) and Denton ATD (Denton),[3] requested the manufacturers to consider new femur designs for the HIII–6C. NHTSA asked the dummy manufacturers to look into improving the femur design after learning of a femur failure. The agency began investigating the femur even though only a single failure had occurred because the same failure had been observed in a prototype version of the Hybrid III 10-year-old child dummy (HIII–10C) that had a femur design that was similar to the present HIII–6C femur.[4] NHTSA was concerned that the HIII–6C's femur was a vulnerable design and that more femur failures would occur as the dummy became more widely used in agency testing.

FTSS and Denton separately developed different redesigns of the HIII–6C's femur. NHTSA has assessed both approaches and has decided to propose design changes that are based on the approach developed by FTSS. NHTSA has prepared a technical report that discusses in detail the femur designs, the agency's analysis of data relating to the proposed redesign of the femur, and other technical information supporting this NPRM. A copy of the report has been placed in the docket.

b. Description of the Femur; Failures

The present design of the HIII–6C femur is specified in 49 CFR Part 572, Subpart N.[5] The machined femur, which is part of the femur assembly illustrated in Figure 1 below, consists of a large section that clamps onto the upper leg and a smaller section that contains the femur shaft. For ease of

[1] Mandatory use of the HIII–6C by NHTSA in compliance tests will begin in 2010. Currently, manufacturers have the option of certifying their child restraints to FMVSS No. 213 using the HIII–6C or the Hybrid II six-year-old dummy.

[2] As noted earlier, we propose changing the specifications and drawings of the HIII–6CW set forth in 49 CFR Part 572, Subpart S, consistent with the changes proposed for the HIII–6C dummy discussed in this preamble.

[3] These are the manufacturers that produce the HIII–6C dummy.

[4] In particular, the machined femur of the HIII–10C had the same sharp corner, discussed in the next section of this preamble, between the ''femur clamp'' and the ''connecting segment'' regions. The machined femur of the HIII–10C that had been involved in the failures was redesigned before the initiation of the HIII–10C's incorporation into 49 CFR Part 572 and the redesigned HIII–10C femurs have not been failing. The redesign of the HIII–10C dummy femur added a ¼-inch (6.35 mm) fillet to reduce stress at the intersection of the femur clamp and connecting segment. Additionally, the material of the HIII–10C machined femur and shaft was modified to be 4140 Steel, which has a significantly higher yield strength (92,000 psi) than the aluminum bronze used in the HIII–6C femur (48,000 psi). The shaft angle of the HIII–10C (77°) is also larger than that of the HIII–6C (55°).

[5] Complete drawings for the HIII–6C femur can be found in Docket No. NHTSA–2002–12541.

discussion, these portions of the machined femur will be referred to as the ''femur clamp'' and the ''connecting segment,'' respectively, for the remainder of this preamble. The femur shaft, retaining flange, and femur ball connect the machined femur to the dummy's pelvis. Similar to a human hip joint, the ball in the HIII–6C femur assembly allows for rotation of the dummy hip joint. The flange is used to attach the femur assembly to the pelvis. The entire femur assembly is found within the lower torso, and the material specification for this assembly, including the machined femur, shaft, flange and ball is Aluminum Bronze C–624 AMC0–18. The line drawn in the illustration shows the approximate location of the femur failure. (The femur load cell, the response of which is discussed in the ''dynamic evaluation'' section below, is located in the distal portion of the upper leg (i.e., farther from the pelvis) and not in the area of the machined femur.)

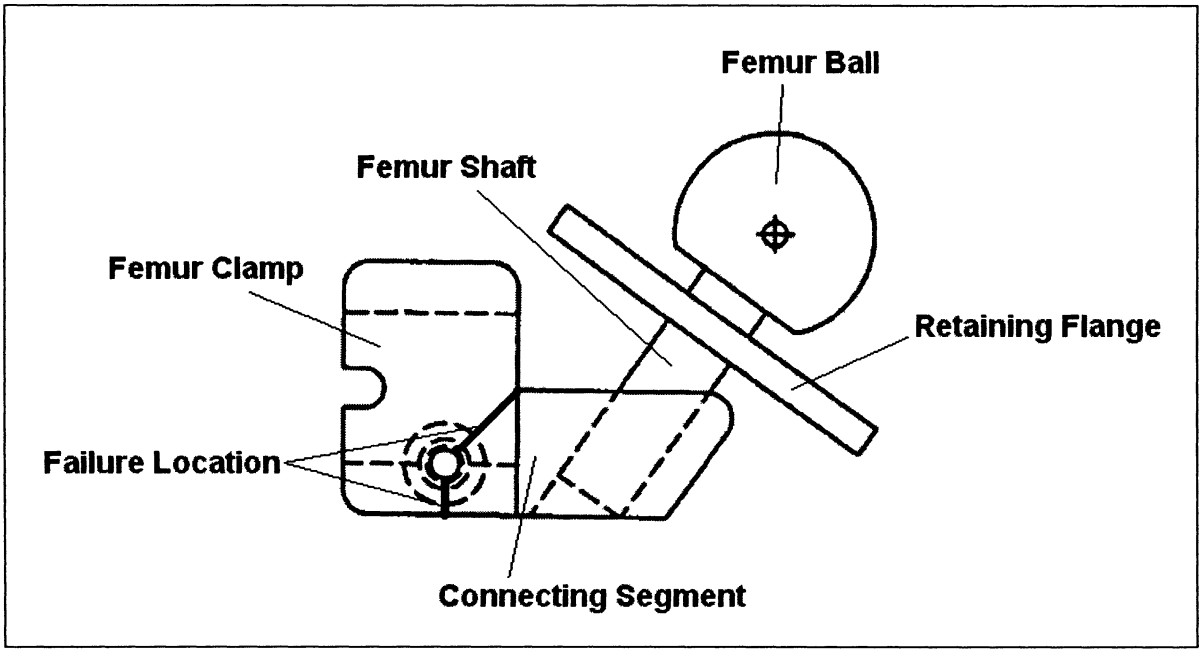

Figure 1: Illustration of femur assembly

Failures of the HIII–6C femur appear to have initiated at a sharp corner between the femur clamp and connecting segment sections of the machined femur. The fracture was observed from this corner to the bolt hole within the femur clamp, at an angle of approximately 45°. The failure continued through the thin section of material directly beneath the bolt hole, causing complete separation of the machined femur. Additionally, in one failed component, small indents on the inner diameter of the retaining flange were observed, indicating potential contact between the flange and shaft. The location of the fracture is depicted in the Figure 1 illustration. Pictures of a fractured part can be found in the technical report accompanying this NPRM.

c. Proposed Femur Design Changes

The proposed modification to improve the femur's durability is based on the approach developed by FTSS. The agency decided on that approach over Denton's because the FTSS design was more straightforward and simpler than that of Denton,[6] and a similar design change had demonstrated improvement in the HIII–10C. Rather than re-designing, FTSS increased the strength and durability of the femur assembly by fabricating the machined femur and shaft from 4340 steel, which has a higher yield strength than the original material, aluminum bronze C–624 AMC0–18, while keeping the ball and retaining flange as the original aluminum bronze material. A ¼-inch (6.35 mm) circular fillet was added between the femur clamp and the connecting segment to eliminate stress-risers that were present on the original femur, and a portion of the connecting segment material near the femur clamp was removed. The weight of the new FTSS femur is only 0.002 lb (0.001 kilograms (kg)) heavier than the original femur. Table 1 below compares the weights and material properties of the original femur, the FTSS-developed femur, and the Denton-developed femur.

[6] Both manufacturers recommended a material change to increase the strength of the femur. In terms of design, FTSS reduced the effects of a stress-riser in the area of the failure, while Denton completed more extensive design changes to also address the alleged issue of ''hip lock.'' Hip lock is a condition where flexion of the dummy's hip joint is mechanically limited due to contact between the femur and the retaining ring or other pelvis structure. Hip lock in the HIII-50th percentile male femur led to design modifications that prevented ''hard'' (i.e., metal-to-metal contact) hip lock from occurring (61 FR 67953, Dec. 26, 1996). In that adult dummy, hard hip lock was characterized by spikes in the unfiltered pelvis and chest accelerometer readings, high and sharply-pointed chest z acceleration traces, non-unimodal chest x and resultant accelerations, and a high tension component in the lumbar z force (Klinich et al., ''Evaluation of a Proposed Hybrid III Hip Modification,'' Stapp Paper No. 952730, 1995).

TABLE 1—WEIGHT AND MATERIAL PROPERTIES FOR THE ORIGINAL AND DEVELOPED HIII–6C FEMUR DESIGNS

Femur design	Measured weight	Material and yield strength	
Original	0.532 lb (0.241 kg)	Aluminum Bronze C–624 AMC0–18	48,000 psi.
FTSS	0.534 lb (0.242 kg)	4340 Steel	114,000 psi.
Denton	0.606 lb (0.275 kg)	4140 Steel	92,000 psi.

To implement this change in femur design and material, the following changes would be made to the materials describing the HIII–6C in 49 CFR Part 572. Drawings 127–3017–1&–2, ''6 YR H3—FEMUR MACHINED'' would be replaced with drawings 127–3017–1S&–2S, which show the proposed machined femur.[7] The femur assembly drawings (127–3016–1&–2) would also be changed due to the new femur design, with new part numbers 127–3016–1S&–2S. Higher assembly drawings including 127–3000, ''LOWER TORSO ASSEMBLY,'' and the complete assembly drawings (127–0000) would be amended to show the proposed part. These revisions would be noted on drawing SA572–127DRL–2. The PADI would also be updated so that it shows the proposed machined femur in figures and reports the proper lower torso assembly and total weight for the dummy. Finally, the part numbers for the machined femur and the femur assembly would be changed in the Parts/Drawings list, along with the revision letters for higher assembly drawings, as appropriate. Copies of the HIII–6C drawing package, PADI, and Parts/Drawings list that include the proposed change in femur design can be obtained online at *http://www.regulations.gov*, in the same docket as this NPRM.

d. Analysis of the New Femur Design

NHTSA has tentatively determined that the proposed changes to the femur would successfully prevent the femur from failing and would not compromise the utility of the test dummy. This determination is based on an analysis showing the stress is reduced by the addition of the fillet as proposed, and on an analysis of dynamic test results, as discussed below.

1. Stress Analysis of the Fillet Effect

In the current HIII–6C machined femur, the change in dimension between the femur clamp and the connecting segment is nearly instant. This abrupt change can lead to high stresses in that area when the femur is loaded. The addition of a fillet in that area reduces these stresses. We have estimated that the proposed addition of the fillet between the femur clamp and the connecting segment of the HIII–6C machined femur will result in stresses approximately 1.6 to two times less than those in the femur without a fillet. However, it is noted that this is only an estimate, as the loading conditions present in the femur during a FMVSS No. 213 type sled test were highly simplified in order to provide a rough estimate of the fillet benefit. Details about the stress reduction approximation can be found in the technical report. Because the fillet design results in substantially reducing stress in the femur of the dummy, we tentatively conclude that adding the fillet and using the 4340 steel material will make the dummy sufficiently durable to avoid femur failure.

2. Dynamic Evaluation

NHTSA evaluated the FTSS-developed femur in April 2006 at the MGA testing facility. To assess the effect of the component modification, a HIII–6C with new femurs (which we refer to as a ''modified HIII–6C'' or ''modified dummy'') was tested in the Britax Marathon, Britax Boulevard and Britax Decathlon to the FMVSS No. 213 test conditions, and the results were compared.[8] To obtain a greater understanding of the loading experienced by the femur assembly, instrumentation was added to the dummy to allow measurement of triaxial accelerations in the pelvis and forces and moments in the femurs. Additionally, to determine the effect of the new femur, we compared test results from a test in which the femur had failed to those of a test with a modified dummy, under conditions that had previously caused failure, i.e., the modified HIII–6C dummy was tested in the Britax Marathon to the FMVSS No. 213 sled pulse.

In all tests of the FTSS-developed femurs, there were no femur failures. In addition, test data relating to left and right femur maximum moments, measurement of FMVSS Nos. 208 and 213 injury mechanisms, dummy kinematics, and other factors concerning the performance of the dummy raised no concerns about the new femur design. We tentatively conclude that the testing indicated that use of the new femur would not affect the utility of the modified HIII–6C and HIII–6CW dummies in FMVSS No. 208, FMVSS No. 213, and NCAP research tests, except to make the dummies more durable and, therefore, more acceptable as anthropomorphic test instruments used in agency testing.

i. Comparing Test Results of the Modified HIII–6C Test in the Marathon, Boulevard, and Decathlon CRSs

NHTSA measured and compared maximum forces and moments measured in the femur load cells (over both legs) of the modified HIII–6C dummy in the Britax Marathon, Boulevard, and Decathlon. The Marathon and Boulevard showed similar maximum forces, while the Decathlon had a higher maximum femur force. All maximum forces occurred along the Z-axis, and all maximum moments were about the Y-axis.

[7] The material specification on drawing 127–3021, ''6 YR H3—FEMUR SHAFT,'' would be changed from ''Aluminum Bronze ⅜ Rnd C–624 AMC0–18'' to ''4340 Steel ⅜ Rnd.''

[8] The Boulevard and Decathlon models were each tested with a modified HIII–6C and with a HIII–6CW with the modified femur design. No femur failure occurred in any of the tests. For simplicity and because the test results of the HIII–6CW are not comparable to those of the HIII–6C, tests of the HIII–6CW dummy are not generally discussed in this preamble. However, results for all tests of the HIII–6CW are discussed in the technical report, including test numbers, maximum head, chest and pelvis accelerations and left and right femur maximum moments and forces.

TABLE 2—MAXIMUM FORCES AND MOMENTS MEASURED IN THE FEMUR LOAD CELLS OF MODIFIED HIII–6C DUMMIES IN AN FMVSS NO. 213 COMPLIANCE TESTING ENVIRONMENT

Femur measure	Britax Marathon*	Britax Decathlon*	Britax Boulevard
	6C	6C	6C
Max Force (N)	1492.9	2264.7	1578.4
Max Moment (N-m)	−78	−63.9	−70

* Marathon: Restraint changed from upright to reclined during test. Decathlon: Top tether webbing separated at the attachment clip and the restraint changed position from upright to reclined.

At the time of maximum moment there are visible differences in the degree of knee extension (test video pictures are provided in the technical report). These visual differences in response are consistent with the differences in force and moment magnitude seen in the tests.

Maximum left and right femur forces from the tests of the HIII–6C dummy are displayed in Figure 2, while Figure 3 shows the maximum moments measured in the left and right legs during each test. In general, force and moment measurements made in the left and right femurs were similar, though not identical. This may give some insight into why failures were observed in the left leg, right leg, or both legs in any given test. We believe that the failures were caused by stresses exceeding the material strength of the femur, so the occurrence of one femur failure, rather than both, may be due to the fact that the forces present during the test were unevenly distributed.

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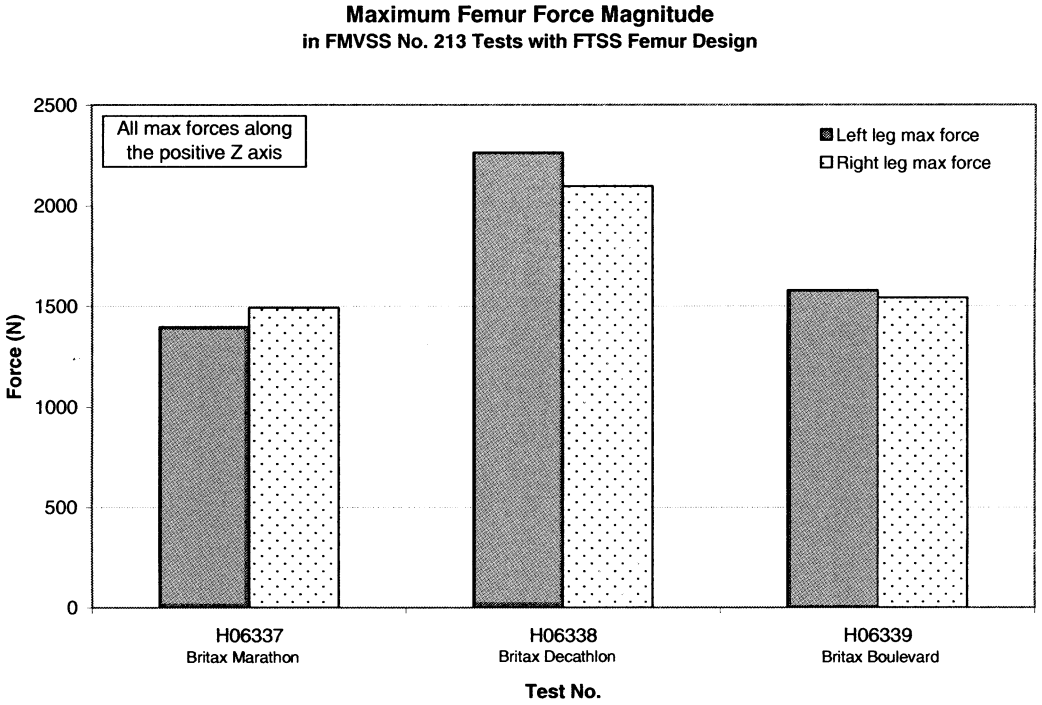

Figure 2: Maximum femur forces measured in modified HIII-6C dummies.

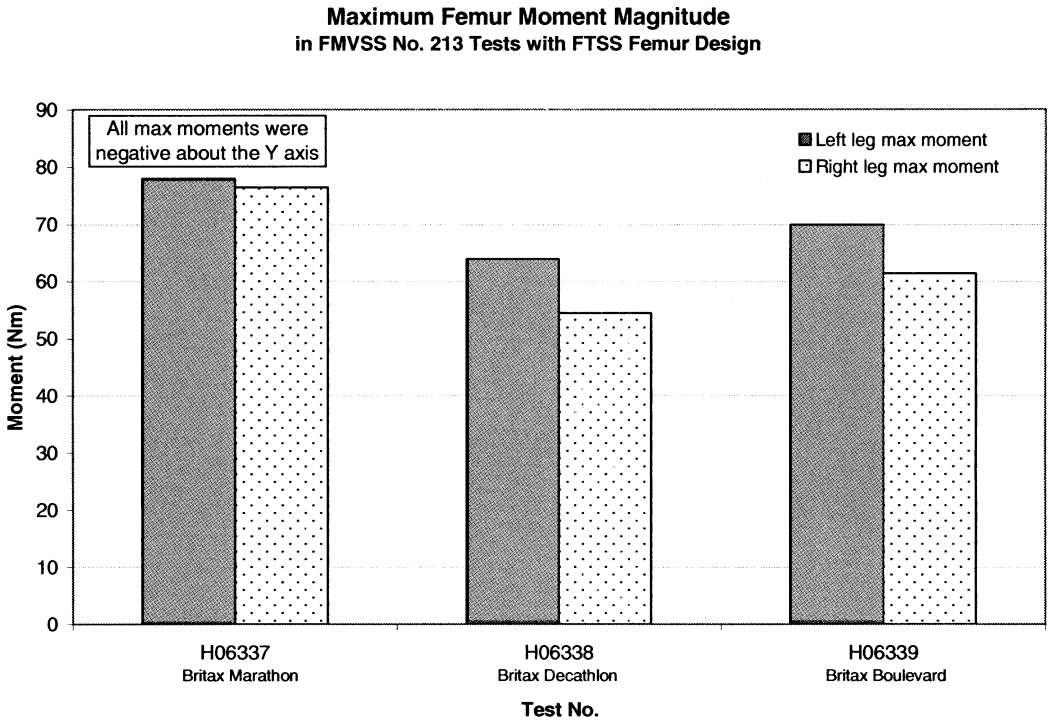

Figure 3: Maximum femur moments measured in modified HIII-6C dummies.

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ii. Comparing the Results of the Britax Marathon Test of the Modified HIII–6C (Test H06337) to Those of a Test of the Original HIII–6C Where Femur Failure Occurred (H06120)

Both tests were performed using the same dummy (S/N 158).[9] In test H06120 (with the original femurs), the left femur failed and detached completely. The right knee of this dummy was in a fully extended position, which could have resulted from the change in kinematics due to loss of one leg. In test H06337 (modified dummy), there were no femur failures and both legs remained attached to the dummy.[10]

A. Effect on FMVSS No. 213 Injury Metrics

In these two tests, we compared the maximum head and chest accelerations. As seen in Figure 4, these measures were similar for both tests, suggesting that the new femur does not affect the dummy head or chest response significantly. Specifically, peak chest resultant acceleration, an FMVSS No. 213 injury criterion, increased only 2.42 percent from 41.4 g with the current Part 572 femur to 42.4 g with the proposed femur. However, we note that the maximum head Z and resultant accelerations occurred after the time of femur failure in test H06120. Therefore, it is possible that the acceleration magnitude or response in time was affected by the loss of one limb.

[9] Both tests were performed using the same dummy (S/N 158). However, because FMVSS No. 213 does not require measurement of femoral loads, no femoral force data was available for test H06120 with the original femurs. Therefore, comparisons were made between pre- and post-test positioning, head and chest measurements, and dummy position throughout the test, as indicated by the test videos. This is discussed in detail in the technical report.

[10] We note that in test H06337 (modified dummy), the child seat had multiple cracks in its base following the test, and during the test the restraint position shifted from upright to reclined. However, these issues are not likely linked to the performance of the new femur.

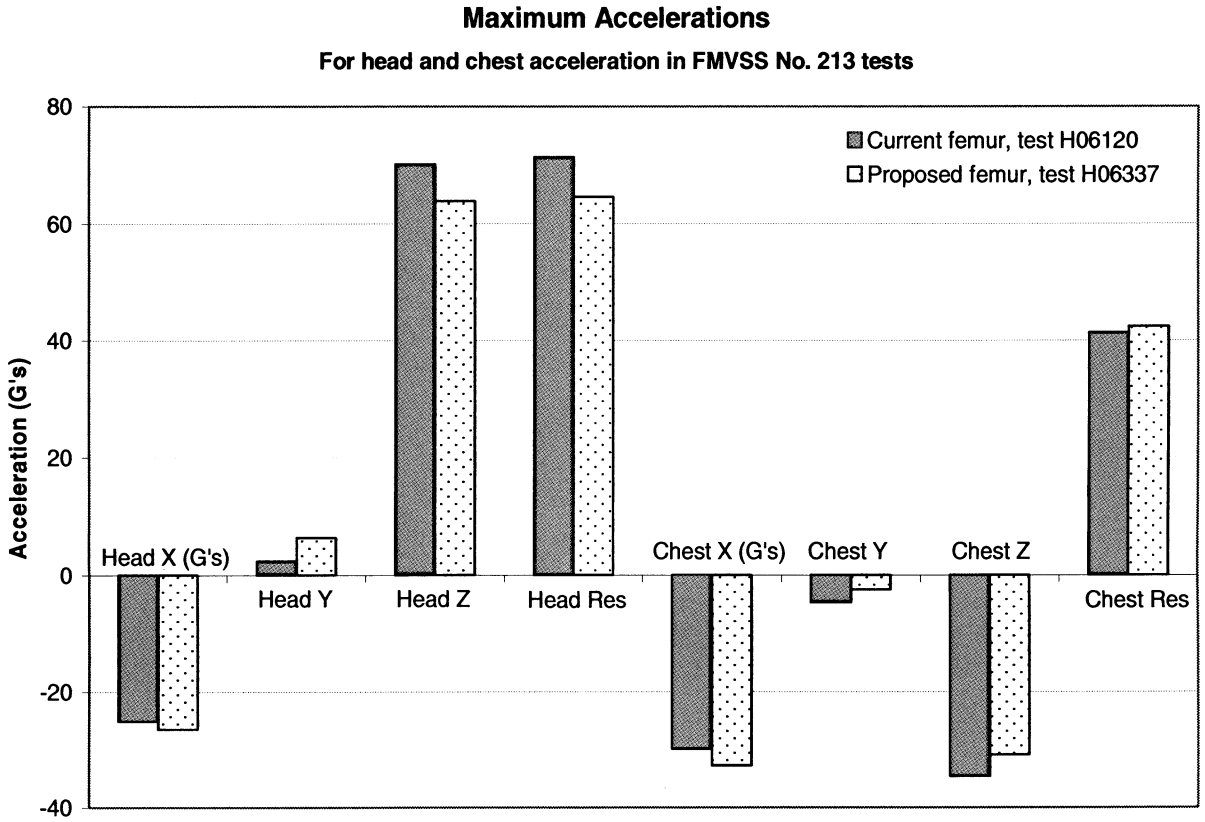

Figure 4: Maximum head and chest accelerations during FMVSS No. 213 tests using a Britax Marathon seat. See notes in the Technical Report for information on Head X and Y accelerations.

We also compared the 36 millisecond (ms) head injury criterion (HIC) values. These values are displayed in Table 3 and Figure 5, along with the previously-discussed peak chest accelerations (Figure 6). The response measured in the modified HIII–6C resulted in a 5.65 percent decrease in HIC over the response of the original HIII–6C. These relatively low changes in response suggest that HIC and chest g's are not significantly altered by the femur replacement.

TABLE 3—HIC 36 AND PEAK CHEST ACCELERATION VALUES FOR MATCHED FMVSS NO. 213 TESTS

[These results are presented in Figures 5 and 6, below]

Measure	H06120: Femur failure w/current part 572 design	H06337: Proposed femur
HIC 36	723.3	682.4
Peak Chest Acceleration (g)	41.4	42.4

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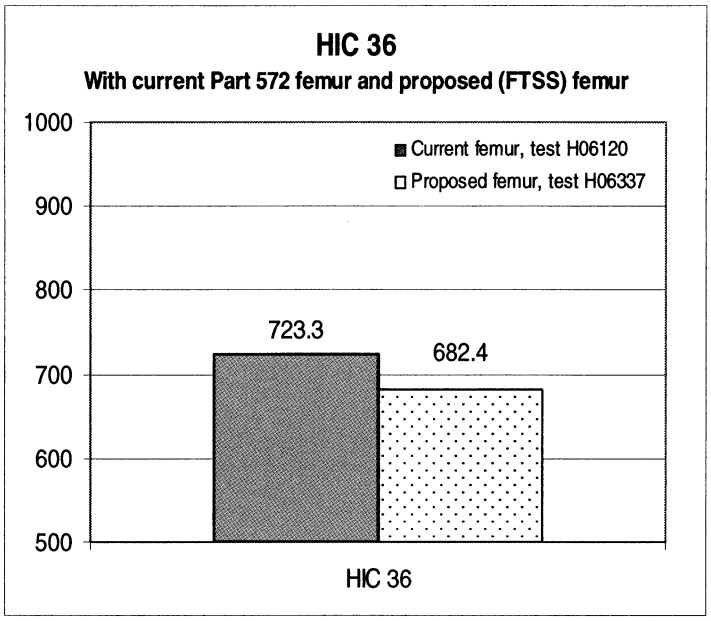

Figure 5: HIC 36 values for tests of the Britax Marathon child seat where the original femur failed (H06120) and for a new femur which did not fail (H06337).

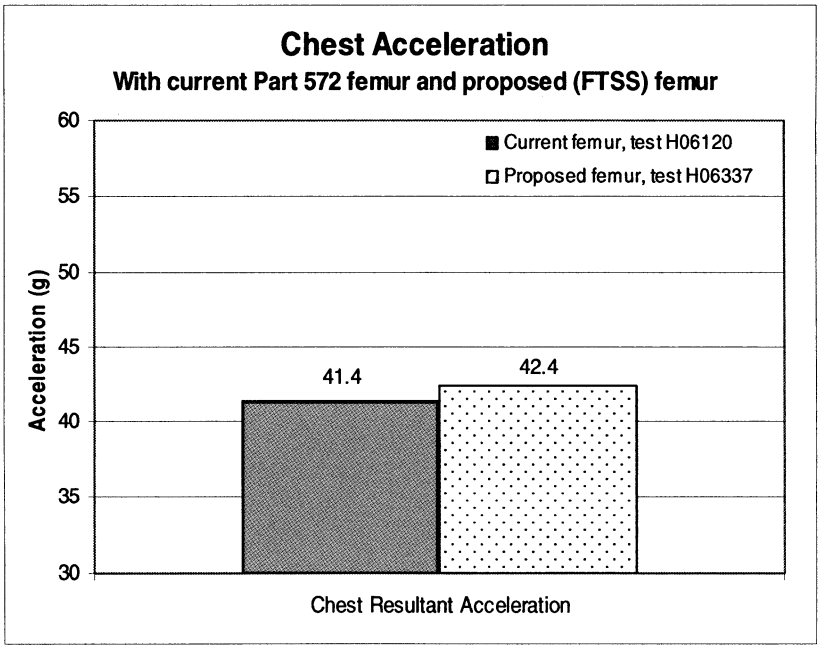

Figure 6: Peak chest acceleration values for tests of the Britax Marathon child seat where the original femur failed (H06120) and for a new femur which did not fail (H06337).

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B. Effect on Dummy Kinematics

Because the FTSS-developed femur design only involves a material change, removal of material, and the addition of a fillet at a high-stress location, we do not expect that use of the new femur would change the dummy's kinematic response. This expectation is borne out by an analysis of test video comparing the kinematics of the dummy in tests H06337 (modified dummy) and H06120 (femur failure). (Photographs from the video are presented in the technical report.) Until the time of maximum femur force, in the test with new femurs, the position of the dummy in each test is fairly similar. At maximum force, the dummy's knees in H06337 (modified dummy) are slightly more extended and lower than the knees in H06120 (femur failure). At the approximate time of femur failure in test H06120, the positions of the two dummies are noticeably different. The fully extended left knee of the dummy in test H06120 (femur failure) and the additional excursion of the leg (as noted by the position of the knee marker) may be indicative of the failing femur component. After femur failure at 100 ms, slight differences in dummy position could be attributable to the loss of one leg in the test H06120. Since the dummies' positions before femur failure were very similar, and because the new femur design is so similar to the current design, we believe that the new femur would not significantly alter dummy response.

C. Dummy Response Biofidelity

Since the FTSS-developed femur has the same geometry as the original femurs where it interfaces with the pelvis, the new femur is not expected to behave any differently than the original femur. As discussed in the previous sections, little difference in head and chest measurements and dummy kinematics was observed in the dummy with the new versus the current Part 572 femur. Therefore, the slight modification in femur design and material is not expected to have an effect on dummy biofidelity.

D. Hip Lock

Because the Denton-developed femur was designed specifically to address the potential issue of hip lock, after being tested, the FTSS-developed femur was inspected for indications of susceptibility to this condition. There was no evidence of excessive wear near the retaining ring/ball joint of the new FTSS-developed femurs. Some wear was noticed on the upper leg of dummy S/N 155 where the femur clamp is fastened to the upper leg weldment. However, because this wear is located at a fastening site, metal-to-metal contact is inevitable and is not indicative of hip lock.

III. Part 2—Abdominal Insert

FTSS and Denton petitioned NHTSA to change Drawing No. 127–8210 of the HIII–6C drawing package, which specifies the abdominal insert for the dummy. The petitioners stated that FTSS owns the original mold for the abdominal insert that was part of the dummies used by NHTSA to develop the 49 CFR Part 572 specifications for the dummy, and that the mold is still being used to manufacture the HIII–6C dummies. The petitioners stated that they have measured the mold to compare its dimensions to those of the drawing and have ''a number of discrepancies between the mold and the drawing.'' The petitioners stated that Denton has also measured its abdominal insert mold, and has found it to match the FTSS mold dimensions. Both manufacturers stated their belief that Drawing No. 127–8210 is in error because of these discrepancies, and have asked NHTSA to revise the abdomen insert drawing to match the part mold dimensions. The petitioners submitted a revised drawing as part of their petition for rulemaking which provided new dimensions for the ledge height, depth, and taper angle of cone.

Agency Response:

NHTSA is granting this request, with slight modification.

During 2006 and in early 2007, the agency investigated the subject dimensional discrepancies of the abdominal insert at NHTSA's VRTC. Five abdominal inserts were measured to obtain the dimensions listed in Table 4; four of these were manufactured by FTSS and ranged in age from 5–12 years old. The fifth abdominal insert was new and purchased from Denton, ATD. The results of this investigation showed (see Table 4 and Figure 7) that the abdominal insert as manufactured did not always meet the ledge height (items 2&3 in Figure 7), depth (items 4&5), notch half width (item 8), notch depth (item 9) and taper of cone specifications (items 6&7).

We note that we measured the actual manufactured part, and not the mold. Because the drawing package specifies dimensions for the part, not the mold, it is logical to correct drawing dimensions based on the measured dimensions of parts. Thus, while we considered the petitioners' recommendations from measurements of the mold, we have developed a revised set of specifications for the abdomen using the set of measured dimensions from available parts as the base. We believe that the dimensions derived from this set of measurements will represent a wide range of parts.

TABLE 4—HIII–6C KEY ABDOMEN DIMENSIONS

[Fig. Ref numbers in the table refer to Figure 7. For full table, including individual dummy responses and matching pelvis opening measurements, see the Technical Report]

Description	Fig. ref	Dim spec. (in.)	Min/Max (in.)	Mean (in.)	SD (in.)	M+/−2SD (in.)	Petition (in.)	Proposed spec. (in.)
Overall height	1	3.81+/.20	3.73/3.79	3.77	0.03	3.82/3.71	3.81	3.81+/.20
Ledge height	2lt	2.10+/.20	1.46/1.63	1.55	0.07	1.69/1.41	1.53	1.53+/.20
	3rt	2.10+/.20	1.48/1.66	1.61	0.08	1.77/1.46	1.53	1.53+/.20
Depth excl. plug	4	2.50+/.20	2.60/2.82	2.72	0.08	2.88/2.56	2.80	2.80+/.20
Depth incl. plug	5	2.50+/.20	2.86/3.03	2.94	.07	3.08/2.80	2.80	2.80+/.20
Taper angle of cone	6lt	123.4 +/−0.5	123/128	125.4	2.41	130/121	122.4	121/129
	7rt	123.4 +/−0.5	123/128	124.6	1.95	128/121	122.4	121/129
Notch Half Width	8	1.45+/.20	1.56/1.69	1.62	0.05	1.72/1.52	1.45	1.50+/−.20
Notch Depth	9	1.40+/−.20	1.16/1.34	1.24	0.07	1.38/1.11	1.40	1.40+/−.20
Width Bottom of Cone	10	5.40+/−.40	.....	.....	.....	.....	.....	5.40+/−.40

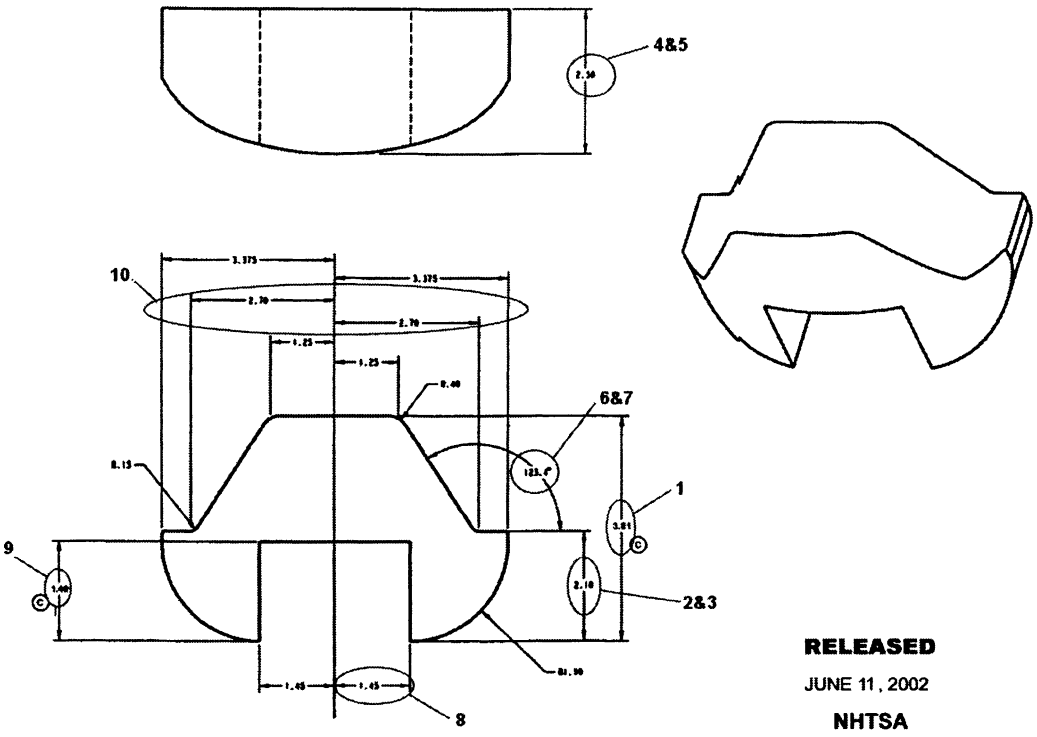

Figure 7: Portions of the HIII-6C Abdomen Insert drawing

We tentatively agree with the petitioners that several dimensions of the abdomen should be revised. Although the recommended dimensional changes are mostly based on agency measurements of physical parts, nearly all changes are in agreement with the petitioners' mold-based dimensions. The recommended action would incorporate the petitioner-recommended changes in dimension to the ledge height and overall depth. The taper angle of the cone dimension would also be changed to include the range of angle requested by the petitioner, but have a nominal value of 125° rather than 122.4°, and an increased tolerance of ±4° to account for the range of angles measured in the available parts.

However, there are two small dimensional discrepancies between the part and drawing that were not addressed in the petition: The notch half width and notch depth dimensions. We are adjusting the notch half width dimension based on measurements of abdominal inserts at VRTC. The notch half width measurements were all larger than the specified nominal dimension of 1.45 inches, and one measurement fell outside the allowed tolerance. Therefore, a slight increase in this dimension to 1.50 inches is proposed. The suggested changes to the abdominal insert drawing are reflected in Table 4 under ''Proposed Spec.'' We have decided not to adjust the notch depth dimension based on part measurements, because only one out of five measurements did not meet the specification, and the age of this part may have affected this dimension. This decision is discussed more fully in the technical report.

IV. Proposed Effective Date

We propose that the changes to the femur design of the HIII–6C and HIII–6CW be effective 180 days after publication of a final rule. With regard to the changes proposed in Part 2, because the changes are more corrective in nature, we propose that the changes to the drawing for the abdomen be effective 45 days after publication of a final rule.

V. Other Issues—Rubber and Foam Parts

FTSS and Denton also suggested that NHTSA undertake a project to investigate tolerances for vinyl and rubber components, develop a detailed procedure on how to measure the dimensions used to define vinyl flesh parts, and work with the manufacturers to ''determine proper values and the expected time frame each part would normally comply with the tolerances, given that these parts can change dimensionally over time.''

Agency Response: We decline this request. The lifetime of foam parts will be highly dependent on the part's age, the test situations the dummy is exposed to (i.e., FMVSS No. 213 compliance tests, vehicle compliance tests, research and development tests, etc.), as well as the conditions in which it is stored, the frequency of use, etc. We encourage the dummy manufacturers to investigate part lifetimes to provide replacement time frames for their customers; the agency lacks the resources to investigate this type of part specification. Moreover, the agency does not have reason to conclude the lifetime of foam parts raises problems that NHTSA needs to address, and the petitioners did not provide data to sufficiently quantify the extent to which this may be a problem.

VI. Rulemaking Analyses and Notices

Executive Order 12866 and DOT Regulatory Policies and Procedures

Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993), provides for making determinations whether a regulatory action is ''significant'' and therefore subject to Office of Management and Budget (OMB) review and to the requirements of the Executive Order. This proposed rulemaking action was not considered a significant regulatory action under Executive Order 12866.

This proposed rulemaking action was also determined not to be significant under the Department of Transportation's (DOT's) regulatory policies and procedures (44 FR 11034, February 26, 1979).

We stated in the final rule [11] that adopted the HIII–6C into 49 CFR Part 572 that the cost of an uninstrumented HIII–6C dummy is approximately $30,000 and that instrumentation will add approximately $25,000 to $40,000 to the cost, depending on the number of data channels the user chooses to collect. This proposed rule would only affect the test dummy by adding a ¼-inch fillet between the femur clamp and the connecting segment of the machined femur, removing material from the connecting segment, and changing the material from aluminum bronze C–624 AMC0–18 to 4340 steel. We do not expect these changes to significantly affect the cost of the dummy. Further, if this proposed Part 572 rule becomes final, it would not impose any requirements on anyone. Businesses would be affected only if they choose to manufacture or test with the dummy. This proposed rule would indirectly impose requirements on only those businesses which choose to manufacture or test with the dummy, in that the agency will only use dummies for compliance testing that meet all of the criteria specified in this proposed rule. Because the economic impacts of this proposal are so minimal, no further regulatory evaluation is necessary.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions), unless the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The Small Business Administration's regulations at 13 CFR Part 121 define a small business, in part, as a business entity ''which operates primarily within the United States.'' (13 CFR 121.105(a)).

We have considered the effects of this rulemaking under the Regulatory Flexibility Act. I hereby certify that the proposed rulemaking action would not have a significant economic impact on a substantial number of small entities. This action would not have a significant economic impact on a substantial number of small entities because changing the femur design would not impose any requirements on anyone. NHTSA would not require anyone to manufacture or redesign the dummy or to test vehicles or CRSs with it.

National Environmental Policy Act

NHTSA has analyzed this proposal for the purposes of the National Environmental Policy Act and determined that it will not have any significant impact on the quality of the human environment.

Executive Order 13132 (Federalism)

NHTSA has examined today's proposed rule pursuant to Executive Order 13132 (64 FR 43255, August 10, 1999) and concluded that no additional consultation with States, local governments or their representatives is mandated beyond the rulemaking process. The agency has concluded that the proposed rule does not have federalism implications because the proposed rule does 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.'' This proposed rule would not impose any requirements on anyone. Businesses would be affected only if they choose to manufacture or test with the dummy.

Further, no consultation is needed to discuss the preemptive effect of today's proposed rule. NHTSA's safety standards can have preemptive effect in at least two ways. This proposed rule would amend 49 CFR Part 572 and is not a safety standard.[12] If this proposed Part 572 rule becomes final, it would not impose any requirements on anyone.

Civil Justice Reform

This proposed rule would not have any retroactive effect. Under 49 U.S.C. 30103, whenever a Federal motor vehicle safety standard is in effect, a State may not adopt or maintain a safety standard applicable to the same aspect of performance which is not identical to the Federal standard, except to the extent that the state requirement imposes a higher level of performance and applies only to vehicles procured for the state's use. 49 U.S.C. 30161 sets forth a procedure for judicial review of final rules establishing, amending, or revoking Federal motor vehicle safety standards. That section does not require submission of a petition for reconsideration or other administrative proceedings before parties may file suit in court.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid control number from the Office of Management and Budget (OMB). This proposed rule would not have any requirements that are considered to be information collection requirements as defined by the OMB in 5 CFR Part 1320.

National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272) directs NHTSA to use voluntary consensus standards in its regulatory activities unless doing so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs NHTSA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable voluntary consensus standards. There are no voluntary consensus standards relevant to this proposed rule.

Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, Federal requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal

[11] 65 FR 2059; January 13, 2000; Docket NHTSA–99–6714.

[12] With respect to the safety standards, the National Traffic and Motor Vehicle Safety Act contains an express preemptive provision: ''When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.'' 49 U.S.C. 30103(b)(1). Second, the Supreme Court has recognized the possibility of implied preemption: State requirements imposed on motor vehicle manufacturers, including sanctions imposed by State tort law, can stand as an obstacle to the accomplishment and execution of a NHTSA safety standard. When such a conflict is discerned, the Supremacy Clause of the Constitution makes their State requirements unenforceable. *See Geier* v. *American Honda Motor Co.,* 529 U.S. 861 (2000).

governments, in the aggregate, or by the private sector, of more than $100 million annually (adjusted for inflation with base year of 1995). Before promulgating a NHTSA rule for which a written statement is needed, section 205 of the UMRA generally requires the agency to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. This proposed rule would not impose any unfunded mandates under the UMRA. This proposed rule would not meet the definition of a Federal mandate because it would not impose requirements on anyone. It would amend 49 CFR Part 572 by changing an aspect of a test dummy that the agency uses. If this proposed rule becomes final, it would affect only those businesses that choose to manufacture or test with the dummy. It would not result in costs of $100 million or more to either State, local, or tribal governments, in the aggregate, or to the private sector.

Plain Language

Executive Order 12866 requires each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

—Has the agency organized the material to suit the public's needs?
—Are the requirements in the rule clearly stated?
—Does the rule contain technical language or jargon that is not clear?
—Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
—Would more (but shorter) sections be better?
—Could the agency improve clarity by adding tables, lists, or diagrams?
—What else could the agency do to make this rulemaking easier to understand?

If you have any responses to these questions, please include them in your comments on this NPRM.

Regulation Identifier Number

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

VII. Public Participation

How do I prepare and submit comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the docket number of this document in your comments.

Your comments must not be more than 15 pages long. (49 CFR 553.21). We established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments. There is no limit on the length of the attachments.

Please submit your comments by any of the methods provided above under **ADDRESSES**.

Please note that pursuant to the Data Quality Act, in order for substantive data to be relied upon and used by the agency, it must meet the information quality standards set forth in the OMB and DOT Data Quality Act guidelines. Accordingly, we encourage you to consult the guidelines in preparing your comments.

Further, note that 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 (65 FR 19477–78).

How do I submit confidential business information?

If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given above under **FOR FURTHER INFORMATION CONTACT**. In addition, you should submit a copy from which you have deleted the claimed confidential business information to the Docket using any of the methods given above under **ADDRESSES**. When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation. (49 CFR Part 512.)

Will the agency consider late comments?

We will consider all comments that the Docket receives before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments that the Docket receives after that date. If the Docket receives a comment too late for us to consider in developing a final rule (assuming that one is issued), we will consider that comment as an informal suggestion for future rulemaking action.

How can I read the comments submitted by other people?

You may read the comments received by the Docket at the address given above under **ADDRESSES**. The hours of the Docket are indicated above in the same location. You may also see the comments on the Internet. To read the comments on the Internet, go to *http://www.regulations.gov*. Follow the online instructions for accessing the dockets.

Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the Docket for new material.

List of Subjects in 49 CFR Part 572

Motor vehicle safety, Incorporation by reference.

In consideration of the foregoing, NHTSA is proposing to amend 49 CFR Part 572 as follows:

PART 572—ANTHROPOMORPHIC TEST DUMMIES

1. The authority citation for Part 572 continues to read as follows:

Authority: 49 U.S.C. 322, 30111, 30115, 30117 and 30166; delegation of authority at 49 CFR 1.50.

Subpart N—Six-Year-Old Child Test Dummy, Beta Version

2. Section 572.120 is amended by revising paragraphs (a)(1) introductory text, (a)(1)(vii), (a)(2), (b), and (c)(1) to read as follows:

§ 572.120 Incorporation by reference.

(a) * * *

(1) A drawings and inspection package entitled, ''Parts List and Drawings, Part 572 Subpart N, Hybrid III Six-Year Old Child Crash Test Dummy (HIII6C, Beta Version), June 2009,'' consisting of:

* * * * *

(vii) The Hybrid III Six-Year-Old Child Parts/Drawing List, dated June 1, 2009.

(2) A procedures manual entitled, ''Procedures for Assembly, Disassembly, and Inspection (PADI) of the Hybrid III 6-Year-Old Child Crash Test Dummy (H–III6C), Beta Version, June 1, 2009'';

* * * * *

(b) The Director of the Federal Register approved the materials incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the materials may be inspected at the Department of Transportation, Docket Operations, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, telephone (202) 366–9826, and at the National Archives and Records Administration (NARA), and in electronic format through Regulations.gov. For information on the availability and inspection of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*. For information on the availability and inspection of this material at Regulations.gov, call 1–877–378–5457, or go to: *http://www.regulations.gov*.

(c) * * *

(1) The drawings and specifications package, the parts list, and the PADI document referred to in paragraphs (a)(1), and (a)(2) of this section, are available in electronic format through www.Regulations.gov and in paper format from Leet-Melbrook, Division of New RT, 18810 Woodfield Road, Gaithersburg, MD 20879, (301) 670–0090.

* * * * *

3. Section 572.121 is amended by revising paragraph (a)(2) introductory text (the table is not amended) to read as follows:

§ 572.121 General description.

(a) * * *

(2) Procedures for Assembly, Disassembly, and Inspection (PADI) of the Hybrid III 6-year-old test dummy, Alpha version, dated June 1, 2009.

Issued: October 15, 2009.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. E9–25241 Filed 10–20–09; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R8-ES-2009-0062; 92210–1117–0000–B4]

[RIN 1018–AW85]

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Buena Vista Lake shrew

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to revise our designation of critical habitat for the Buena Vista Lake shrew (*Sorex ornatus relictus*) under the Endangered Species Act of 1973, as amended (Act). Our proposal is the same as the proposed critical habitat we published on August 19, 2004 (69 FR 51417). In total, approximately 4,649 acres (ac) (1,881 hectares (ha)) occur within the boundaries of the proposed revised critical habitat designation. The proposed revised critical habitat is located in the Central Valley floor of Kern County, California.

DATES: To allow us adequate time to conduct this review, we request that we receive information on or before December 21, 2009. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by December 7, 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 on Docket No. FWS-R8-ES-2009-0062.
- U.S. mail or hand-delivery: Public Comments Processing, Attn: Docket no. FWS-R8-ES-2009-0062; 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: Daniel Russell, Acting Listing Coordinator, U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way, W-2605, Sacramento, CA 95825; telephone (916) 414–6600; facsimile (916) 414–6712. 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 to revise critical habitat 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) The reasons we should or should not revise the designation of habitat as ''critical habitat'' under section 4 of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(2) Specific information on:

- Areas that provide habitat for the Buena Vista Lake shrew (herein after referred to as the shrew) that we did not discuss in our August 19, 2004 (69 FR 51417) proposed critical habitat rule,
- Areas containing the features essential to the conservation of the shrew that we should include in the revised designation and why,
- Areas proposed that do not contain features essential for the conservation of the species and why, and
- Areas not occupied at the time of listing that are essential to the conservation of the species and why.

(3) Land-use designations and current or planned activities in the areas proposed as revised critical habitat, as well as their possible effects on proposed revised critical habitat.

(4) Comments or information that may assist us in identifying or clarifying the physical and biological features.

(5) How the proposed revised critical habitat boundaries could be refined to more closely circumscribe the landscapes identified as containing the features essential to the species' conservation.

(6) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities or families, and the benefits of including or excluding areas that exhibit these impacts.

(7) Whether any specific areas being proposed as revised critical habitat should be excluded under section

4(b)(2) of the Act, and whether the benefits of potentially excluding any particular area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(8) Information on any quantifiable potential economic impacts of the proposed designation of critical habitat.

(9) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

You may submit your comments on this proposed rule by one of the methods listed in the **ADDRESSES** section. If you submit information via *http://www.regulations.gov*, your entire submission — including any personal identifying information—will be posted on the website. If you submit a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying 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*.

Comments and information that we receive will be available for you to review at *http://www.regulations.gov*, or you may make an appointment during normal business hours at the U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

It is our intent to discuss only those topics directly relevant to the designation of revised critical habitat in this proposed rule. There is no new information on the biology, distribution, or abundance of the shrew since the time the species was listed. For more information on the shrew, refer to the final listing rule published in the **Federal Register** on March 6, 2002 (67 FR 10101).

Previous Federal Actions

On August 19, 2004, we proposed critical habitat for the shrew on approximately 4,649 ac (1,881 ha) in Kern County, California (69 FR 51417). On January 24, 2005, we published a final rule (70 FR 3438) designating 84 ac (34 ha) of critical habitat for the shrew in Kern County, California. The decrease in acreage from the areas we proposed to the areas we designated resulted from exclusions under section 4(b)(2) of the Act and, to a small degree, refinements in our mapping of critical habitat boundaries.

On October 2, 2008, the Center for Biological Diversity filed a complaint in the U.S. District Court for the Eastern District of California challenging the Service's designation of critical habitat for the shrew (*Center for Biological Diversity* v. *United States Fish and Wildlife, et al.,* Case No. 08-CV-01490-AWI-GSA). A July 9, 2009, settlement agreement stipulates the Service will, within 90 days of the signed agreement, submit to the **Federal Register** for publication a new proposal of critical habitat for the species which encompasses the same geographic area as the August 19, 2004, (69 FR 51417) proposed designation. Additionally, the Service agreed to submit to the **Federal Register** for publication, on or before March 22, 2012, a final determination on revised critical habitat for the shrew.

The current designation of critical habitat for the Buena Vista Lake shrew (70 FR 3438, January 24, 2005) remains in full force and effect until we publish a new final rule revising critical habitat for the shrew.

Critical Habitat

Critical habitat is defined in section 3 of the Act as:

(i) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(I) essential to the conservation of the species and

(II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided under the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing the destruction or adverse modification of critical habitat. Section 7(a)(2) requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner seeks or requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) would apply, but even in the event of a destruction or adverse modification finding, Federal action agency's and the applicant's obligation is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

For inclusion in a critical habitat designation, the habitat within the geographical area occupied by the species at the time it was listed must contain the physical and biological features essential to the conservation of the species, and be included only if those features may require special management considerations or protection. Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (areas on which are found the physical and biological features (PBFs) laid out in the appropriate quantity and spatial arrangement for the conservation of the species). Under the Act and regulations at 50 CFR 424.12, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed only when we determine that those areas are essential for the conservation of the species and that designation limited to those areas occupied at the time of listing would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658)), and our associated Information

Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we determine which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be required for recovery of the species.

Areas that are important to the conservation of the species, but are outside the critical habitat designation, will continue to be subject to conservation actions we implement under section 7(a)(1) of the Act. Areas that support populations are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Physical and Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and the regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied at the time of listing to propose as critical habitat, we consider the physical and biological features essential to the conservation of the species which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historic, geographical, and ecological distributions of a species.

We consider the specific physical and biological features (PBFs) to be the primary constituent elements of habitat laid out in the appropriate quantity and spatial arrangement essential for the conservation of the species. We derive the physical and biological features from the primary constituent elements (PCEs) for this species as they were described in the August 19, 2004 (69 FR 51417) proposed designation of critical habitat for the Buena Vista Lake shrew. Please refer to the Proposed Regulation Promulgation Section of this document and the previous proposed designation (69 FR 51417, August 19, 2004) for a description of PCEs.

Proposed Revised Critical Habitat Designation

Under the terms of the July 9, 2009, settlement agreement, we propose revised critical habitat for the shrew that matches the proposed designation we published on August 19, 2004 (69 FR 51417). See the Proposed Regulation Promulgation section of this document, which is the same as that which we published in 2004. The proposed designation includes five units which constitute approximately 4,649 ac (1,881 ha), located in the Central Valley floor of Kern County, California. Please see the August 19, 2004 (69 FR 51417), notice for details regarding methods, criteria, critical habitat unit descriptions, and special management considerations or protection for the proposed revised critical habitat designation.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. However, decisions by the courts of appeals for the Fifth and Ninth Circuits have invalidated our regulatory definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F. 3d 1059 (9th Cir 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.*, 245 F.3d 434, 442F (5th Cir 2001)). Instead, we rely upon the statutory provisions of the Act to make that determination. Under the statutory provisions of the Act, the key factor in determining whether an action will destroy or adversely modify critical habitat is whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain those PCEs that relate to the ability of the area to support the species) to serve its intended conservation role for the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. This is a procedural requirement only, as any conservation recommendations in a conference report or opinion are strictly advisory. However, once proposed species become listed, or proposed critical habitat is designated as final, the full prohibitions of section 7(a)(2) of the Act apply to any Federal action. The primary utility of the conference procedures is to maximize the opportunity for a Federal agency to adequately consider proposed species and critical habitat and avoid potential delays in implementing their proposed action as a result of the section 7(a)(2) compliance process, should those species be listed or the critical habitat designated.

We may conduct conferences either informally or formally. We typically use informal conferences as a means of providing advisory conservation recommendations to assist the agency in eliminating conflicts that the proposed action may cause with respect to the proposed critical habitat. We typically

use formal conferences when the Federal agency or the Service believes the proposed action is likely to adversely affect a species proposed for listing or degrade proposed critical habitat in some manner.

We generally provide the results of an informal conference in a conference report, while we provide the results of a formal conference in a conference opinion. We typically prepare conference opinions on proposed critical habitat in accordance with procedures contained at 50 CFR 402.14, as if the proposed critical habitat was already designated. If no substantial new information or changes in the action alter the content of the opinion, we may adopt the conference opinion as the biological opinion when the critical habitat is designated (see 50 CFR 402.10(d)).

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. Activities on State, tribal, local, or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from us under section 10 of the Act) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) are subject to the section 7(a)(2) consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded, authorized, or permitted, do not require section 7(a)(2) consultations.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. At the conclusion of this consultation, the Service will issue either:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, but are likely to adversely affect, listed species or critical habitat.

If we issue a biological opinion concluding that a project is likely to result in jeopardy to a listed species or the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable, to avoid these outcomes. We define ''reasonable and prudent alternatives'' at 50 CFR 402.02 as alternative actions identified during consultation that:

- Can be implemented in a manner consistent with the intended purpose of the action,
- Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,
- Are economically and technologically feasible, and
- Would, in the Director's opinion, avoid jeopardizing the continued existence of the listed species or destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where a new species is listed or critical habitat is subsequently designated that may be affected and the Federal agency has retained discretionary involvement or control over the action. Consequently, some Federal agencies may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement may affect subsequently listed species or designated critical habitat.

Application of the Jeopardy and Adverse Modification Standards

Jeopardy Standard

Currently, the Service applies an analytical framework for Buena Vista Lake shrew jeopardy analyses that relies heavily on the importance of known populations to the species' survival and recovery. Section 7(a)(2) of the Act analysis is focused not only on these populations but also on the habitat conditions necessary to support them.

The jeopardy analysis usually expresses the survival and recovery needs of Buena Vista Lake shrew in a qualitative fashion without making distinctions between what is necessary for survival and what is necessary for recovery. Generally, the jeopardy analysis focuses on the range-wide status of Buena Vista Lake shrew, the factors responsible for that condition, and what is necessary for this species to survive and recover. An emphasis is also placed on characterizing the conditions of Buena Vista Lake shrew in the area affected by the proposed Federal action and the role of affected populations in the survival and recovery of the species. That context is then used to determine the significance of adverse and beneficial effects of the proposed Federal action and any cumulative effects for purposes of making the jeopardy determination.

Adverse Modification Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Generally, the conservation role of Buena Vista Lake shrew critical habitat units is to support the various life-history needs and provide for the conservation of the species. Activities that may destroy or adversely modify critical habitat are those that alter the PCEs to an extent that appreciably reduces the conservation value of critical habitat for Buena Vista Lake shrew.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat may also jeopardize the continued existence of the species.

Federal agencies already consult with us on activities in areas currently occupied by the species to ensure that their actions do not jeopardize the continued existence of the species. These actions include, but are not limited to:

(1) Actions that would affect riparian or wetland areas by any Federal Agency. Such activities could include, but are not limited to, flood control or changes in water banking activities. These activities could eliminate or reduce the habitat necessary for the reproduction, sheltering, or growth of Buena Vista Lake shrews.

(2) Actions that would affect the regulation of water flows by any Federal agency. Such activities could include, but are not limited to, damming, diversion, and channelization. These activities could eliminate or reduce the habitat necessary for the reproduction, sheltering, or growth of Buena Vista Lake shrews.

(3) Actions that would involve regulations funded or permitted by the Federal Highway Administration. (We

note that the Federal Highway Administration does not fund the routine operations and maintenance of the State highway system.) Such activities could include, but are not limited to, new road construction and right-of-way designation. These activities could eliminate or reduce riparian or wetland habitat along river crossings necessary for reproduction, sheltering, or growth of Buena Vista Lake shrews.

(4) Actions that would involve regulation of airport improvement activities by the Federal Aviation Administration. Such activities could include, but are not limited to, the creation or expansion of airport facilities. These activities could eliminate or reduce riparian or wetland habitat necessary for the reproduction, sheltering, foraging, or growth of Buena Vista Lake shrews.

(5) Actions that would involve licensing of construction of communication sites by the Federal Communications Commission. Such activities could include, but are not limited to, the installation of new radio equipment and facilities. These activities could eliminate or reduce the habitat necessary for the reproduction, sheltering, foraging, or growth of Buena Vista Lake shrews.

(6) Actions that would involve funding of activities by the U.S. Environmental Protection Agency, Department of Energy, Federal Emergency Management Agency, Federal Highway Administration, or any other Federal agency. Such activities could include, but are not limited to, activities associated with the cleaning up of Superfund sites, erosion control activities, and flood control activities. These activities could eliminate or reduce upland or aquatic habitat for Buena Vista Lake shrews.

(7) Actions that would affect waters of the United States authorized by the U.S. Army Corps of Engineers under section 404 of the Clean Water Act. Such activities could include, but are not limited to, placement of fill into wetlands. These activities could eliminate or reduce the habitat necessary for the reproduction, feeding, or growth of Buena Vista Lake shrews.

All lands within this proposed revised designation as critical habitat are within the historical geographic area occupied by the species, and are likely to be used by the shrew whether for foraging, breeding, growth of juveniles, dispersal, migration, genetic exchange, or sheltering. We consider all lands included in this proposed revised designation to be essential to the survival of the species. Federal agencies already consult with us on activities in areas currently occupied by the species, and also one whether the species may be affected by the action, to ensure that their actions do not jeopardize the continued existence of the species. Therefore, we believe that the revised designation of critical habitat is not likely to result in a significant regulatory burden above that already in place due to the presence of the listed species. Few additional consultations are likely to be conducted due to the revised designation of critical habitat.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

- An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;
- A statement of goals and priorities;
- A detailed description of management actions to be implemented to provide for these ecological needs; and
- A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.''

There are no Department of Defense lands with a completed INRMP within the proposed revised critical habitat designation.

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial information available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as part of critical habitat. We cannot exclude such areas from critical habitat if such exclusion would result in the extinction of the species.

The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the designation of revised critical habitat for the Buena Vista Lake shrew. This information is intended to assist the Secretary in making decisions about whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. The economic analysis considers the economic efficiency effects that may result from the designation, including habitat protections that may be co-extensive with the listing of the species. It also addresses distribution of impacts, including an assessment of the potential effects on small entities and the energy industry. This information can be used by the Secretary to assess whether the effects of the designation might unduly burden a particular group or economic sector.

The analysis focuses on the direct and indirect costs of the rule. However, economic impacts to land use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning laws, State natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies. Economic impacts that result from these types of protections are not included in the analysis as they are considered to be part of the regulatory and policy baseline. Our economic analysis evaluated the potential future effects associated with the listing of this species as endangered under the Act, as well as any potential effect of the critical habitat designation above and beyond those regulatory and economic impacts associated with listing.

Following the publication of the previous proposed critical habitat designation (69 FR 51417), we conducted an economic analysis to estimate the potential economic effect of the designation. On November 30, 2004, we published a notice of availability for the draft economic analysis of the proposed critical habitat designation (69 FR 69578). The economic analysis included both retrospective, or pre-designation, and prospective, or post-designation, economic costs to various entities as a result of Buena Vista Lake shrew conservation activities. Retrospective costs are those costs estimated to have occurred from the time the species was listed in April 2002 until the proposal of critical habitat in August 2004. The estimated retrospective cost is $122,237. These costs were primarily certain administrative costs associated with the preparation of a Comprehensive Conservation Plan at the Kern National Wildlife Refuge critical habitat unit (CHU) and the section 7 consultation related to the preparation of a biological opinion related to a habitat conservation plan (HCP) at the Goose Lake proposed CHU.

Values presented in the draft economic analysis are in 2004 dollars and are calculated at 3 and 7 percent discount rates. Total prospective costs range from $6.7 to $14.2 million under a 3 percent discount rate, and $4.8 to $10.1million under a 7 percent rate. Thus, prospective average annual costs range from $452,266 to $955,833. These costs include effects on agricultural producers adjacent or proximate to three CHUs, biological monitoring, HCP development, and supplemental water purchases. The ranges reflect totals with and without supplemental water for Kern Lake, Coles Levee, and Kern Fan Water Recharge CHUs. Both the Kern National Wildlife Refuge and Goose Lake CHUs are assumed to require supplemental water, and thus do not contribute to this range of costs. However, the economic analysis prepared for the 2004 critical habitat designation does not accurately reflect the full range of potential economic impacts that may result from this proposed revision to Buena Vista Lake shrew critical habitat.

We are preparing a new draft economic analysis of the economic impacts of this proposed revision to critical habitat for the shrew. Upon completion of the new draft economic analysis, we will announce its availability in the **Federal Register** and reopen the public comment period on the proposed revised designation and the new draft economic analysis. At that time, copies of the draft economic analysis will be available for downloading from the Internet at *http://www.regulations.gov*, or by contacting the Sacramento Fish and Wildlife Office directly (see **FOR FURTHER INFORMATION CONTACT** section).

Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our revised critical habitat designation is based on scientifically sound data, assumptions, and analyses. We have invited these peer reviewers to comment during this public comment period on our specific assumptions and conclusions in this proposed designation of revised critical habitat.

We will consider all comments and information we receive during this comment period on this proposed rule during our preparation of a final determination. Accordingly, the final decision may differ from this proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days after the date of publication of this proposed rule in the **Federal Register**. Such requests must be sent to 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** and local newspapers at least 15 days before the hearing.

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 proposed 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

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

At this time, we lack the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, we defer the RFA finding until completion of the new draft economic analysis prepared under section 4(b)(2) of the Act and E.O. 12866. Upon completion of the new draft economic analysis, we will announce its availability in the **Federal Register** and reopen the public comment period on the proposed revised designation and the new draft economic analysis. We will include with this announcement, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(a) This rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)-(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or [T]ribal

governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and [T]ribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(b) We do not believe that this rule would significantly or uniquely affect small governments. Therefore, a Small Government Agency Plan is not required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment if appropriate

Takings

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating revised critical habitat for the Buena Vista Lake shrew in a takings implications assessment. The takings implications assessment concludes that this designation of revised critical habitat for this species does not pose significant takings implications for lands within or affected by the designation.

Federalism

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this proposed revised critical habitat designation with appropriate State resource agencies in California. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical and biological features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating revised critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the physical and biological features within the designated areas to assist the public in understanding the habitat needs of the this species.

Paperwork Reduction Act of 1995

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. 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.

National Environmental Policy Act (NEPA)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

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.

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), E.O. 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act'', we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes.

We have determined that there are no tribal lands occupied at the time of listing that contain the features essential for the conservation, and no tribal lands that are essential for the conservation for the Buena Vista Lake shrew. Therefore, we have not proposed to designate revised critical habitat for this species on tribal lands.

Energy Supply, Distribution, or Use

On May 18, 2001, the President issued an Executive Order (E.O. 13211; Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. We do not expect it to significantly affect energy supplies, distribution, or use. Because this action is not a significant energy action, no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

References Cited

A complete list of all references cited in this rulemaking is available on *http://www.regulations.gov* and upon request from the Field Supervisor, Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section).

Author(s)

The primary authors of this notice are the staff members of the Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section).

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 § 17.95(a) by revising the entry for ''Buena Vista Lake Shrew (*Sorex ornatus relictus*)'' to read as follows:

§ 17.95 *Critical habitat—fish and wildlife.*

(a) *Mammals.*

* * * * *

Buena Vista Lake Shrew (*Sorex ornatus relictus*)

(1) Critical habitat units are depicted for Kern County, California, on the maps below.

(2) The primary constituent elements of critical habitat for the Buena Vista Lake shrew are the habitat components that provide:

(i) Riparian or wetland communities supporting a complex vegetative structure with a thick cover of leaf litter or dense mats of low-lying vegetation;

(ii) Suitable moisture supplied by a shallow water table, irrigation, or proximity to permanent or semi-permanent water; and

(iii) A consistent and diverse supply of prey.

(3) Critical habitat does not include existing features and structures, such as buildings, aqueducts, airports, roads, and other developed areas not containing one or more of the primary constituent elements.

(4) Data layers defining map units were created on a base of USGS 7.5' quadrangles, and critical habitat units were then mapped using Universal Transverse Mercator (UTM) coordinates.

(5) *Note*: Map 1 (index map) follows:

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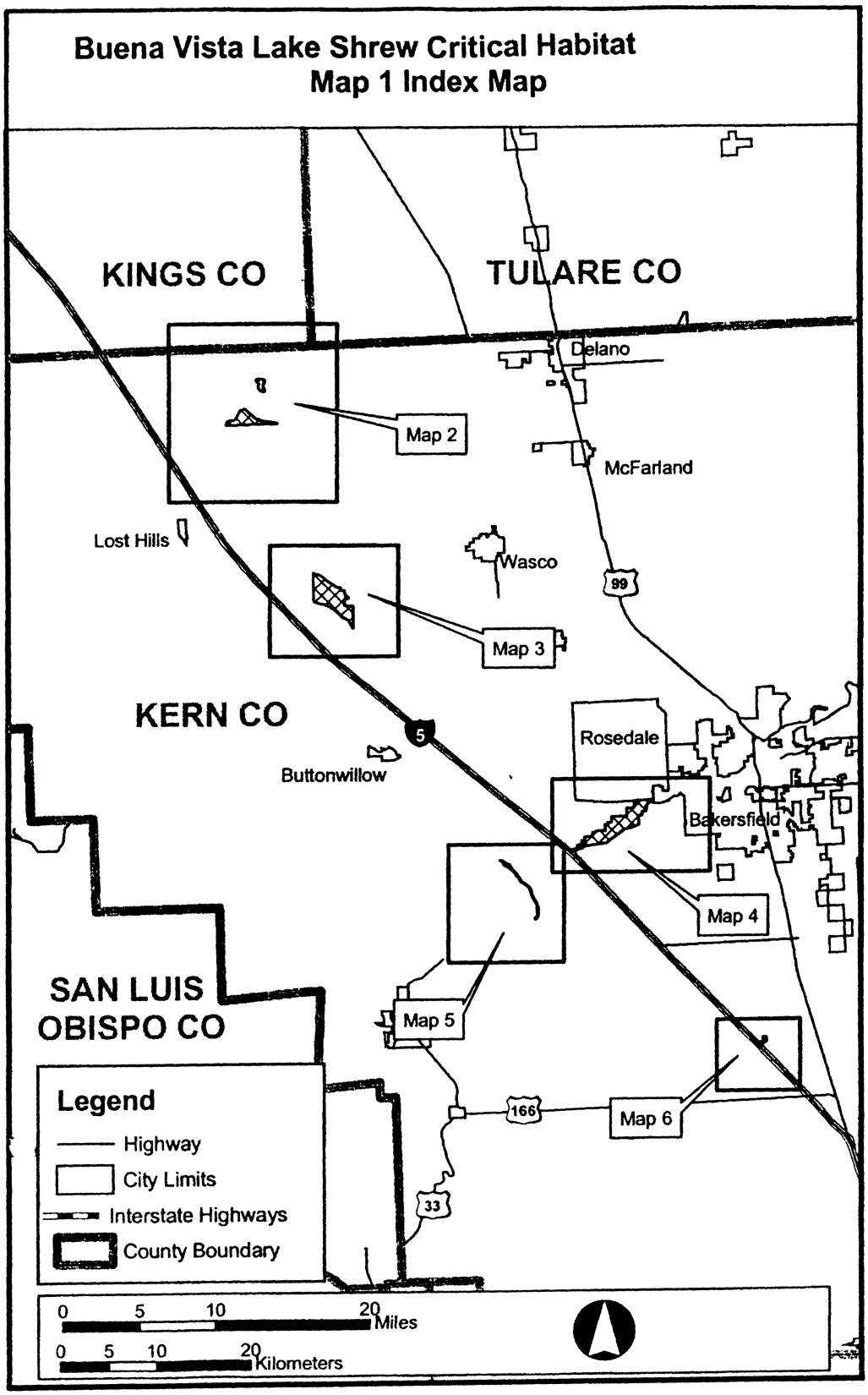


(6) Unit 1a: Kern National Wildlife Refuge, Kern County, California.

(i) From USGS 1:24,000 quadrangle maps Hacienda Ranch, California, and Lost Hills NE, California, land bounded by the following UTM 11 NAD 27 coordinates (E, N): 261370, 3955645; 261384, 3955731; 261457, 3955912; 261502, 3955985; 261534, 3956044; 261643, 3955967; 261679, 3955949; 261775, 3955967; 261797, 3955981; 261784, 3956017; 261779, 3956062;

261802, 3956149; 261829, 3956249; 261815, 3956326; 261788, 3956417; 261784, 3956621; 261734, 3956675; 261711, 3956716; 261716, 3956762; 261756, 3956784; 261788, 3956825; 261793, 3956862; 261797, 3957157; 261806, 3957170; 261825, 3957175; 261943, 3957120; 261993, 3957107; 262179, 3957093; 262297, 3957089; 262315, 3957071; 262424, 3956857; 262469, 3956771; 262479, 3956739; 262479, 3956707; 262465, 3956685; 262460, 3956671; 262460, 3956644; 262465, 3956607; 262469, 3956566; 262479, 3956535; 262465, 3956494; 262451, 3956453; 262447, 3956417; 262447, 3956385; 262460, 3956367; 262488, 3956362; 262519, 3956385; 262551, 3956417; 262598, 3956482; 262561, 3956219; 262543, 3956086; 262536, 3956035; 262456, 3955981; 262429, 3955903; 262397, 3955881; 262347, 3955858; 262320, 3955844; 262265, 3955822; 262224, 3955799; 262197, 3955776; 262202, 3955763; 262220, 3955744; 262256, 3955717; 262288, 3955704; 262383, 3955694; 262438, 3955690; 262487, 3955684; 262486, 3955677; 262477, 3955610; 261938, 3955627; 261370, 3955645; returning to 261370, 3955645.

(ii) The map of Unit 1a appears at paragraph (8)(ii) of this entry.

(7) Unit 1b: Kern National Wildlife Refuge, Kern County, California.

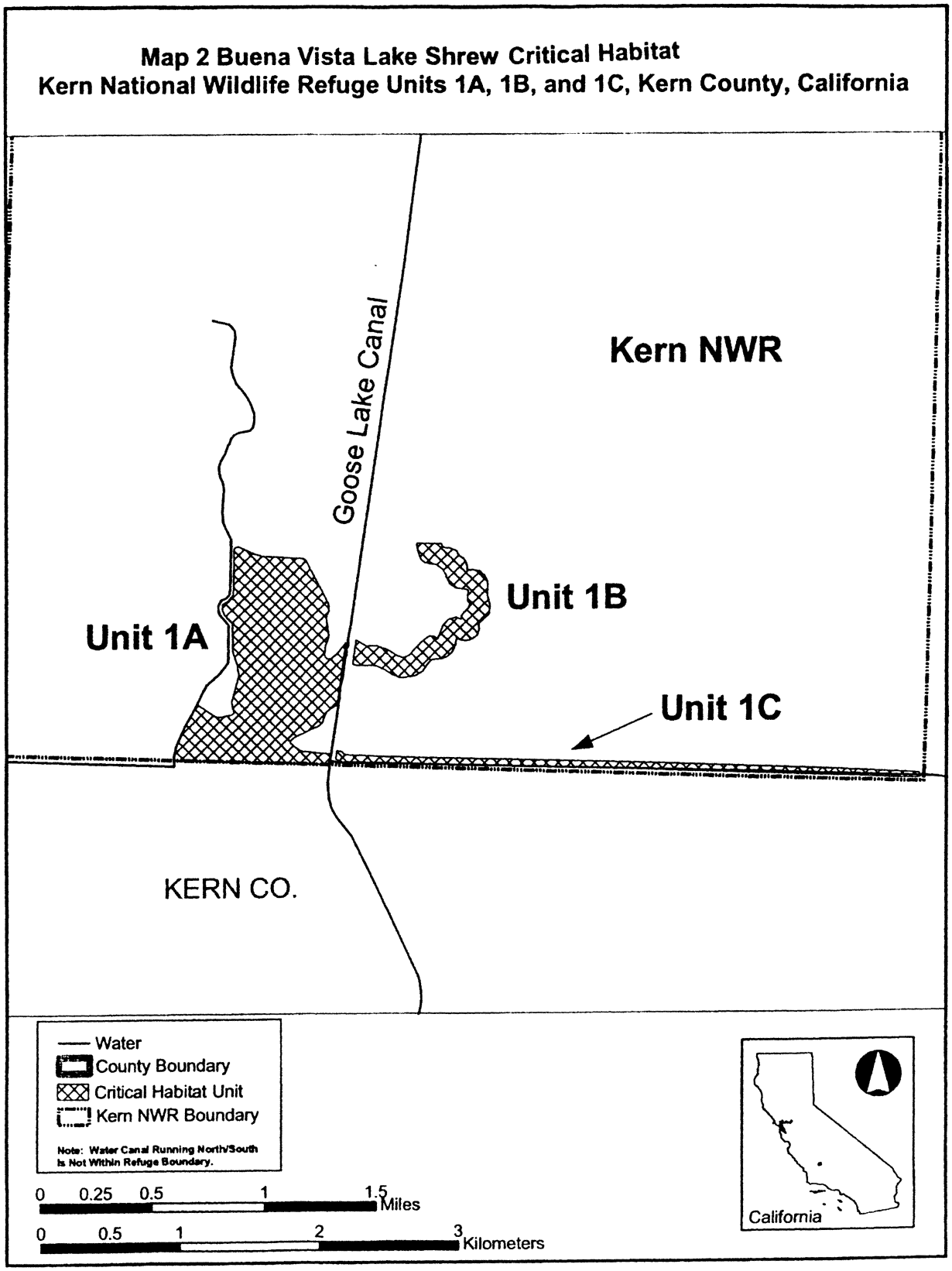
(i) From USGS 1:24,000 quadrangle map Lost Hills NW, California, and Lost Hills NE, California; land bounded by the following UTM 11 NAD 27 coordinates (E, N): 263287, 3957189; 263287, 3957174; 263304, 3957163; 263343, 3957160; 263390, 3957139; 263399, 3957115; 263411, 3957100; 263438, 3957086; 263459, 3957050; 263464, 3957023; 263464, 3957003; 263506, 3957003; 263553, 3956997; 263589, 3956964; 263607, 3956929; 263613, 3956887; 263607, 3956834; 263613, 3956801; 263627, 3956748; 263621, 3956686; 263571, 3956638; 263547, 3956617; 263550, 3956573; 263539, 3956532; 263500, 3956505; 263453, 3956490; 263402, 3956502; 263390, 3956511; 263382, 3956463; 263364, 3956416; 263328, 3956381; 263287, 3956363; 263236, 3956360; 263207, 3956354; 263180, 3956321; 263147, 3956271; 263097, 3956241; 263053, 3956232; 262988, 3956226; 262931, 3956250; 262878, 3956283; 262822, 3956309; 262786, 3956318; 262745, 3956315; 262688, 3956318; 262662, 3956321; 262650, 3956327; 262674, 3956499; 262715, 3956472; 262748, 3956455; 262783, 3956458; 262816, 3956458; 262854, 3956443; 262899, 3956428; 262961, 3956389; 263005, 3956372; 263053, 3956386; 263091, 3956431; 263142, 3956484; 263195, 3956526; 263239, 3956520; 263254, 3956502; 263272, 3956540; 263296, 3956603; 263334, 3956647; 263384, 3956662; 263423, 3956647; 263423, 3956674; 263450, 3956703; 263473, 3956727; 263482, 3956757; 263467, 3956780; 263467, 3956810; 263470, 3956831; 263473, 3956854; 263461, 3956860; 263426, 3956866; 263384, 3956869; 263340, 3956902; 263319, 3956949; 263310, 3956976; 263293, 3957006; 263275, 3957020; 263248, 3957041; 263207, 3957047; 263162, 3957056; 263136, 3957080; 263115, 3957136; 263109, 3957171; 263109, 3957195; 263287, 3957189; returning to 263287, 3957189.

(ii) The map of Unit 1b appears at paragraph (8)(ii) of this entry.

(8) Unit 1c: Kern National Wildlife Refuge, Kern County, California.

(i) From USGS 1:24,000 quadrangle map Lost Hills NW, California, and Lost Hills NE, California; land bounded by the following UTM 11 NAD 27 coordinates (E, N): 262564, 3955705; 262575, 3955694; 262592, 3955680; 262623, 3955677; 262864, 3955666; 263540, 3955646; 264029, 3955635; 264946, 3955607; 266049, 3955565; 266680, 3955534; 266700, 3955531; 266714, 3955523; 266714, 3955495; 266588, 3955497; 266243, 3955511; 264214, 3955584; 262687, 3955626; 262572, 3955629; 262528, 3955647; 262530, 3955660; 262533, 3955685; 262536, 3955706; 262564, 3955705; returning to 262564, 3955705.

(ii) *Note*: Map 2 (Units 1a, 1b, and 1c) follows:

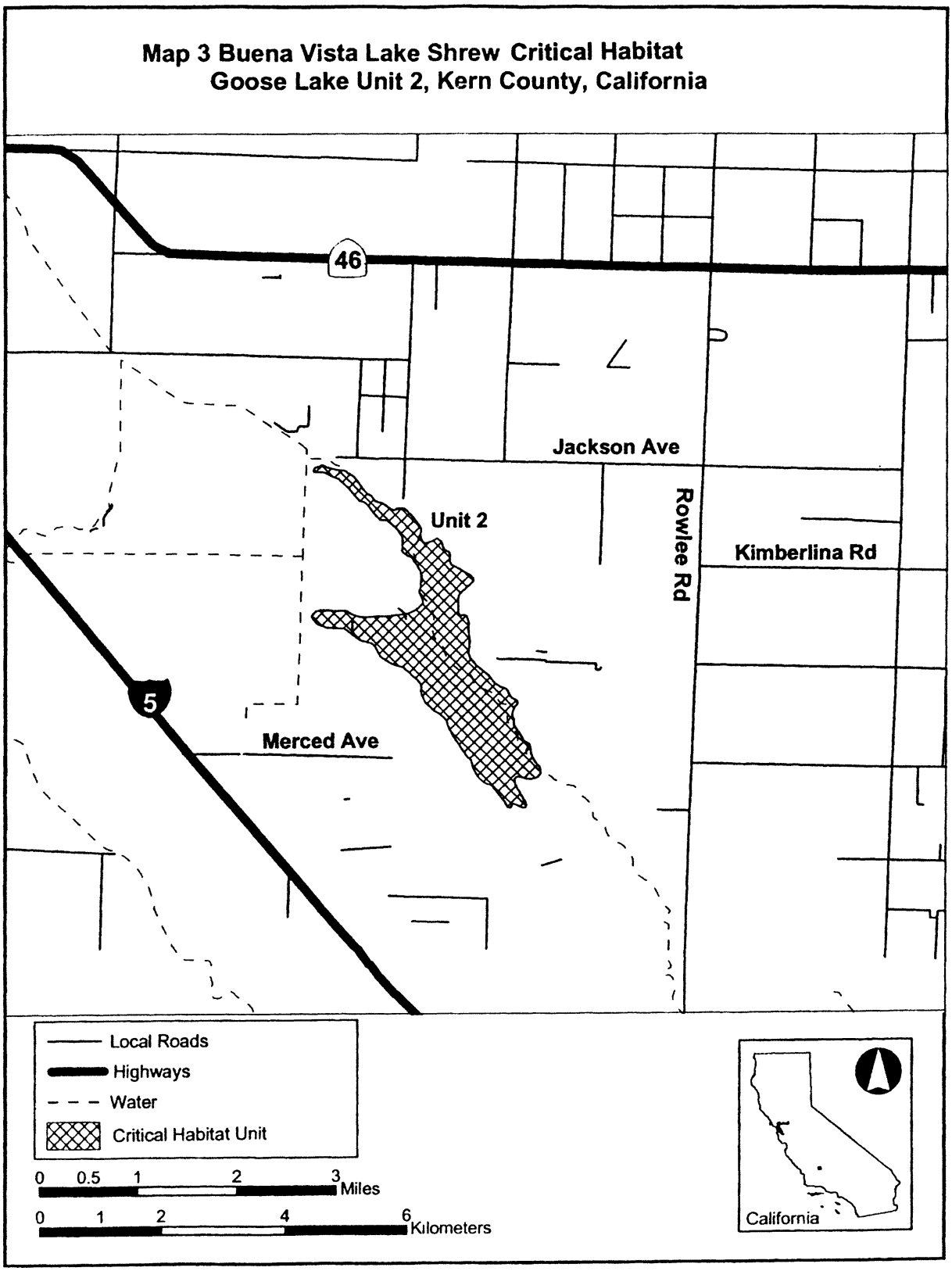


(9) Unit 2: Goose Lake, Kern County, California.

(i) From USGS 1:24,000 quadrangle map Semitropic, California, land bounded by the following UTM 11 NAD 27 coordinates (E, N): 269741, 3939122; 269841, 3939090; 269931, 3939074; 270005, 3939064; 270065, 3939048; 270081, 3939030; 270117, 3939010; 270185, 3938968; 270273, 3938860; 270351, 3938749; 270403, 3938691; 270443, 3938671; 270484, 3938649; 270502, 3938621; 270544, 3938573; 270598, 3938547; 270660, 3938527; 270782, 3938449; 270824, 3938423;

270848, 3938423; 270878, 3938431; 270930, 3938449; 271005, 3938452; 271020, 3938439; 271064, 3938409; 271120, 3938353; 271186, 3938269; 271260, 3938173; 271286, 3938125; 271286, 3938079; 271278, 3938035; 271288, 3937959; 271318, 3937905; 271334, 3937887; 271392, 3937893; 271444, 3937905; 271556, 3937957; 271578, 3937939; 271623, 3937907; 271635, 3937885; 271639, 3937855; 271653, 3937819; 271667, 3937785; 271685, 3937767; 271727, 3937751; 271749, 3937735; 271761, 3937702; 271761, 3937658; 271763, 3937582; 271765, 3937570; 271777, 3937548; 271793, 3937526; 271843, 3937504; 271905, 3937470; 272025, 3937400; 272087, 3937372; 272123, 3937328; 272141, 3937312; 272143, 3937294; 272139, 3937274; 272125, 3937250; 272091, 3937212; 271995, 3937122; 271931, 3937068; 271911, 3937040; 271901, 3937004; 271901, 3936914; 271901, 3936848; 271903, 3936802; 271907, 3936750; 271915, 3936716; 271935, 3936700; 271969, 3936702; 272009, 3936706; 272037, 3936694; 272047, 3936674; 272061, 3936638; 272075, 3936580; 272067, 3936533; 272065, 3936457; 272083, 3936371; 272089, 3936307; 272085, 3936191; 272067, 3936127; 272067, 3936087; 272101, 3936007; 272181, 3935911; 272241, 3935853; 272379, 3935749; 272429, 3935687; 272504, 3935603; 272525, 3935587; 272573, 3935555; 272625, 3935533; 272669, 3935517; 272703, 3935479; 272729, 3935427; 272763, 3935380; 272810, 3935344; 272858, 3935316; 272864, 3935290; 272860, 3935258; 272822, 3935212; 272790, 3935148; 272788, 3935086; 272808, 3935024; 272802, 3934974; 272814, 3934916; 272882, 3934818; 272920, 3934764; 272964, 3934686; 272998, 3934652; 273032, 3934632; 273064, 3934608; 273084, 3934508; 273090, 3934444; 273126, 3934370; 273172, 3934302; 273216, 3934257; 273234, 3934231; 273242, 3934185; 273244, 3934139; 273228, 3934101; 273208, 3934081; 273158, 3934055; 273122, 3934045; 273076, 3934041; 273018, 3934049; 272956, 3934067; 272940, 3934071; 272890, 3934081; 272870, 3934079; 272850, 3934077; 272832, 3934055; 272824, 3934035; 272828, 3933995; 272832, 3933957; 272850, 3933923; 272876, 3933881; 272912, 3933819; 272922, 3933791; 272946, 3933753; 273012, 3933641; 273014, 3933611; 273004, 3933579; 272980, 3933575; 272946, 3933579; 272916, 3933593; 272898, 3933597; 272854, 3933621; 272818, 3933637; 272800, 3933637; 272788, 3933625; 272780, 3933601; 272763, 3933575; 272743, 3933571; 272705, 3933585; 272665, 3933669; 272445, 3933945; 272411, 3933951; 272379, 3933963; 272317, 3933995; 272227, 3934081; 272177, 3934169; 272139, 3934245; 272135, 3934294; 272115, 3934362; 272063, 3934402; 272011, 3934470; 271817, 3934758; 271739, 3934912; 271711, 3935000; 271663, 3935054; 271596, 3935112; 271514, 3935154; 271470, 3935200; 271364, 3935298; 271310, 3935413; 271296, 3935477; 271304, 3935523; 271304, 3935571; 271254, 3935639; 271156, 3935723; 271082, 3935797; 271040, 3935817; 271006, 3935859; 270976, 3935873; 270910, 3935887; 270824, 3935911; 270712, 3935979; 270624, 3936038; 270598, 3936089; 270550, 3936181; 270528, 3936215; 270488, 3936249; 270419, 3936275; 270327, 3936295; 270265, 3936325; 270199, 3936375; 270135, 3936421; 270089, 3936463; 270033, 3936493; 269891, 3936500; 269745, 3936506; 269603, 3936566; 269575, 3936586; 269523, 3936650; 269503, 3936684; 269513, 3936714; 269557, 3936768; 269633, 3936788; 269761, 3936784; 269835, 3936788; 270035, 3936782; 270071, 3936778; 270153, 3936728; 270285, 3936688; 270417, 3936680; 270550, 3936690; 270716, 3936690; 271054, 3936732; 271166, 3936772; 271242, 3936820; 271312, 3936896; 271324, 3936926; 271314, 3936962; 271300, 3937002; 271266, 3937064; 271260, 3937094; 271278, 3937156; 271290, 3937256; 271286, 3937368; 271278, 3937422; 271222, 3937530; 271164, 3937596; 271150, 3937632; 271136, 3937652; 271084, 3937668; 271038, 3937699; 270979, 3937746; 270981, 3937783; 270987, 3937969; 270960, 3938011; 270868, 3938143; 270728, 3938249; 270692, 3938259; 270628, 3938259; 270606, 3938273; 270500, 3938387; 270435, 3938483; 270401, 3938521; 270373, 3938543; 270315, 3938561; 270287, 3938569; 270113, 3938769; 269941, 3938928; 269843, 3938962; 269715, 3939032; 269585, 3939032; 269563, 3939032; 269543, 3939040; 269533, 3939054; 269533, 3939074; 269543, 3939096; 269567, 3939110; 269591, 3939120; 269621, 3939122; 269659, 3939144; 269685, 3939146; 269709, 3939138; 269741, 3939122; returning to 269741, 3939122.

(ii) *Note*: Map 3 (Unit 2) follows:

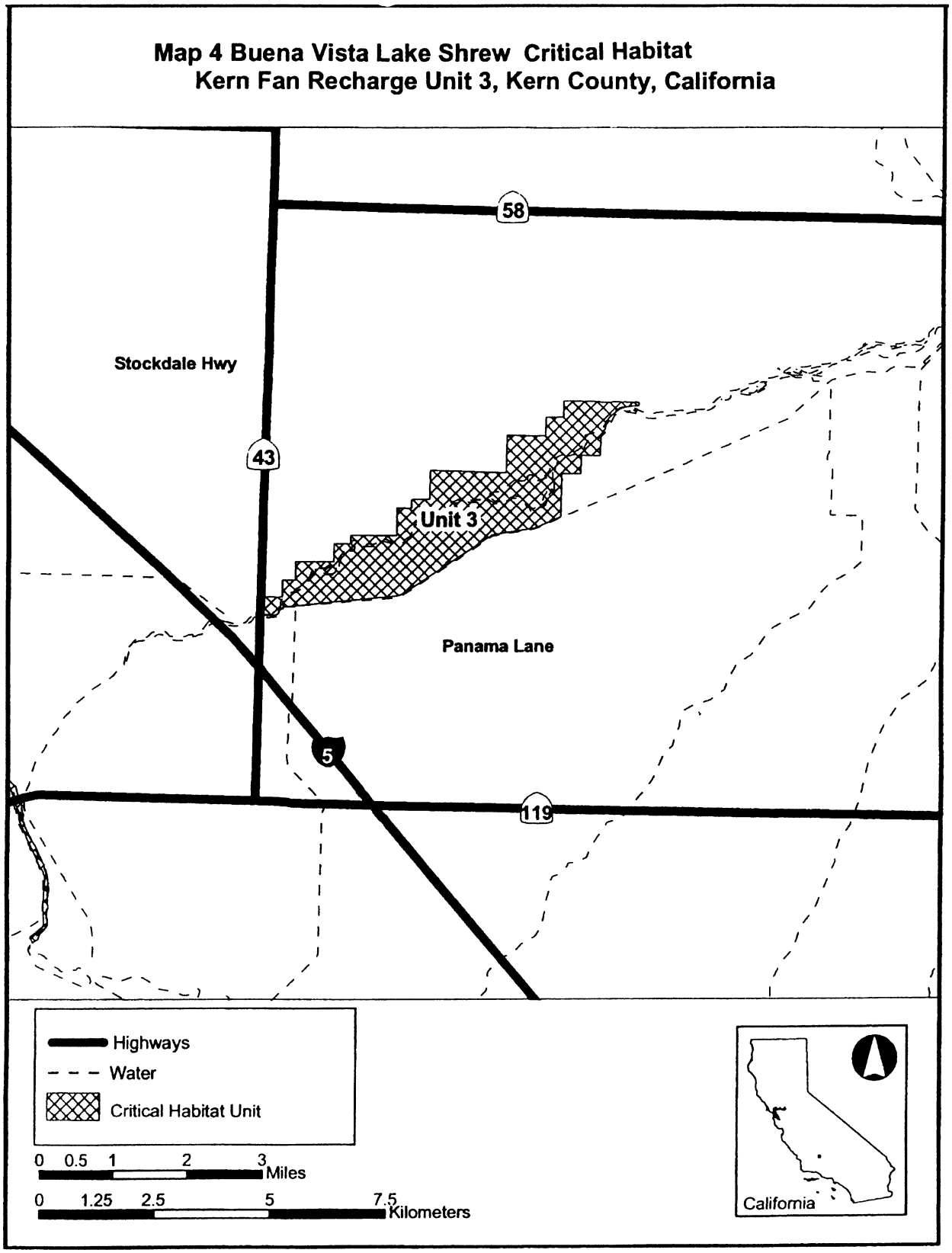


(10) Unit 3: Kern Fan Water Recharge Area, Kern County, California.

(i) From USGS 1:24,000 quadrangle maps Tupman, California, and Stevens, California, land bounded by the following UTM 11 NAD 27 coordinates (E, N): 295516, 3908835; 295279, 3908837; 295290, 3909235; 295839, 3909235; 295839, 3909605; 296123, 3909598; 296123, 3910008; 296939, 3909995; 296945, 3910388; 297306, 3910388; 297306, 3910580; 298301, 3910571; 298305, 3911170; 298614, 3911161; 298617, 3911357; 299013, 3911357; 299021, 3911981; 300650,

3911934; 300666, 3912745; 301491, 3912726; 301496, 3913131; 301878, 3913131; 301885, 3913492; 302639, 3913467; 302689, 3913456; 302875, 3913452; 302953, 3913467; 303501, 3913456; 303499, 3913377; 303346, 3913377; 303182, 3913345; 303096, 3913310; 302950, 3913206; 302850, 3913113; 302800, 3913024; 302782, 3912942; 302764, 3912860; 302686, 3912771; 302671, 3912700; 302664, 3912300; 302261, 3912303; 302250, 3911900; 301850, 3911907; 301827, 3910972; 301270, 3910731; 301149, 3910709; 300352, 3910586; 298760, 3909525; 298405, 3909289; 298306, 3909259; 296918, 3909128; 295881, 3909023; 295832, 3908998; 295780, 3908939; 295750, 3908877; 295710, 3908847; 295653, 3908837; returning to 295516, 3908835.

(ii) *Note*: Map 4 (Unit 3) follows:

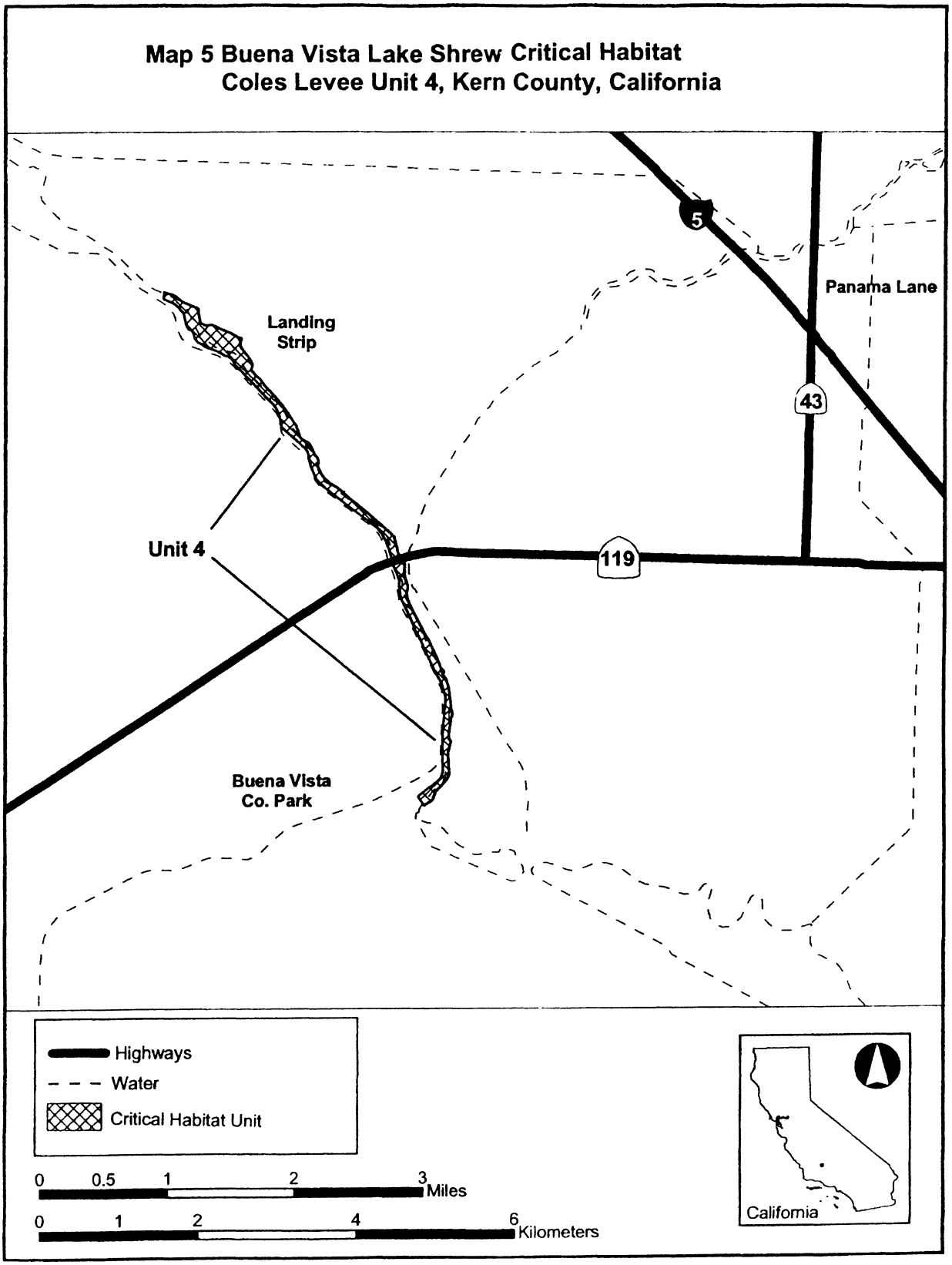


(11) Unit 4: Coles Levee Unit, Kern County, California.

(i) From USGS 1:24,000 quadrangle maps Tupman, and Buena Vista Lakebed, California, land bounded by the following UTM 11 NAD 27 coordinates (E, N): 287308, 3908077; 287165, 3908138; 287172, 3908222; 287285, 3908192; 287341, 3908153; 287414, 3908098; 287610, 3908020; 287614, 3907949; 287624, 3907898; 287631, 3907847; 287668, 3907818; 287716, 3907803; 287779, 3907811; 287843, 3907787; 287915, 3907750; 288008, 3907711; 288058, 3907689;

288114, 3907658; 288160, 3907643; 288138, 3907573; 288150, 3907533; 288182, 3907490; 288229, 3907431; 288272, 3907372; 288298, 3907314; 288284, 3907242; 288348, 3907166; 288396, 3907126; 288453, 3907045; 288530, 3906966; 288583, 3906909; 288667, 3906812; 288705, 3906757; 288744, 3906700; 288796, 3906619; 288848, 3906542; 288901, 3906392; 288938, 3906357; 288998, 3906330; 289020, 3906301; 289045, 3906261; 289081, 3906173; 289115, 3906128; 289131, 3906076; 289119, 3906028; 289135, 3906004; 289165, 3905928; 289197, 3905879; 289271, 3905813; 289358, 3905761; 289389, 3905735; 289480, 3905654; 289597, 3905561; 289758, 3905425; 289910, 3905291; 290046, 3905162; 290070, 3905143; 290115, 3904972; 290125, 3904923; 290185, 3904904; 290200, 3904868; 290206, 3904784; 290205, 3904694; 290207, 3904637; 290218, 3904594; 290234, 3904560; 290251, 3904514; 290244, 3904477; 290234, 3904437; 290242, 3904380; 290275, 3904275; 290324, 3904182; 290376, 3904078; 290418, 3903999; 290467, 3903903; 290499, 3903856; 290545, 3903769; 290575, 3903699; 290601, 3903641; 290624, 3903595; 290673, 3903473; 290708, 3903444; 290705, 3903422; 290695, 3903396; 290733, 3903335; 290771, 3903227; 290793, 3903070; 290795, 3903016; 290802, 3902968; 290815, 3902899; 290812, 3902870; 290794, 3902836; 290778, 3902637; 290775, 3902582; 290802, 3902553; 290785, 3902492; 290764, 3902406; 290768, 3902275; 290782, 3902151; 290776, 3902124; 290744, 3902068; 290668, 3901981; 290608, 3901920; 290572, 3901811; 290459, 3901742; 290454, 3901756; 290386, 3901852; 290407, 3901876; 290507, 3901957; 290601, 3902026; 290671, 3902088; 290699, 3902164; 290699, 3902230; 290693, 3902301; 290694, 3902410; 290690, 3902504; 290694, 3902638; 290701, 3902789; 290711, 3902878; 290722, 3903028; 290722, 3903129; 290696, 3903214; 290677, 3903290; 290619, 3903389; 290577, 3903475; 290495, 3903653; 290439, 3903768; 290401, 3903848; 290347, 3903947; 290298, 3904071; 290224, 3904237; 290169, 3904357; 290152, 3904432; 290141, 3904507; 290139, 3904575; 290113, 3904653; 290087, 3904717; 290060, 3904773; 290050, 3904836; 290030, 3904894; 290008, 3904975; 289979, 3905056; 289927, 3905163; 289868, 3905242; 289805, 3905291; 289745, 3905342; 289684, 3905386; 289617, 3905441; 289518, 3905517; 289397, 3905610; 289269, 3905708; 289176, 3905781; 289124, 3905822; 289088, 3905884; 289068, 3905932; 289055, 3905970; 289036, 3906012; 289029, 3906057; 289016, 3906107; 289006, 3906162; 288994, 3906200; 288973, 3906236; 288940, 3906273; 288835, 3906369; 288791, 3906415; 288729, 3906457; 288672, 3906513; 288656, 3906561; 288651, 3906608; 288641, 3906669; 288619, 3906723; 288598, 3906761; 288545, 3906827; 288415, 3906958; 288351, 3907026; 288255, 3907123; 288204, 3907179; 288155, 3907233; 288109, 3907278; 288080, 3907311; 288060, 3907340; 288028, 3907386; 287992, 3907412; 287960, 3907420; 287893, 3907455; 287829, 3907486; 287774, 3907509; 287709, 3907532; 287645, 3907569; 287613, 3907589; 287570, 3907640; 287558, 3907682; 287537, 3907740; 287491, 3907756; 287471, 3907781; 287449, 3907839; 287435, 3907900; 287419, 3907959; 287365, 3908021; returning to 287308, 3908077.

(ii)*Note*: Map 5 (Unit 4) follows:

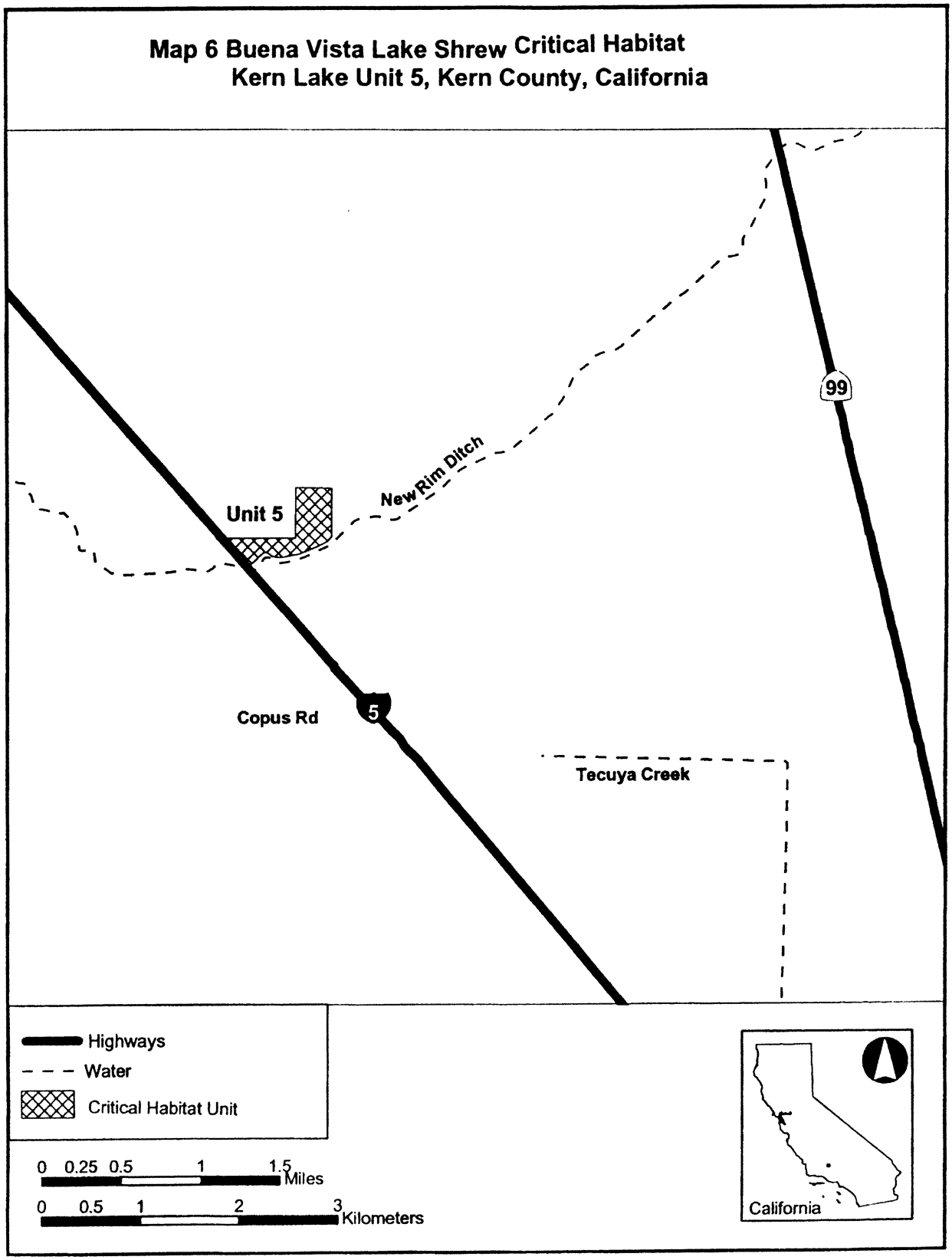


(12) Unit 5: Kern Lake, Kern County, California.

(i) From USGS 1:24,000 quadrangle map Coal Oil Canyon, California, land bounded by the following UTM 11 NAD 27 coordinates (E, N): 312996, 3887027; 312953, 3887034; 312911, 3887047; 312886, 3887054; 312657, 3887298; 313456, 3887299; 313458, 3887806; 313823, 3887799; 313823, 3887314; 313786, 3887267; 313696, 3887224; 313618, 3887189; 313491, 3887139; 313363, 3887112; 313298, 3887107; 313231, 3887112; 313193, 3887142; 313168, 3887157; 313136, 3887152;

313091, 3887112; 313056, 3887072; returning to 312996, 3887027.

(ii) *Note*: Map 6 (Unit 5) follows:



* * * * *

Dated: October 7, 2009

Thomas L. Strickland

Assistant Secretary for Fish and Wildlife and Parks

[FR Doc. E9–25242 Filed 10–20–09; 8:45 am]

BILLING CODE 4310–55–C

Notices

Federal Register

Vol. 74, No. 202

Wednesday, October 21, 2009

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

Submission for OMB Review; Comment Request

October 15, 2009.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the 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 should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: Generic Clearance for the Development of Nutrition Education Messages and Products for the General Public.

OMB Control Number: 0584–0523.

Summary of Collection: The Center for Nutrition Policy and Promotion (CNPP) of the U.S. Department of Agriculture conducts consumer research to identify key issues of concern related to understanding and use of the *Dietary Guidelines for Americans* and *MyPyramid.* The *Dietary Guidelines,* a primary source of dietary health information, are issued jointly by the USDA and Health and Human Services and serve as the cornerstone of Federal nutrition policy and form the basis for nutrition education efforts of these agencies. *MyPyramid* is a tool, which helps consumers understand and use the *Dietary Guidelines.* CNPP works to improve the health and well-being of Americans by developing and promoting dietary guidelines that links scientific research to the nutrition needs of consumers.

Need and Use of the Information: CNPP will collect information to develop practical and meaningful nutrition and physical activity guidance for Americans to help improve their health. The collected information will also be used to expand the knowledge base concerning how the *Dietary Guidelines for Americans* and *MyPyramid* recommendations and messages are understood as well as how they can be used by consumers to improve balance of their food intake with physical energy expenditure for good health. If this information is not collected, USDA's ability to incorporate messages and materials that are practical, meaningful, and relevant for the intended audience in any proposed update of the Dietary Guidelines for Americans or MyPyramid will be impaired.

Description of Respondents: Individuals or households.

Number of Respondents: 57,000.

Frequency of Responses: Reporting: Other (as desired).

Total Burden Hours: 12,004.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. E9–25237 Filed 10–20–09; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2009-0075]

Notice of Request for Extension of Approval of an Information Collection; Cut Flowers from Countries with Chrysanthemum White Rust

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with regulations for the importation of cut flowers from countries with chrysanthemum white rust.

DATES: We will consider all comments that we receive on or before December 21, 2009.

ADDRESSES: You may submit comments by either of the following methods:

- Federal eRulemaking Portal: Go to (*http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2009-0075*) to submit or view comments and to view supporting and related materials available electronically.
- Postal Mail/Commercial Delivery: Please send two copies of your comment to Docket No. APHIS-2009-0075, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238. Please state that your comment refers to Docket No. APHIS-2009-0075.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room

hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690-2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at (*http://www.aphis.usda.gov*).

FOR FURTHER INFORMATION CONTACT: For information on regulations for the importation of cut flowers from countries with chrysanthemum white rust, contact Mr. William Aley, Senior Import Specialist, Risk Management and Plants for Planting Policy, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737; (301) 734-5057. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851-2908.

SUPPLEMENTARY INFORMATION:

Title: Cut Flowers from Countries with Chrysanthemum White Rust.

OMB Number: 0579-0271.

Type of Request: Extension of approval of an information collection.

Abstract: The Plant Protection Act (PPA, 7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to restrict the importation, entry, and interstate movement of plants, plant products, and other articles to prevent the introduction of plant pests into the United States or their dissemination within the United States. As authorized by the PPA, APHIS regulates the importation of cut flowers from certain parts of the world as provided in ''Subpart—Cut Flowers'' (7 CFR 319.74-1 through 319.74-4).

In accordance with these regulations, cut flowers from countries with chrysanthemum white rust may be imported into the United States only under certain conditions to prevent the introduction of this disease into the United States. These conditions involve the use of information collection activities, including a phytosanitary certificate with an additional declaration statement and box labeling.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.2483404 hours per response.

Respondents: Foreign national plant protection organizations and registered production sites.

Estimated annual number of respondents: 1,025.

Estimated annual number of responses per respondent: 2.4985365.

Estimated annual number of responses: 2,561.

Estimated total annual burden on respondents: 636 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 15th day of October, 2009.

Kevin Shea

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E9–25330 Filed 10–20–09: 12:46 pm]

BILLING CODE: 3410–34–S

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2009-0076]

Notice of Request for Extension of Approval of an Information Collection; Untreated Oranges, Tangerines, and Grapefruit from Mexico Transiting the United States to Foreign Countries

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with regulations for the transit of untreated oranges, tangerines, and grapefruit from Mexico through the United States to other foreign countries.

DATES: We will consider all comments that we receive on or before December 21, 2009.

ADDRESSES: You may submit comments by either of the following methods:

- Federal eRulemaking Portal: Go to (*http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2009-0076*) to submit or view comments and to view supporting and related materials available electronically.
- Postal Mail/Commercial Delivery: Please send two copies of your comment to Docket No. APHIS-2009-0076, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238. Please state that your comment refers to Docket No. APHIS-2009-0076.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690-2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at (*http://www.aphis.usda.gov*).

FOR FURTHER INFORMATION CONTACT: For information on regulations for the transit of untreated oranges, tangerines, and grapefruit from Mexico through the United States to other foreign countries, contact Mr. Marc E. Phillips, Regulatory Permit Analyst, Plant and Plant Product Permits, RPM, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737; (301) 734-0753. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851-2908.

SUPPLEMENTARY INFORMATION: *Title:* Untreated Oranges, Tangerines, and Grapefruit from Mexico Transiting the United States to Foreign Countries.

OMB Number: 0579-0303.

Type of Request: Extension of approval of an information collection.

Abstract: The Plant Protection Act (PPA, 7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to restrict the importation, entry, and interstate

movement of any plant, plant product, biological control organism, noxious weed, means or conveyance, or other article to prevent the introduction of plant pests into the United States or their dissemination within the United States. This authority has been delegated to the Animal and Plant Health Inspection Service.

The plant quarantine safeguard regulations in title 7 of the Code of Federal Regulations, part 352, allow certain products or articles that are classified as prohibited or restricted products or articles under other regulations in title 7 to be moved through the United States under certain conditions. Such articles include fruits and vegetables that are moved into the United States for: (1) A temporary stay where unloading or landing is not intended, (2) unloading or landing for transshipment and exportation, (3) unloading or landing for transportation and exportation, or (4) unloading and entry at a port other than the port of first arrival.

The regulations in § 352.30 address the movement of untreated oranges, tangerines, and grapefruit from Mexico into or through the United States in transit to foreign countries. These regulations require the trucking industry and shippers to obtain permits from APHIS that allow the untreated fruit to transit the United States.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.5 hours per response.

Respondents: Trucking industry; shippers.

Estimated annual number of respondents: 25.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 25.

Estimated total annual burden on respondents: 12.5 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 15th day of October, 2009.

Kevin Shea

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E9–25331 Filed 10–20–09: 8:19 am]

BILLING CODE: 3410–34–S

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2009-0077]

Notice of Request for Extension of Approval of an Information Collection; Importation of Nursery Stock

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with regulations for the importation of nursery stock.

DATES: We will consider all comments that we receive on or before December 21, 2009.

ADDRESSES: You may submit comments by either of the following methods:

- Federal eRulemaking Portal: Go to (*http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2009-0077*) to submit or view comments and to view supporting and related materials available electronically.
- Postal Mail/Commercial Delivery: Please send two copies of your comment to Docket No. APHIS-2009-0077, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238. Please state that your comment refers to Docket No. APHIS-2009-0077.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690-2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at (*http://www.aphis.usda.gov*).

FOR FURTHER INFORMATION CONTACT: For information on regulations for the importation of nursery stock, contact Dr. Arnold T. Tschanz, Senior Plant Pathologist, Risk Management and Plants for Planting Policy, RPM, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737; (301) 734-0627. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851-2908.

SUPPLEMENTARY INFORMATION:

Title: Importation of Nursery Stock.

OMB Number: 0579-0279.

Type of Request: Extension of approval of an information collection.

Abstract: The Plant Protection Act (PPA, 7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to restrict the importation, entry, and interstate movement of plants, plant products, and other articles to prevent the introduction of plant pests into the United States or their dissemination within the United States. APHIS regulations contained in''Subpart—Nursery Stock Plants, Roots, Bulbs, Seeds, and Other Plant Products (§§ 319.37 through 319.37-14) restrict, among other things, the importation of living plants, plant parts, seeds, and plant cuttings for planting or propagation.

In accordance with these regulations, nursery stock from certain parts of the world may be imported into the United States only under certain conditions to prevent the introduction of plant pests into the United States. These conditions involve the use of information collection activities, including phytosanitary certificates with additional declaration statements, grower registration and agreements, requests for reinstatement to export program, and box labeling.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.10914 hours per response.

Respondents: Foreign national plant protection organizations; importers of nursery stock.

Estimated annual number of respondents: 52.

Estimated annual number of responses per respondent: 79.46.

Estimated annual number of responses: 4,132.

Estimated total annual burden on respondents: 451 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 15th day of October, 2009.

Kevin Shea

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E9–25332 Filed 10–20–09: 12:21 pm]

BILLING CODE: 3410–34–S

DEPARTMENT OF AGRICULTURE

Forest Service

Mendocino Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Mendocino County Resource Advisory Committee will meet October 30, 2009 (RAC) in Willits, California. Agenda items to be covered include: (1) Approval of minutes, (2) Public Comment, (3) Sub-committees (4) Discussion/Approval of projects (5) Matters before the group-discussion/action (6) Next agenda and meeting date.

DATES: The meeting will be held on October 30, from 9 a.m. to 12 noon.

ADDRESSES: The meeting will be held at the Mendocino County Museum, located at 400 E. Commercial St., Willits, California.

FOR FURTHER INFORMATION CONTACT: Roberta Hurt, Committee Coordinator, USDA, Mendocino National Forest, Covelo Ranger District, 78150 Covelo Road, Covelo, CA 95428. (707) 983–6658; E-Mail *windmill@willitsonline.com.*

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Persons who wish to bring matters to the attention of the Committee may file written statements with the Committee staff by October 15, 2009. Public comment will have the opportunity to address the committee at the meeting.

Dated: October 10, 2009.

Lee Johnson,

Designated Federal Official.

[FR Doc. E9–25297 Filed 10–20–09; 8:45 am]

BILLING CODE M

DEPARTMENT OF COMMERCE

International Trade Administration

North Dakota State University, et al., Notice of Consolidated Decision on Applications for Duty–Free Entry of Electron Microscopes

This is a decision consolidated pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 A.M. and 5:00 P.M. in Room 3705, U.S. Department of Commerce, 14th and Constitution Avenue., NW, Washington, D.C.

Docket Number: 09–048. Applicant: North Dakota State University, Fargo, ND 58102. Instrument: Electron Microscope. Manufacturer: JEOL, Japan. Intended Use: See notice at 74 FR 46973, September 14, 2009.

Docket Number: 09–049. Applicant: Washington State University, Pullman, WA 99164. Instrument: Electron Microscope. Manufacturer: FEI Company, Czech Republic. Intended Use: See notice at 74 FR 46973, September 14, 2009.

Docket Number: 09–050. Applicant: Stanford University, Stanford, CA 94305. Instrument: Electron Microscope. Manufacturer: FEI Company, the Netherlands. Intended Use: See notice at 74 FR 46973, September 14, 2009.

Comments: None received. Decision: Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as these instruments are intended to be used, was being manufactured in the United States at the time the instruments were ordered. Reasons: Each foreign instrument is an electron microscope and is intended for research or scientific educational uses requiring an electron microscope. We know of no electron microscope, or any other instrument suited to these purposes, which was being manufactured in the United States at the time of order of each instrument.

Dated: October 15, 2009.

Christopher Cassel,

Director, Subsidies Enforcement Office, Import Administration.

[FR Doc. E9–25337 Filed 10–20–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XS26

Endangered Species; File No. 14726

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Blair Witherington, Florida Fish and Wildlife Conservation Commission, 9700 South A1A, Melbourne Beach, Florida, 32951, has applied in due form for a permit to take loggerhead (*Caretta caretta*), leatherback (*Dermochelys coriacea*), Kemp's ridley (*Lepidochelys kempii*), green (*Chelonia mydas*), and hawksbill (*Eretmochelys imbricata*) sea turtles for purposes of scientific research.

DATES: Written, telefaxed, or e-mail comments must be received on or before November 20, 2009.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the Features box on the

Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov/index.cfm*, and then selecting File No. 14726 from the list of available applications. These documents are also available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376; and

Southeast Region, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701; phone (727)824–5312; fax (727)824–5309.

Written comments or requests for a public hearing on this application should be mailed to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate.

Comments may also be submitted by facsimile at (301)713–0376, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

Comments may also be submitted by e-mail. The mailbox address for providing e-mail comments is *NMFS.Pr1Comments@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: File No. 14726.

FOR FURTHER INFORMATION CONTACT: Patrick Opay or Amy Hapeman, (301)713–2289.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

The purpose of this project is to locate and describe areas of the Atlantic Ocean and Gulf of Mexico near Florida that serve as developmental habitat for pelagic-stage juvenile and neonate loggerhead, green, Kemp's ridley, hawksbill, and leatherback sea turtles, to quantify threats to pelagic sea turtles, and to gather information on their life-history, genetics, movements, behavior, and diet. Researchers propose to capture by dip net, flipper tag, passive integrated transponder tag, measure, weigh, and oral swab up to 250 loggerheads, 100 greens, 50 Kemp's ridleys, 50 hawksbills, and 10 leatherbacks. Up to 100 of the loggerheads, all of the greens, all of the Kemp's ridleys, all of the hawksbills, and all of the leatherbacks would be esophageal lavaged.

Up to 100 of the loggerheads, all of the greens, and all of the hawksbills would be skin biopsied. Up to 5 of the Kemp's ridleys would have a satellite tag attached. The requested permit duration is five years.

Dated: October 15, 2009.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E9–25349 Filed 10–20–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

International Trade Administration

C–489–806

Certain Pasta From Turkey: Final Results of Countervailing Duty Changed Circumstances Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On January 28, 2009, the Department of Commerce (''the Department'') published a notice of initiation of a changed circumstances review (''CCR'') of the countervailing duty (''CVD'') order on certain pasta from Turkey as requested by Marsan Gida Sanayi ve Ticret A.S. (''Marsan''). *See Notice of Initiation of Countervailing Duty Changed Circumstances Review: Certain Pasta from Turkey*, 74 FR 4938 (January 28, 2009) (''*Initiation Notice*''). On September 15, 2009, we published our preliminary results of the CVD CCR. *See Certain Pasta From Turkey: Preliminary Results of Countervailing Duty Changed Circumstances Review*, 74 FR 47225 (September 15, 2009) (''*Preliminary Results*''). Pursuant to the new criteria outlined in the *Preliminary Results*, we preliminarily found that Marsan is not the successor to Gidasa Sabanci Gida Sanayi ve Ticaret A.S. (''Gidasa'') for purposes of the CVD cash deposit rates. We invited interested parties to comment on these preliminary results and we received comments from Marsan. For the final results, we continue to find that Marsan is not the successor to Gidasa, for purposes of the CVD cash deposit rates, and therefore its merchandise should continue to enter under the ''all others'' cash deposit rate.

EFFECTIVE DATE: October 21, 2009.

FOR FURTHER INFORMATION CONTACT: Shelly Atkinson, or Brandon Farlander, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0116 or (202) 482–0182, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 24, 1996, the Department published in the **Federal Register** the order on certain pasta from Turkey. *See Notice of Countervailing Duty Order: Certain Pasta (''Pasta'') From Turkey*, 61 FR 38546 (July 24, 1996). On December 3, 2008, Marsan requested that the Department initiate and conduct expedited CCRs to determine that, for purposes of the antidumping duty (''AD'') and CVD cash deposit rates, Marsan is the successor to Gidasa. *See* Marsan's December 3, 2008, submission entitled, ''Pasta from Turkey: Request for Expedited Changed Circumstances Review of AD/CVD Orders'' (''CCR Request''). On January 28, 2009, the Department published a notice of initiation of a CCR of the CVD order for Marsan. *See Initiation Notice*. On April 16, 2009, the Department requested additional information and issued a questionnaire to Marsan, to which it responded on May 1, 2009. *See* Marsan's May 1, 2009, response entitled, ''Pasta from Turkey: Marsan response to the supplemental questionnaire.''

On April 14, 2009, and June 2, 2009, the Department published its preliminary and final results, respectively, for the CCR of the AD order on certain pasta from Turkey and found that Marsan was the successor–in-interest to Gidasa for AD cash deposit purposes. *See Certain Pasta from Turkey: Notice of Preliminary Results of Antidumping Duty Changed Circumstances Review*, 74 FR 17153 (April 14, 2009); *Certain Pasta from Turkey: Notice of Final Results of Antidumping Duty Changed Circumstances Review*, 74 FR 26373 (June 2, 2009). On September 15, 2009, the Department published the preliminary results of the CVD CCR of the CVD order on pasta from Turkey and preliminarily found that, based on the Department's new methodology and criteria to analyze successorship claims in CVD CCRs, Marsan was not the successor to Gidasa, for purposes of the CVD cash deposit rate, and therefore its merchandise should continue to enter under the ''all others'' cash deposit rate. *See Preliminary Results*. We invited

parties to comment on our preliminary results and received comments from Marsan on September 24, 2009. We did not receive any rebuttal comments.

Scope of Review

Imports covered by this review are shipments of certain non–egg dry pasta in packages of five pounds (2.27 kilograms) or less, whether or not enriched or fortified or containing milk or other optional ingredients such as chopped vegetables, vegetable purees, milk, gluten, diastases, vitamins, coloring and flavorings, and up to two percent egg white. The pasta covered by this scope is typically sold in the retail market, in fiberboard or cardboard cartons, or polyethylene or polypropylene bags of varying dimensions.

Excluded from the scope of this review are refrigerated, frozen, or canned pastas, as well as all forms of egg pasta, with the exception of non–egg dry pasta containing up to two percent egg white.

The merchandise subject to review is currently classifiable under item 1902.19.20 of the *Harmonized Tariff Schedule of the United States (''HTSUS'')*. Although the *HTSUS* subheading is provided for convenience and customs purposes, the written description of the merchandise subject to the order is dispositive.

Final Results of Changed Circumstances Review

For the final results, we are hereby adopting our methodology and findings from the *Preliminary Results*. We continue to find that Marsan's merchandise is not entitled to enter under the CVD cash deposit rate previously established in the last CVD administrative review of Gidasa. Accordingly, we determine that Marsan's merchandise should continue to enter under the ''all others'' CVD cash deposit rate of 9.38 percent.

All issues raised in the case brief filed by Marsan are addressed in the Issues and Decision Memorandum for the Final Results of the Countervailing Duty Changed Circumstances Review on Certain Pasta from Turkey (''Issues and Decision Memorandum''), which is dated concurrently with and hereby adopted by this notice. Attached to this notice as an appendix is a list of the issues which the interested party raised and to which we have responded in the Issues and Decision Memorandum. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in the Department's Central Records Unit in Room 1117 of the main Department building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the Web at http://ia.ita.doc.gov/frn/index.html. The paper copy and electronic version of the Issues and Decision Memorandum are identical in content.

Notification

This notice serves as a final reminder to parties to administrative protective orders (''APO's) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Failure to timely notify the Department in writing of the return/destruction of APO material is a sanctionable violation.

We are issuing and publishing these results and notice in accordance with sections 751(b)(1) and 777(i)(1) and (2) of the Act and 19 CFR 351.216.

Dated: October 13, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

APPENDIX

List of Comments and Issues in the Issues and Decision Memorandum

Comment 1: Whether the Facts of the Case Warrant a Finding of Successorship
Comment 2: Whether Marsan was Denied Procedural Due Process
Comment 3: Whether the Department's New Policy Furthers the Goals of the Statute

[FR Doc. E9–25344 Filed 10–20–09; 8:45 am]
BILLING CODE 3510–DS–S

U.S. DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

(Docket 43–2009)

Foreign-Trade Zone 174 Tucson, Arizona, Application for Expansion and Reorganization under Alternative Site Framework

An application has been submitted to the Foreign–Trade Zones (FTZ) Board (the Board) by Tucson Regional Economic Opportunities, Inc., grantee of FTZ 174, requesting authority to expand the zone and reorganize under the alternative site framework (ASF) adopted by the Board (74 FR 1170, 01/12/09; correction 74 FR 3987, 01/22/09). The ASF is an option for grantees for the establishment or reorganization of general–purpose zones and can permit significantly greater flexibility in the designation of new ''usage–driven'' FTZ sites for operators/users located within a grantee's ''service area'' in the context of the Board's standard 2,000–acre activation limit for a general–purpose zone project. The application was submitted pursuant to the provisions of the Foreign–Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on October 13, 2009.

The grantee's proposed service area under the ASF would be the County of Pima, Arizona. If approved, the grantee would be able to serve sites throughout the service area based on companies' needs for FTZ designation. The proposed service area is adjacent to or within the Tucson Customs and Border Protection port of entry.

FTZ 174 was approved by the Board on January 30, 1991 (Board Order 508, 56 FR 4595, 02/05/91) and expanded on August 9, 2000 (Board Order 1114, 65 FR 50177, 08/17/00). The applicant is requesting to include its current six sites as ''magnet sites''. The applicant proposes that Site 2 be exempt from ''sunset'' time limits that otherwise apply to sites under the ASF. The applicant is also requesting approval of the following initial ''usage–driven'' site: *Proposed Site 7* (97.71 acres) - the Target Corporation Distribution Center, 8940 East Rita Park Drive, in Tucson.

In accordance with the Board's regulations, Christopher Kemp of the FTZ staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address listed below. The closing period for their receipt is December 21, 2009. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to January 4, 2010)

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign–Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's website, which is accessible via www.trade.gov/ftz. For further information, contact Christopher Kemp at christopher_kemp@ita.doc.gov or (202) 482–0862.

Dated: October 13, 2009.

Elizabeth Whiteman

Acting Executive Secretary.

[FR Doc. E9–25341 Filed 10–20–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–570–962

Certain Sodium and Potassium Phosphate Salts From the People's Republic of China: Initiation of Antidumping Duty Investigation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: October 21,2009.

FOR FURTHER INFORMATION CONTACT: Katie Marksberry at (202) 482–7906, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

The Petition

On September 24, 2009, the Department of Commerce (''Department'') received a petition concerning imports of certain sodium and potassium phosphate salts (''certain phosphate salts'') from the People's Republic of China (''PRC'') filed in proper form by ICL Performance Products LP (''ICL'') and Prayon, Inc. (collectively, ''Petitioners''). *See* Petition for the Imposition of Antidumping and Countervailing Duties on Imports of Certain Sodium and Potassium Phosphate Salts from the People's Republic of China, dated September 24, 2009 (''Petition''). On September 30, 2009, the Department issued an additional request for information and clarification of certain areas of the Petition. Based on the Department's requests, Petitioners timely filed additional general information pertaining to the Petition on October 5, 2009, and additional information pertaining to the antidumping portion of the Petition on October 6, 2009 (hereinafter, ''Supplement to the AD Petition''). The period of investigation (''POI'') is January 1, 2009, through June 30, 2009.

In accordance with section 732(b) of the Tariff Act of 1930, as amended (''Act''), Petitioners allege that imports of certain phosphate salts from the PRC are being, or are likely to be, sold in the United States at less than fair value, within the meaning of section 731 of the Act, and that such imports are materially injuring, or threatening material injury to, an industry in the United States.

The Department finds that Petitioners filed the Petition on behalf of the domestic industry because Petitioners are an interested party, as defined in section 771(9)(C) of the Act, and have demonstrated sufficient industry support with respect to the antidumping duty investigation that Petitioners are requesting the Department to initiate (*see* ''Determination of Industry Support for the Petition'' section below).

Scope of Investigation

The products covered by this investigation are certain phosphate salts from the PRC. For a full description of the scope of the investigation, please see the ''Scope of Investigation,'' in Appendix I of this notice.

Comments on Scope of Investigation

As discussed in the preamble to the regulations (*Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27323 (May 19, 1997)), we are setting aside a period for interested parties to raise issues regarding product coverage. The Department encourages all interested parties to submit such comments by November 3, 2009.[1]Comments should be addressed to Import Administration's APO/Dockets Unit, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230. The period of scope consultations is intended to provide the Department with ample opportunity to consider all comments and to consult with parties prior to the issuance of the preliminary determination.

Comments on Product Characteristics for Antidumping Duty Questionnaires

We are requesting comments from interested parties regarding the appropriate physical characteristics of certain phosphate salts to be reported in response to the Department's antidumping questionnaires. This information will be used to identify the key physical characteristics of the merchandise under consideration in order to more accurately report the relevant factors and costs of production, as well as to develop appropriate product comparison criteria.

Interested parties may provide information or comments that they believe are relevant to the development of an accurate listing of physical characteristics. Specifically, they may provide comments as to which characteristics are appropriate to use as: 1) general product characteristics; and 2) the product comparison criteria. We note that it is not always appropriate to use all product characteristics as product comparison criteria. We base product comparison criteria on meaningful commercial differences among products. In other words, while there may be some physical product characteristics utilized by manufacturers to describe certain phosphate salts, it may be that only a select few product characteristics take into account commercially meaningful physical characteristics. Generally, the Department attempts to list the most important physical characteristics first and the least important characteristics last.

In order to consider the suggestions of interested parties in developing and issuing the antidumping duty questionnaires, we must receive comments at the above–referenced address by November 3, 2009. Additionally, rebuttal comments must be received by November 10, 2009.

Determination of Industry Support for the Petition

Section 732(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 732(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 732(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A), or (ii) determine industry support using a statistically valid sampling method.

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs the Department to look to producers and workers who produce the domestic like product. The U.S. International Trade Commission (''ITC''), which is responsible for determining whether ''the domestic

[1] November 3, 2009, is twenty calendar days from the signature date of this notice.

industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both the Department and the ITC must apply the same statutory definition regarding the domestic like product (section 771(10) of the Act), they do so for different purposes and pursuant to a separate and distinct authority. In addition, the Department's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law. *See USEC, Inc. v. United States*, 132 F. Supp. 2d 1, 8 (CIT 2001), *citing Algoma Steel Corp. Ltd. v. United States*, 688 F. Supp. 639, 644 (CIT 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989), *cert. denied* 492 U.S. 919 (1989).

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this subtitle.'' Although the reference point from which the domestic like product analysis begins is usually ''the article subject to an investigation'' (*i.e.*, the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition), Petitioners presented one class or kind of merchandise, but four domestic like products.

The four like products, when considered together, correspond to the product scope description. Based on our analysis of the information submitted on the record, we have determined that certain phosphate salts (sodium tripolyphospate (''STPP''), monopotassium phosphate (''MKP''), dipotassium phosphate (''DKP''), and tetrapotassium phosphate (''TKPP'')) constitute four domestic like products and we have analyzed industry support in terms of those domestic like products. For a discussion of the domestic like product analysis in this case, see ''Antidumping Duty Investigation Initiation Checklist: Certain Sodium and Potassium Phosphate Salts from the People's Republic of China'' (''Initiation Checklist''), at Attachment II, Analysis of Industry Support for the Petitions Covering Certain Sodium and Potassium Phosphate Salts from the People's Republic of China, on file in the Central Records Unit (''CRU''), Room 1117 of the main Department of Commerce building.

With regard to section 732(c)(4)(A) of the Act, in determining whether Petitioners have standing (*i.e.*, the domestic workers and producers supporting the Petition account for (1) at least 25 percent of the total production of the domestic like product and (2) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petition), we considered the industry support data contained in the Petition with reference to the domestic like products. To establish industry support, Petitioners provided their own production volume of the domestic like products for calendar year 2008, and compared that to total production volume of the domestic like products for the industry. We have relied upon data Petitioners provided for purposes of measuring industry support. For further discussion, *see* Initiation Checklist at Attachment II.

The Department's review of the data provided in the Petition, supplemental submissions, and other information readily available to the Department indicates that Petitioners have established industry support for each of the four like products. First, the Petition establishes support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like products and, as such, the Department is not required to take further action in order to evaluate industry support (*e.g.*, polling). *See* section 732(c)(4)(D) of the Act, *see also* Initiation Checklist at Attachment II. Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petition account for at least 25 percent of the total production of the relevant domestic like product. *See* Initiation Checklist at Attachment II. Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petition account for more than 50 percent of the production of the relevant domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petition. Accordingly, the Department determines that the Petition was filed on behalf of the domestic industry within the meaning of section 732(b)(1) of the Act. *See* Initiation Checklist at Attachment II.

The Department finds that Petitioners filed the Petition on behalf of the domestic industry because they are interested parties as defined in sections 771(9)(C) of the Act and have demonstrated sufficient industry support with respect to the antidumping investigation that they are requesting the Department initiate. *See* Initiation Checklist at Attachment II.

Allegations and Evidence of Material Injury and Causation

Petitioners allege that the U.S. industries producing the domestic like products are being materially injured, or are threatened with material injury, by reason of the imports of the subject merchandise sold at less than NV. Petitioners contend that the industries' injured condition is illustrated by reduced market share, underselling and price depressing and suppressing effects, lost sales and revenue, reduced production, reduced capacity and capacity utilization, reduced shipments, reduced employment, and an overall decline in financial performance. We have assessed the allegations and supporting evidence regarding material injury, threat of material injury, and causation, and we have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation. *See* Initiation Checklist at Attachment III (Analysis of Injury Allegations and Evidence of Material Injury and Causation).

Allegations of Sales at Less Than Fair Value

The following is a description of the allegation of sales at less than fair value upon which the Department based its decision to initiate this investigation of imports of certain phosphate salts from the PRC. The sources of data for the deductions and adjustments relating to the U.S. price and the factors of production are also discussed in the initiation checklist. *See* Initiation Checklist.

U.S. Price

Petitioners calculated export price (''EP'') based on documentation of actual sales and offers for sale obtained from confidential sources. *See* Initiation Checklist; *see also* Volume I of the Petition, at 26, and Supplement to the AD Petition at Exhibit 36. Petitioners made adjustments for distributor mark–ups and cost, insurance and freight (''CIF'') charges. *See* Initiation Checklist; *see also* Volume I of the Petition, at 26. Petitioners also relied on Census Bureau statistics for U.S. price. *See* Volume I of the Petition, at 45. We did not rely on one of the provided U.S. prices because, according to the supporting affidavit, it was based on an estimated, not actual, price from a rejected sales offer. *See* Initiation Checklist; *see also* Supplement to the AD Petition at Exhibit AD–39.

Normal Value

Petitioners state that the PRC is a non–market economy (''NME'') country and no determination to the contrary has been made by the Department. *See* Volume I of the Petition, at 27. In accordance with section 771(18)(C)(i) of the Act, the presumption of NME status remains in effect until revoked by the Department. The presumption of NME status for the PRC has not been revoked by the Department and, therefore, remains in effect for purposes of the initiation of this investigation. Accordingly, the normal value (''NV'') of the product for the PRC investigation is appropriately based on factors of production valued in a surrogate market–economy country in accordance with section 773(c) of the Act. In the course of the PRC investigation, all parties, including the public, will have the opportunity to provide relevant information related to the issue of the PRC's NME status and the granting of separate rates to individual exporters.

Petitioners contend that India is the appropriate surrogate country for the PRC because: 1) it is at a level of economic development comparable to that of the PRC; 2) it is a significant producer of comparable merchandise; and 3) information required to calculate unit factor costs and financial ratios is readily available. *See* Volume I of the Petition, at 27–30, and Volume 3 of the Petition at Exhibit AD–5. Based on the information provided by Petitioners, we believe that it is appropriate to use India as a surrogate country for initiation purposes. After initiation of the investigation, interested parties will have the opportunity to submit comments regarding surrogate country selection and, pursuant to 19 CFR 351.301(c)(3)(i), will be provided an opportunity to submit publicly available information to value factors of production within 40 days after the date of publication of the preliminary determination.

Petitioners calculated the NV and dumping margins using the Department's NME methodology as required by 19 CFR 351.202(b)(7)(i)(C) and 19 CFR 351.408. Petitioners calculated separate NV and dumping margins for integrated and non–integrated producers in order to reflect the different production processes used. Petitioners based the calculations on the experience of ICL and its predecessor, Astaris, with a few exceptions based on recent articles concerning the PRC phosphorus industry. *See* Volume 1 of the Petition, at 30–31, Volume 3 of the Petition, at Exhibits AD 10 and AD–11, and Supplement to the AD Petition at 13, and Exhibit AD–35. In calculating NV, Petitioners based the quantity of each of the inputs used to manufacture certain phosphate salts in the PRC on its own industry knowledge and production experience during and before the POI, with some supplemental information obtained from *China Chemical Reporter. See* Supplement to the AD Petition at 13–14, and Exhibit AD–35. Petitioner states that the constructed NV for each PRC producer may be different, depending on the level of integration. *See* Volume 1 of the Petition, at 31.

Petitioner determined the consumption quantities of all raw materials and packing materials based on the production experience of ICL, Astaris, and *China Chemical Reporter. See* Supplement to the AD Petition at Exhibit AD–35. Petitioners valued the factors of production based on reasonably available, public surrogate country data, specifically, Indian import statistics from the World Trade Atlas (''WTA''). *See* Volume 3 of the Petition, at Exhibit AD–16. Petitioners excluded from these import statistics imports from countries previously determined by the Department to be NME countries and from Indonesia, the Republic of Korea, and Thailand as the Department has previously excluded prices from these countries because they maintain broadly available, non–industry-specific export subsidies. *See id.* In addition, the Petitioners made currency conversions, where necessary, based on the POI–average rupee/U.S. dollar exchange rate, as reported on the Department's website. See Supplement to the AD Petition at 4–5, and Exhibit AD–26. Petitioners determined labor costs for STPP, TKPP, DKP and MKP using the labor consumption, in hours, derived from its ICL's experience in 2008. *See* Supplement to the AD Petition Exhibit, at AD–35. Petitioners valued direct labor costs using the Department's NME Wage Rate for the PRC at http://ia.ita.doc.gov/wages/05wages/05wages–051608.html. *See* Volume 1 of the Petition, at 41. The Department determines that the surrogate values used by Petitioners are reasonably available and, thus, acceptable for purposes of initiation.

Petitioners determined electricity costs for STPP, TKPP, DKP and MKP using the electricity consumption, in kilowatt hours, derived from ICL's experience in 2008. *See* Supplement to the AD Petition, at Exhibit at AD–35. Petitioners valued electricity using the Indian electricity rate reported by the Central Electric Authority of the Government of India. *See* Volume 1 of the Petition, at 40 and Volume 3 of the Petition, at Exhibit AD–15.

Petitioners determined natural gas costs for STPP, TKPP, DKP and MKP using the natural gas consumption derived from ICL's experience in 2008. *See* Supplement to the AD Petition Exhibit at AD–35. Petitioners valued natural gas using Indian import statistics from WTA. *See* Volume 3 of the Petition, at Exhibit AD–15.

Petitioners based factory overhead, selling, general and administrative (''SG&A''), and profit on data from Tata Chemicals, the largest Indian producer of phosphate salts, for the fiscal year April 2008 through March 2009. *See* Volume 3 of the Petition, at Exhibit AD–19. Petitioners state that Tata Chemicals is a producer of phosphate salts that is back–integrated to the production of phosphoric acid and that it produces more than one phosphate salt and various related upstream materials. *See* Volume 1 of the Petition, at 42–44. Petitioners were unable to identify a fully integrated producer of phosphate salts in India and anticipate that an adjustment may be necessary to account for differing levels of integration. However, Petitioners state that Tata Chemical provides the best information available to reasonably represent the cost structure of an integrated phosphate salt producer in the PRC. *See id.* Therefore, for purposes of the initiation, the Department finds Petitioners' use of Tata Chemical's unconsolidated financial ratios appropriate.

Fair-Value Comparisons

Based on the data provided by Petitioners, there is reason to believe that imports of certain phosphate salts from the PRC are being, or are likely to be, sold in the United States at less than fair value. Based on a comparison of U.S. prices and NV calculated in accordance with section 773(c) of the Act, the estimated dumping margins for certain phosphate salts from the PRC range from 33.7 percent to 177.4 percent. *See* Initiation Checklist.

Initiation of Antidumping Investigation

Based upon the examination of the Petition on certain phosphate salts from the PRC, the Department finds that the Petition meets the requirements of section 732 of the Act. Therefore, we are initiating an antidumping duty investigation to determine whether imports of certain phosphate salts from the PRC are being, or are likely to be, sold in the United States at less than fair value. In accordance with section 733(b)(1)(A) of the Act and 19 CFR 351.205(b)(1), unless postponed, we will

make our preliminary determinations no later than 140 days after the date of this initiation.

Targeted–Dumping Allegations

On December 10, 2008, the Department issued an interim final rule for the purpose of withdrawing 19 CFR 351.414(f) and (g), the regulatory provisions governing the targeted-dumping analysis in antidumping duty investigations, and the corresponding regulation governing the deadline for targeted–dumping allegations, 19 CFR 351.301(d)(5). *See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 FR 74930 (December 10, 2008). The Department stated that ''{w}ithdrawal will allow the Department to exercise the discretion intended by the statute and, thereby, develop a practice that will allow interested parties to pursue all statutory avenues of relief in this area.'' *See id.* at 74931.

In order to accomplish this objective, if any interested party wishes to make a targeted- dumping allegation in this investigation pursuant to section 777A(d)(1)(B) of the Act, such allegations are due no later than 45 days before the scheduled date of the preliminary determination.

Respondent Selection

For this investigation, the Department will request quantity and value information from all known exporters and producers identified with complete contact information in the Petition, *see* Petition at Exhibit GEN–12. The quantity and value data received from NME exporters/producers will be used as the basis to select the mandatory respondents.

The Department requires that the respondents submit a response to both the quantity and value questionnaire and the separate–rate application by the respective deadlines in order to receive consideration for separate–rate status. *See Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Initiation of Antidumping Duty Investigation*, 73 FR 10221, 10225 (February 26, 2008); *Initiation of Antidumping Duty Investigation: Certain Artist Canvas From the People's Republic of China*, 70 FR 21996, 21999 (April 28, 2005). The Department will post the quantity and value questionnaire along with the filing instructions on the Import Administration website at http://ia.ita.doc.gov/ia–highlights-and–news.html, and a response to the quantity and value questionnaire is due no later than November 4, 2009.

Separate Rates

In order to obtain separate–rate status in NME investigations, exporters and producers must submit a separate–rate status application. *See* our practice, described in Policy Bulletin 05.1: Separate–Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non–Market Economy Countries, dated April 5, 2005 (''Separate Rates and Combination Rates Bulletin''), available on the Department's website at http://ia.ita.doc.gov/policy/bull05–1.pdf. Based on our experience in processing the separate–rate applications in previous antidumping duty investigations, we have modified the application for this investigation to make it more administrable and easier for applicants to complete. *See, e.g., Initiation of Antidumping Duty Investigation: Certain New Pneumatic Off–the-Road Tires From the People's Republic of China*, 72 FR 43591, 43594–95 (August 6, 2007). The specific requirements for submitting the separate–rate application in this investigation are outlined in detail in the application itself, which will be available on the Department's website at http://ia.ita.doc.gov/ia–highlights-and–news.html on the date of publication of this initiation notice in the **Federal Register**. The separate–rate application will be due 60 days after publication of this initiation notice. For exporters and producers who submit a separate–rate status application and subsequently are selected as mandatory respondents, these exporters and producers will no longer be eligible for consideration for separate rate status unless they respond to all parts of the questionnaire as mandatory respondents. As noted in the ''Respondent Selection'' section above, the Department requires that respondents submit a response to both the quantity and value questionnaire and the separate rate application by the respective deadlines in order to receive consideration for separate–rate status.

Use of Combination Rates in an NME Investigation

The Department will calculate combination rates for certain respondents that are eligible for a separate rate in this investigation. The Separate Rates and Combination Rates Bulletin states:

> {w}hile continuing the practice of assigning separate rates only to exporters, all separate rates that the Department will now assign in its NME investigations will be specific to those producers that supplied the exporter during the period of investigation. Note, however, that one rate is calculated for the exporter and all of the producers which supplied subject merchandise to it during the period of investigation. This practice applies both to mandatory respondents receiving an individually calculated separate rate as well as the pool of non–investigated firms receiving the weighted–average of the individually calculated rates. This practice is referred to as the application of ''combination rates'' because such rates apply to specific combinations of exporters and one or more producers. The cash–deposit rate assigned to an exporter will apply only to merchandise both exported by the firm in question and produced by a firm that supplied the exporter during the period of investigation.

See Separate Rates and Combination Rates Bulletin at 6 (emphasis added).

Distribution of Copies of the Petition

In accordance with section 732(b)(3)(A) of the Act and 19 CFR 351.202(f), copies of the public versions of the Petition have been provided to the representatives of the Government of the PRC. Because of the large number of producers/exporters identified in the Petition, the Department considers the service of the public version of the Petition to the foreign producers/exporters satisfied by the delivery of the public version to the Government of the PRC, consistent with 19 CFR 351.203(c)(2).

ITC Notification

We have notified the ITC of our initiations, as required by section 732(d) of the Act.

Preliminary Determinations by the ITC

The ITC will preliminarily determine, no later than November 9, 2009, whether there is a reasonable indication that imports of certain phosphate salts from the PRC are materially injuring, or threatening material injury to a U.S. industry. A negative ITC determination will result in the investigation being terminated; otherwise, this investigation will proceed according to statutory and regulatory time limits. This notice is issued and published pursuant to section 777(i) of the Act.

Dated: October 14, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix I

Scope of the Investigation

The phosphate salts covered by this investigation include Sodium Tripolyphosphate (STPP), whether anhydrous or in solution, anhydrous Monopotassium Phosphate (MKP), anhydrous Dipotassium Phosphate (DKP) and Tetrapotassium Pyrophosphate (TKPP), whether anhydrous or in solution (collectively ''phosphate salts'').

STPP, also known as Sodium triphosphate, Tripoly or Pentasodium triposphate, is a sodium polyphosphate with the formula Na5O10P3. The American Chemical Society, Chemical Abstract Service (''CAS'') registry number for STPP is 7758–29–4. STPP is typically 25% phosphorus, 31% sodium and and 57% diphosphorus pentoxide (P2O5). STPP is classified under heading 2835.31.0000, HTSUS.

TKPP, also known as normal potassium pyrophosphate, Diphosphoric acid or Tetrapotassium salt, is a potassium salt with the formula K4P2O7. The CAS registry number for TKPP is 7320–34–5. TKPP is typically 18.7% phosphorus and 47.3% potassium. It is generally greater than or equal to 43.0% P2O5 content. TKPP is classified under heading 2835.39.1000, HTSUS.

MKP, also known as Potassium dihydrogen phosphate, KDP, or Monobasic potassium phosphate, is a potassium salt with the formula KH2PO4. The CAS registry number for MKP is 7778–77–0. MKP is typically 22.7% phosphorus, 28.7% potassium and 52% P2O5. MKP is classified under heading 2835.24.0000, HTSUS.

DKP, also known as Dipotassium salt, Dipotassium hydrogen orthophosphate or Potassium phosphate, dibasic, has a chemical formula of K2HPO4. The CAS registry number for DKP is 7758–11–4. DKP is typically 17.8% phosphorus, 44.8% potassium and 40% P2O5 content. DKP is classified under heading 2835.24.0000, HTSUS.

The products covered by this investigation include the foregoing phosphate salts in all grades, whether food grade or technical grade. The product covered by this investigation includes anhydrous MKP and DKP without regard to the physical form, whether crushed, granule, powder or fines. Also covered are all forms of STPP and TKPP, whether crushed, granule, powder, fines or solution.

For purposes of the investigation, the narrative description is dispositive, not the tariff heading, American Chemical Society, CAS registry number or CAS name, or the specific percentage chemical composition identified above.

[FR Doc. E9–25340 Filed 10–20–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

[Docket No. [PTO–P–2009–0039]

Request for Comments and Notice of Roundtable on Work Sharing for Patent Applications

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Notice of public meeting; request for comments.

SUMMARY: In an effort to avoid duplication of work and to expedite the patent examination process, the United States Patent and Trademark Office (USPTO) has been developing work-sharing initiatives in which an office uses, to the maximum extent practicable, the work already done by another office. The USPTO is conducting a roundtable to obtain input from diverse sources in the patent community and/or the public sector to evaluate views on work sharing. The roundtable is open to the public. The USPTO plans to invite a number of roundtable participants from patent user groups, practitioners, industry, independent inventor organizations, academia, and Government. To ensure that the USPTO is receiving a balanced array of views on work sharing, the USPTO also plans to have a few ''at-large'' participants based upon requests received in response to this notice. To ensure that all who are speaking will have a meaningful chance to do so, the number of participants in the roundtable is limited. Those who wish to participate in the roundtable must do so by written request. Members of the public who wish solely to attend and observe the roundtable need not submit a request.

In addition, any member of the public may submit written comments on issues raised at the roundtable or on any issue pertaining to work sharing.

Dates and Times: The public meeting will be held on Wednesday, November 18, 2009, from 8:30 a.m. to 1 p.m. The deadline for receipt of requests to participate in the roundtable is 5 p.m. on Wednesday, November 4, 2009.

The deadline for receipt of written comments for consideration by the USPTO on issues raised at the roundtable or on any issue pertaining to work sharing is December 11, 2009.

ADDRESSES: The roundtable will be held at the USPTO, Madison Auditorium, Concourse Level, Madison Building, 600 Dulany Street, Alexandria, Virginia 22314.

Requests to participate at the roundtable are required and must be submitted by electronic mail message through the Internet to *elizabeth.shaw2@uspto.gov*. Requests to participate at the roundtable should indicate the following information: (1) The name of the person desiring to participate and the person's contact information (telephone number and electronic mail address); and (2) the organization(s) the person represents, if any.

Written comments should be sent by electronic mail message over the Internet addressed to *IP.Policy@uspto.gov*. Comments may also be submitted by mail addressed to: Mail Stop OIPPE, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450, ATTN: Elizabeth Shaw. Although comments may be submitted by mail, the USPTO prefers to receive comments via the Internet.

The written comments will be available for public inspection by appointment only at the Office of Intellectual Property Policy and Enforcement in the Executive Library located in Madison West, Tenth Floor, 600 Dulany Street, Alexandria, Virginia 22314. Contact: Elizabeth Shaw at *elizabeth.shaw2@uspto.gov* or 571–272–8494.

Because comments will be made available for public inspection, information that is not desired to be made public, such as an address or phone number, should not be included in the comments.

FOR FURTHER INFORMATION CONTACT: Elizabeth Shaw, Office of Intellectual Property Policy and Enforcement, by phone 571–272–8494, by facsimile to 571–273–0121, by e-mail at *elizabeth.shaw2@uspto.gov* or by mail addressed to: Mail Stop OIPPE, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, Virginia 22313–1450, ATTN: Elizabeth Shaw.

SUPPLEMENTARY INFORMATION: Inventors and companies are increasingly seeking intellectual property protection for their inventions domestically and in multiple international markets. Because of the fractured nature of the global patent system, applicants must file different applications for their inventions in each country leading to multiple searches

and examinations. This redundancy not only creates inefficiencies and additional costs for applicants, but also results in the offices around the world duplicating a substantial amount of work. The USPTO and many offices around the world now face a growing backlog of pending applications, and applicants must wait longer times for an application to receive an examination. Through work sharing, an office eliminates the redundancy by utilizing the work of another office thereby expediting patent prosecution.

The USPTO is conducting a roundtable to evaluate the patent community and/or the public sector's views on work sharing, including current work-sharing efforts, as well as suggestions for future work-sharing opportunities. The USPTO plans to invite a number of roundtable participants from patent user groups, practitioners, industry, independent inventor organizations, academia, and Government. To ensure that the USPTO is receiving a balanced array of views on work sharing, the USPTO also plans to have a few ''at-large'' participants based upon requests received in response to this notice. To ensure that all who are speaking will have a meaningful chance to do so, the number of participants in the roundtable is limited. Those who wish to participate in the roundtable must do so by written request. Members of the public who wish solely to attend and observe the roundtable need not submit a request.

Any member of the public, however, may submit written comments for consideration by the USPTO on issues raised at the roundtable or on any other issues pertaining to work sharing. Persons submitting written comments should note that the USPTO does not plan to provide a ''comment and response'' analysis of such comments as this notice does not constitute a notice of proposed rule making.

The USPTO plans to make the roundtable available via Web cast. Web cast information will be available on the USPTO's Internet Web site before the roundtable. The written comments and list of the roundtable participants and their associations will be posted on the USPTO's Internet Web site.

Dated: October 14, 2009.

David J. Kappos,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. E9–25262 Filed 10–20–09; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–831]

Fresh Garlic from the People's Republic of China: Partial Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

FOR FURTHER INFORMATION CONTACT: Martha Douthit or Summer Avery, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone: (202) 482–5050 or (202) 482–4052, respectively.

SUPPLEMENTARY INFORMATION:

Background

On December 24, 2008, the Department published a notice of initiation of an administrative review of fresh garlic from the People's Republic of China (PRC), covering the period November 1, 2007 through October 31, 2008. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 73 FR 79055 (December 24, 2008) (*Initiation Notice*).

On April 3, 2009, the Fresh Garlic Producers Association (FGPA) and its individual members[1] (collectively, Petitioners) withdrew their request of review of certain companies in this administrative review. On April 28, 2009, Shenzhen Xinboda Industrial Co., Ltd. (Xinboda), also withdrew its own review request. *See* the Attachment to this notice for the list of companies for which the Department is rescinding its review.

Partial Rescission

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if a party that requested the review withdraws the request within 90 days of the date of publication of the initiation notice of the requested review. Further, pursuant to 19 CFR 351.213(d)(1), the Department is permitted to extend this time limit if it is reasonable to do so. On March 24, 2009, at the request of Petitioners, the Department extended the deadline for the withdrawal of review requests to March 31, 2009. On March 31, 2009, the Department further extended the deadline for the withdrawal of review requests to April 3, 2009.

For all but one of the companies listed in the Attachment, Petitioners were the only party that requested the review. In addition to Petitioners' request for a review of Xinboda, the company itself requested a review. Although Xinboda's withdrawal of its request for a review was beyond the April 3 deadline, the Department has decided to accept its withdrawal given that Petitioners timely withdrew their request for review of Xinboda.

Therefore, in accordance with 19 CFR 351.213(d)(1), we are rescinding this review with respect to all companies named in the Attachment to this notice.

Assessment Rates

The Department will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. For those companies for which this review has been rescinded and which have a separate rate, antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(2). The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of this notice. For those companies for which this review has been rescinded, but which do not have a separate rate at this time (and thus remain part of the PRC–wide entity), the Department will issue assessment instructions upon the completion of this administrative review.

Notification to Importers

This notice serves as a final reminder to importers for whom this review is being rescinded of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance

[1] The individual members of the FGPA are Christopher Ranch L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc.

with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which may be subject to sanctions.

This notice is issued and published in accordance with section 777(i)(1) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.213(d)(4).

Dated: October 8, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

Attachment

The following companies were named in our *Initiation Notice*. Subsequently, interested parties withdrew all relevant requests for review for these companies. Therefore, pursuant to 19 CFR 351.213(d)(1), we are rescinding this administrative review with respect to these companies.

American Pioneer Shipping
Anhui Dongqian Foods Ltd.
Anqiu Haoshun Trade Co., Ltd.
APS Qingdao
Chengwu County Yuanxiang Industry & Commerce Co., Ltd
Chiping Shengkang Foodstuff Co., Ltd.
Hangzhou Guanyu Foods Co., Ltd.
Hongqiao International Logistics Co
IT Logistics Qingdao Branch
Jinan Solar Summit International Co., Ltd.
Jining Highton Trading Co., Ltd.
Jinxian County Huaguang Food Import & Export, Ltd.
Jinxiang Dacheng Food Co., Ltd.
Jinxiang Hejia Co., Ltd.
Jinxiang Jinma Fruits Vegetables Products Co., Ltd
Jinxiang Tianheng Trade Co., Ltd.
Juye Homestead Fruits and Vegetables Co., Ltd.
Laizhou Xubin Fruits and Vegetables
Linyi City Heding District Jiuli Foodstuff Co
Ningjin Ruifeng Foodstuff Co., Ltd.
Qingdao Lianghe International Trade Co., Ltd.
Qingdao Tiantaixing Foods Co., Ltd.
Qingdao Winner Foods Co., Ltd.
Qingdao Yuankang International
Samyoung America (Shanghai) Inc.
Shandong Chengshun Farm Produce Trading Co., Ltd.
Shandong Chenhe Int'l Trading Co., Ltd.
Shandong Dongsheng Eastsun Foods Co., Ltd.
Shandong Garlic Company
Shandong Jinxiang Zhengyang Import & Export Co., Ltd.
Shandong Sanxing Food Co., Ltd.
Shandong Xingda Foodstuffs Group Co., Ltd.
Shandong Yipin Agro (Group) Co., Ltd
Shenzhen Xinboda Industrial Co., Ltd.
T&S International, LLC
Taian Eastsun Foods Co., Ltd.
Weifang Chenglong Import & Export Co., Ltd.
Weifang Naike Foodstuffs Co., Ltd.
WSSF Corporation (Weifang)
Xiamen Huamin Import Export Company
You Shi Li International Trading Co., Ltd.
Zhangzhou Xiangcheng Rainbow Greenland Food Co., Ltd.
Zhengzhou Harmoni Spice Co., Ltd.
Zhengzhou Yuanli Trading Co., Ltd.

[FR Doc. E9–25350 Filed 10–20–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–570–894

Certain Tissue Paper Products from the People's Republic of China: Notice of Partial Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (the Department) is rescinding in part the administrative review of the antidumping duty order on certain tissue paper products from the People's Republic of China (PRC) for the period March 1, 2008, to February 28, 2009, with respect to Sunlake Décor Co., Ltd. (Sunlake). This partial rescission is based on the withdrawal of the request for review of Sunlake by the only interested party that requested the review the petitioner.[1]

EFFECTIVE DATE: October 21, 2009.

FOR FURTHER INFORMATION CONTACT: Brian Smith or Gemal Brangman, 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) 482–3773, respectively.

SUPPLEMENTARY INFORMATION:

Background

On March 2, 2009, the Department published a notice of opportunity to request an administrative review of the antidumping duty order on certain tissue paper products from the PRC. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 74 FR 9077 (March 2, 2009). In response, the petitioner timely requested an administrative review of the antidumping duty order on certain tissue paper products from the PRC for entries of the subject merchandise during the period March 1, 2008, through February 28, 2009, for Sunlake (i.e., an exporter of the subject merchandise). Therefore, on April 21, 2009, the Department initiated a review of Sunlake. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 74 FR 19042 (April 27, 2009).

In a letter dated June 30, 2009, the petitioner withdrew its request for review of Sunlake and requested that the Department rescind the review with respect to it. No other party has requested a review of Sunlake. This administrative review will continue with respect to Max Fortune Industrial Limited and Max Fortune (FETDE) Paper Products Co., Ltd. (collectively referred to as ''Max Fortune'') and Seaman Paper Asia Company Ltd.

Rescission, in Part, of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if the party who requested the review withdraws the request within 90 days of the date of publication of the notice of initiation of the requested review. Accordingly, the petitioner timely withdrew its request for review of Sunlake within the 90-day period and no other party requested a review of Sunlake's entries. Therefore, in accordance with 19 CFR 351.213(d)(1), we are rescinding this administrative review with respect to Sunlake.

Assessment

The Department will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. For the company for which this review has been rescinded, antidumping duties shall be assessed, if applicable, at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for

[1] The petitioner is Seaman Paper Company of Massachusetts, Inc.

consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of this notice.

Notification to Importers

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), 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 published in accordance with section 777(i) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: October 14, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–25336 Filed 10–20–09; 8:45 am]

BILLING CODE 3510–DS–S

CONSUMER PRODUCT SAFETY COMMISSION

Virginia Graeme Baker Pool and Spa Safety Act; Draft Technical Guidance on Unblockable Drains; Notice of Hearing

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of public hearing.

SUMMARY: The Consumer Product Safety Commission (Commission) will conduct a public hearing to receive views from all interested parties about the draft guidance for industry entitled ''July 2009 Staff Draft Technical Guidance on Unblockable Drains.'' The guidance specifies requirements for a drain cover, such that, when attached to a drain, it constitutes an unblockable drain. The Commission invites public participation at the hearing. Oral presentations concerning the Unblockable Drain guidance should be limited to approximately ten minutes and will become part of the public record.

DATES: The public hearing will begin at 9 a.m. on November 4, 2009. Requests to make oral presentations and the written text of any oral presentations must be received by the Office of the Secretary not later than 5 p.m. Eastern Standard Time (EST) on October 28, 2009.

ADDRESSES: The hearing will be in the Hearing Room, 4th Floor of the Bethesda Towers Building, 4330 East-West Highway, Bethesda, Maryland 20814. Requests to make oral presentations and texts of oral presentations should be captioned ''Unblockable Drain Guidance'' and sent by electronic mail (''e-mail'') to *cpsc-os@cpsc.gov,* or mailed or delivered to the Office of the Secretary, Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, Maryland 20814, no later than 5 p.m. EST on October 28, 2009.

FOR FURTHER INFORMATION CONTACT: For information about the public hearing or to request an opportunity to make an oral presentation, please send an e-mail, call, or write Todd A. Stevenson, Office of the Secretary, Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, Maryland 20814; e-mail *cpsc-os@cpsc.gov;* telephone (301) 504–7923; facsimile (301) 504–0127. An electronic copy of the ''July 2009 CPSC Staff Draft Technical Guidance on Unblockable Drains'' can be found at *http://www.poolsafety.gov/unblockable.pdf.*

SUPPLEMENTARY INFORMATION: The Virginia Graeme Baker Pool and Spa Safety Act (Pub. L. 110–140, 121 Stat. 1794 (''Act'')) was signed into law on December 19, 2007. The Act is designed to prevent drain entrapments and eviscerations in pools and spas. Public Law 110–140. The law became effective on December 19, 2008. The Act defines an ''unblockable drain'' as ''a drain of any size and shape that a human body cannot sufficiently block to create a suction entrapment hazard.'' Section 1403(7) of the Act (15 U.S.C. 8002(7)).

In August 2009, CPSC staff announced the availability of Draft Guidance on what constitutes an ''unblockable drain'' under the Act and asked for written comments concerning the draft guidance from interested persons (''July 2009 CPSC Staff Draft Technical Guidance on Unblockable Drains,'' *http://www.poolsafety.gov/unblockable.pdf*). The Commission received comments in support of and in opposition to the staff guidance, in addition to some technical comments concerning the guidance itself. For example, some commenters pointed out that, in addition to the size requirements of the unblockable drain cover, the guidance should stress the importance of proper flow rates and the drain cover fastener integrity. CPSC agrees with these technical comments and intends to amend the guidance to include the following sentence: ''In reaching this definition for an unblockable drain, the characterization of a suction fitting is taken from the standard to include the sump and cover as a unit, along with the following: (1) The blocking element dimensions and the diagonal measure to define a minimum size requirement (in excess of 18″ x 23″ or a diagonal measurement greater than 29″); (2) the need for the remaining open flow area of the cover, once shadowed, to provide sufficient flow to prevent entrapment; and (3) the general requirements of the standard for fasteners and fastening integrity (*i.e.,* the cover must stay in place).'' Parties who wish to attend the public meeting should be aware of this contemplated change to the guidance when preparing their presentations. The Commission, through this notice, is announcing a public hearing to hear further from interested parties on the staff draft guidance, and the Commission reserves the ability to ask questions of presenters at the public hearing.

Persons who desire to make oral presentations at the hearing on November 4, 2009, should send an e-mail, call, or write Todd A. Stevenson, Office of the Secretary, Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, Maryland 20814, e-mail *cpsc-os@cpsc.gov,* telephone (301) 504–7923, facsimile (301) 504–0127 not later than 5 p.m. EST on October 28, 2009. Presentations should be limited to approximately ten minutes.

Persons desiring to make presentations must submit the text of their presentations to the Office of the Secretary not later than 5 p.m. EST on October 28, 2009. The Commission reserves the right to impose further time limitations on all presentations and further restrictions to avoid duplication of presentations. The hearing will begin at 9 a.m. on November 4, 2009, and will conclude the same day.

Dated: October 16, 2009.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. E9–25311 Filed 10–20–09; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 3037–013]

BTSFEO, LLC; TAI–O Associates, LP; Notice of Application for Transfer of License, and Soliciting Comments, Motions To Intervene, and Protests

October 14, 2009.

On April 10, 2009, BTSFEO, LLC (Transferor) and TAI–O Associates, LP (Transferee) filed a joint application for transfer of license of the Elizabeth Webbing Hydroelectric Project No. 3037. The project is located on the Blackstone River in Providence County, Rhode Island.

Applicants seek Commission approval to transfer the license for the Elizabeth Webbing Hydroelectric Project from BTSFEO, LLC to TAI–O Associates, LP.

Applicant Contact: For Transferor, Mr. Gene Carlino, Esq., BTSFEO, LLC, c/o Carlino Law Associates, 410 South Main Street, Providence, RI 02903, telephone (401) 831–9000, FAX (401) 831–9090.

For Transferee, Mr. Louis Yip, TAI–O Associates, LP, 521 Roosevelt Avenue, Central Falls, RI 02863, telephone (401) 965–3666, FAX (212) 504–3097.

FERC Contact: Diane M. Murray, (202) 502–8838.

Deadline for filing comments, protests, and motions to intervene: 30 days from the issuance of this notice. Comments and motions to intervene 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–3037–013) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–25256 Filed 10–20–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 77–212]

Pacific Gas and Electric Company; Notice of Availability of Final Environmental Assessment

October 14, 2009.

In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Energy Regulatory Commission's regulations, 18 CFR Part 380 (Order No. 486, 52 FR 47879), the Commission has reviewed an application, filed August 26, 2008 and supplemented January 30, 2009, requesting approval of a proposed plan to provide spring frost protection and late fall irrigation water for commercial crops and hay in the Potter Valley Project area, FERC Project No. 77. Commission staff has prepared a final Environmental Assessment (EA) and in the final EA, staff analyzed the potential environmental effects of the proposed plan and concludes that approval of the plan, with appropriate environmental measures, would not constitute a major federal action significantly affecting the quality of the human environment.

The Order Granting Amendment of License Article 52 was issued on October 14, 2009 and the final EA is attached to the order. A copy of the final EA is also on file with the Commission and is available for public inspection. The final EA may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3372, or for TTY, (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–25254 Filed 10–20–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL10–2–000]

San Diego Gas & Electric Company; Notice of Filing

October 14, 2009.

Take notice that on October 9, 2009, pursuant to Rule 207 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure and Regulations, 18 CFR 385.207 (2006), San Diego Gas & Electric Company (SDG&E) filed a Petition for Declaratory Order (Petition) requesting Commission approval of proposed accounting and ratemaking treatment for a portion of SDG&E's 500 kV Sunrise Powerlink Project, to be located in Imperial Valley County between the San Diego County line and the Imperial Valley Substation (Border-East Line), that will be the subject of a thirty-year lease to Citizens Energy Corporation. This Petition is addressing the portion of the Border-East Line that SDG&E is not leasing to Citizens.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail

FERCOnlineSupport@ferc.gov, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on November 9, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–25257 Filed 10–20–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL10–3–000]

Citizens Energy Corporation; Notice of Filing

October 14, 2009.

Take notice that on October 9, 2009, pursuant to Rule 207 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, 18 CFR 385.207 (2006), Section 219 of the Federal Power Act, 16 U.S.C. 791a–828c, 824s, and Order No. 679, *Promoting Transmission Investment Through Pricing Reform,* Order No. 679, 116 FERC 61,057, *order on reh'g,* 117 FERC 61,345 (2006) (Order No. 679A) (Incentive Pricing Rule), Citizens Energy Corporation filed a Petition for Declaratory Order requesting Commission approval of two rate treatments for the Sunrise Powerlink Transmission Project, located in Imperial Valley, California.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on November 9, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–25255 Filed 10–20–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. NP09–26–000]

North American Electric Reliability Corporation; Order Addressing Applicability of Section 215 of the Federal Power Act to Federal Entities

October 15, 2009.

1. On June 24, 2009, the North American Electric Reliability Corporation (NERC) filed a Notice of Penalty for a self-certified violation of a Commission-approved Reliability Standard by the U.S. Army Corps of Engineers (Corps)-Tulsa District. In that filing, NERC requested that the Commission issue a decision addressing the jurisdictional issue of whether, pursuant to section 215 of the Federal Power Act (FPA), federal entities that use, own, or operate the Bulk-Power System, such as the Corps-Tulsa District, must comply with mandatory Reliability Standards.

2. The Corps-Tulsa District did not seek Commission review of the Notice of Penalty, which took effect on the 31st day after filing pursuant to section 215(e)(2) of the FPA.[1] In this order, we affirm that, pursuant to section 215 of the FPA, the Corps-Tulsa District and other federal entities that use, own, or operate the Bulk-Power System must comply with mandatory Reliability Standards.

Background

A. Statutory Framework

3. Section 215 of the FPA authorizes the Commission to certify and oversee an electric reliability organization (ERO), which is responsible for developing and enforcing mandatory Reliability Standards that are applicable to owners, users, and operators of the Bulk-Power System.[2] Section 215(e) authorizes the ERO, as well as the Commission on its own motion or on complaint, to assess penalties for violation of Reliability Standards.[3] Exercising this statutory authority, the Commission certified NERC as the ERO[4] and initially approved 83 Reliability Standards.[5] Further, consistent with the statute, NERC as the ERO delegated to eight Regional Entities, including Texas Regional Entity, authority to, *inter alia,* enforce mandatory Reliability Standards.[6]

4. Users, owners, and operators of the Bulk-Power System are required to register with NERC.[7] NERC's Compliance Registry identifies all entities subject to compliance with the approved Reliability Standards. Further, NERC has developed a statement of Registry Criteria that is employed by NERC and the Regional Entities to determine which organizations should be registered because they are material to the reliability of the Bulk-Power System.[8] In cases where an entity is registered involuntarily by NERC, that entity has an opportunity to timely appeal its registration status in accordance with Rule 504 and Appendix 5 to NERC's Rules of Procedure.

5. NERC must file a Notice of Penalty with the Commission before a Regional Entity or NERC penalty assessment for the violation of a Reliability Standard takes effect.[9] Each penalty determination is subject to Commission review, on its own motion or by an application for review by the recipient

[1] 16 U.S.C. 824o(e)(2) (2006).

[2] 16 U.S.C. 824o(c) (2006).

[3] *Id.* § 824o(e).

[4] *North American Electric Reliability Corp.,* 116 FERC ¶ 61,062, *order on reh'g and compliance,* 117 FERC ¶ 61,126 (2006), *order on compliance,* 118 FERC ¶ 61,030, *order on compliance,* 118 FERC ¶ 61,190, order on reh'g, 119 FERC ¶ 61,046 (2007), *aff'd sub nom. Alcoa Inc.* v. *FERC,* 554 F.3d 1342 (D.C. Cir., 2009).

[5] *Mandatory Reliability Standards for the Bulk-Power System,* Order No. 693, FERC Stats & Regs. ¶ 31,242, *order on reh'g,* Order No. 693–A, 120 FERC ¶ 61,053 (2007).

[6] *North American Electric Reliability Corp.,* 119 FERC ¶ 61,060, *order on reh'g,* ¶ 61,260 (2007).

[7] 18 CFR 39.2(c) (2009).

[8] The Commission accepted the NERC Registry Criteria in Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 93–95.

[9] *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards,* Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 506, *order on reh'g,* Order No. 672–A, FERC Stats. & Regs. ¶ 31,212 (2006).

of a penalty, within thirty days from the date NERC files the applicable Notice of Penalty.[10] In the absence of the filing of an application for review of a penalty or motion or other action by the Commission, each penalty filed by NERC is affirmed by operation of law upon the expiration of the applicable thirty-day period.

B. Notice of Penalty

1. Corps-Tulsa District Violation

6. The Corps-Tulsa District owns a hydropower project called the Denison Project Generator, located on the Red River in Bryan County, Oklahoma and Grayson County, Texas. The Denison project has two main generators with a maximum plant capacity of 80 megawatts. Texas Regional Entity registered the Corps-Tulsa District in June 2007 as a generator owner. According to NERC, the Corps-Tulsa District was provided notice of the registration and did not appeal its registration status.

7. On June 24, 2009, NERC submitted a Notice of Penalty incorporating the findings and justifications set forth in a Notice of Confirmed Violation and Proposed Penalty or Sanction issued on February 20, 2008, by the Texas Regional Entity.[11] According to NERC, the Corps-Tulsa District self-certified on October 3, 2007, non-compliance with Reliability Standard PRC–005–1 Requirements R1.1 and R2 for its Denison Project Generator.[12] NERC states that, in the self-certification, the Corps-Tulsa District argued that, as a governmental entity, it was not required to comply with section 215 of the FPA. According to NERC, the Corps stated that, because of this uncertainty, it was not in a position to register with the Regional Entity, but that it would strive to meet the electric Reliability Standards established pursuant to section 215 of the FPA, subject to the availability of funds appropriated by Congress and project operation requirements.

8. On October 31, 2007, Texas Regional Entity issued an Initial Notice of Alleged Violation and, subsequently, a Notice of Alleged Violation and Proposed Penalty or Sanction (NAVAPS). NERC states that the Corps-Tulsa District responded to the NAVAPS on November 20, 2007, but did not make the required election of agreeing with/not contesting or contesting the alleged violations and/or penalty. Instead, according to NERC, the Corps-Tulsa District asserted that the self-reporting data it provided on October 3, 2007 to Texas Regional Entity was provided on a voluntary basis, that the submission did not constitute entity registration or a recognition of jurisdiction by the Corps, and that the Corps is not in a position to register with the Corps-Tulsa District's respective reliability organization. NERC states that the Corps-Tulsa District further stated that, in order ''[t]o avoid substantial changes to preliminary mitigation plans as a result of the [Corps'] forthcoming national policy, a mitigation plan for this non-compliance will not be submitted until this national policy has been completed,'' and that it will ''voluntarily conform to the reliability standards * * * [t]o the extent [its] current appropriations allow [it] to comply with the Act.'' [13]

9. NERC states that on January 17, 2008, Texas Regional Entity issued a letter to the Corps-Tulsa District directing it to submit an acceptable mitigation plan within ten days. The Corps-Tulsa District responded asserting that it was unclear whether it is subject to the requirements of section 215 of the FPA, but that it intended to make all reasonable efforts to voluntarily comply with the Reliability Standards while remaining within the funding level provided by Congress. The Corps-Tulsa District stated that it was awaiting receipt of national policy guidance regarding submission of mitigation plans, and projected that it would be able to provide a final regional mitigation plan by October 2008.

10. NERC states that on January 30, 2008, the Corps-Tulsa District submitted a mitigation plan to Texas Regional Entity but again reiterated its belief that section 215 of the FPA does not apply to the Corps-Tulsa District because it does not contain a clear, unequivocally expressed waiver of sovereign immunity, which, the Corps-Tulsa District argues, is necessary for any entity to exercise jurisdiction over a federal agency. The Corps-Tulsa District also reiterated that it intended to make all reasonable efforts to voluntarily comply with NERC Reliability Standards so long as it can do so within the funding levels authorized to it by Congress.

11. Texas Regional Entity proposed a zero dollar penalty. After NERC review, NERC submitted the Notice of Penalty to the Commission on June 24, 2009. The penalty became effective by operation of law on July 27, 2009, and the Commission issued notice to that effect.[14] The Commission noted that the Corps-Tulsa District has challenged the applicability of mandatory Reliability Standards under section 215 of the FPA, that the Commission has sought comments on the applicability of mandatory Reliability Standards to the U.S. Army Corps of Engineers and other federal agencies, and that it would address this issue separately.[15]

2. NERC Request for Decision on Jurisdictional Matter

12. In the Notice of Penalty, NERC states that the Corps-Tulsa District ''has challenged NERC's jurisdiction (and therefore that of the Commission) under section 215 of the FPA.'' [16] NERC, however, believes that the Corps-Tulsa District is subject to mandatory Reliability Standards under section 215 and requests that the Commission, regardless of whether the Corps-Tulsa District seeks Commission review of the Notice of Penalty, issue a decision on the scope of NERC's and the Commission's jurisdiction under section 215 of the FPA.

13. In support of its position, NERC states that section 215 (b)(1) of the FPA provides that ''[t]he Commission shall have jurisdiction * * * over * * * all users, owners, and operators of the bulk-power system, including but not limited to the entities described in section 201(f), for purposes of approving reliability standards established under this section and enforcing compliance with this section.'' NERC argues that section 201(f) of the FPA describes agencies or instrumentalities of the United States and thus these entities are expressly included within the term ''users, owners, and operators of the bulk-power system'' in section 215 and made subject to the Commission's jurisdiction to both approve and enforce Reliability Standards.

14. In further support, NERC states that Congress, in the Energy Policy Act

[10] 16 U.S.C. 824o(e)(2) (2006).

[11] Texas Regional Entity is an independent division of the Electric Reliability Council of Texas, Inc. (ERCOT).

[12] PRC–005–1 requires that all generation protection systems affecting the reliability of the bulk electric system be maintained and tested. Requirement R1 requires each generator owner that owns a generation protection system to have a protection system maintenance and testing program for protection systems that affect the reliability of the Bulk-Power System. Requirement R1.1 requires that this program include maintenance and testing intervals and their basis. Texas Regional Entity subsequently determined that the Corp-Tulsa District did not violate PRC–005–1, Requirement R2 and it dismissed that violation.

[13] NERC June 24, 2009 Filing, attachment b (COE–Tulsa District response to the Notice of Alleged Violation and Proposed Penalty and Sanction, November 20, 2007).

[14] *North American Electric Reliability Corp.,* 128 FERC ¶ 61,088 (2009).

[15] *Id.* at n.1.

[16] Notice of Penalty at 7.

of 2005,[17] made technical and conforming amendments to the FPA that were necessitated by the substantive changes to the FPA, including the addition of section 215. As part of these changes, FPA section 201(b), which establishes the applicability of Part II of the FPA, was amended to expressly add ''section 215'' to the list of sections of the FPA enumerated in section 201(b)(2) and to add ''[n]otwithstanding section 201(f)'' to the beginning of section 201(b)(2). NERC argues that the specific provisions of section 201(b)(2) override the general language of section 201(f), which excludes the United States from the application of Part II of the FPA. Thus, NERC argues that section 201(b)(2) provides further confirmation that the United States is subject to section 215 and to Commission jurisdiction both for carrying out the provisions of sections 215 and for enforcing those provisions.

15. Finally, NERC looks to the legislative history of the Energy Policy Act of 2005 and in particular, to the debate surrounding the Thomas amendment, which was adopted by the United States Senate in 2002 and which was a precursor to FPA section 215. NERC points to an explanation offered by Senator Thomas, the author of that amendment, stating ''[t]he new reliability organization will have enforcement powers with real teeth to ensure reliability. The amendment provides that mandatory reliability rules will apply to all users of the transmission grid. There are no loopholes. No one will be exempt.'' [18] NERC notes that Senator Bingaman also stated that ''[t]he reliability system needs to apply to all users.'' In addition, NERC quotes a later analysis of substantively similar reliability legislation by the General Accounting Office acknowledging the applicability of reliability rules to federal entities: ''All users, owners and operators of the bulk-power system would have to comply with the reliability standards. * * * We understand this would include both private entities and Federal entities (such as the Tennessee Valley Authority, the Bonneville Power Administration, and other federal marketing agencies), among others.'' [19]

Notice of Filing and Comments

16. Notice of NERC's June 24, 2009 filing was published in the **Federal Register**, 74 FR 32,153 (2009), with comments due on or before July 24, 2009. By notice published July 24, 2009, the comment period was extended to August 24, 2009.

17. The Corps filed a motion to intervene and comments regarding the applicability of Reliability Standards under section 215 of the FPA.

18. In addition, Western Electricity Coordinating Council (WECC), Tex-La Electric Cooperative of Texas, Inc., SERC Reliability Corporation, and the Midwest Reliability Organization filed motions to intervene. Mid-West Electric Consumers Association and the Southwestern Power Resources Association (collectively, Federal Power Customers), Texas Regional Entity, the National Rural Electric Cooperative Association (NRECA), the United States Department of Energy (DOE), ReliabilityFirst Corporation (ReliabilityFirst), the Southeastern Federal Power Customers, Inc. (Southeastern Customers) and the United States Department of the Interior (Interior) filed motions to intervene and comments. The Department of the Army, Office of the Assistant Secretary for Civil Works (Department of the Army), filed comments. The Southwest Transmission Dependent Utility Group (Southwest Utility Districts), Tri-State Generation and Transmission Association, Inc. (Tri-State) filed motions to intervene and protests.

19. On September 8, 2009, NERC filed reply comments. On September 23, 2009, the Corps filed an objection to NERC's motion for leave to file reply comments. On October 7, 2009, DOE filed a response to NERC's reply comments. On October 7, 2009, DOE also filed a motion for a stay to suspend enforcement activity only in those cases where a civil fine against a DOE entity is at issue.[20]

A. The Corps' Comments

20. The Corps states that it currently operates 75 hydropower plants nationwide and they account for three percent of the nation's total electrical capacity. The Corps states that the Denison powerhouse, the subject of NERC's Notice of Penalty, is operated as a peaking plant with approximately 37 percent plant annual capacity factor. The Corps also states that although there are two transmission lines going into the Denison switchyard, only the transmission line going into Texas is being utilized for transmission of power from the Denison powerhouse. The other line is energized up to an open breaker and associated disconnecting switch in the switchyard. According to the Corps, while it is possible to transmit power both into Oklahoma and Texas simultaneously using individual units, the two systems can never be connected together without resulting in equipment damage. A ''bus tie'' breaker is used to separate the two units for this type of operation. Therefore, the Corps asserts that this switchyard is treated as a radial transmission line with no critical connection to the ERCOT system. The Corps further asserts that since no power is ''wheeled'' through the switchyard to serve another load, NERC has not alleged that if the switchyard equipment fails, there will be an adverse effect on the reliability of the Bulk Power System.

21. The Corps contends that section 215 does not grant the Commission or NERC jurisdiction over Corps-owned hydroelectric generating facilities at its Civil Works projects.[21] The Corps adds that NERC's analysis is flawed in that the Corps has numerous hydropower projects and in order to respond to NERC's filing, which is essentially a request for declaratory judgment, the Corps must address the unique configurations of each of its facilities, although only one was involved in the Notice of Penalty. The Corps asserts that this violates its due process rights because only the Denison Generator Project has been cited. The Corps also asserts that Congress has not waived the Corps' sovereign immunity, and thus, NERC cannot issue monetary penalties against the Corps. Further, the Corps asserts that the legal dispute should be submitted to the Attorney General, not through the Commission's notice and comment process.

B. Other Comments and Protests

22. The Department of the Army, NRECA, Southwest Utility Districts, and Interior raise procedural issues. The Department of the Army states that the Department of Justice's Office of Legal Counsel, and not the Commission's adjudicatory process, is the proper forum for resolving the disagreement on implementation of section 215 of the FPA. NRECA states that it supports NERC's need for clarity regarding the scope of its jurisdiction under section 215 but does not believe a specific

[17] Energy Policy Act of 2005 (EPAct 2005), Pub. L. No 109–58, Title XII, Subtitle A, 119 Stat. 594, 941 (2005).

[18] *Citing* Cong. Rec. 1874 (March 14, 2002).

[19] *Citing* General Accounting Office, *Draft Legislation Concerning an Electric Reliability Organization,* at 3, n.5 (March 18, 2003).

[20] The Commission recognizes that the DOE has a concern that the possibility of civil penalties for federal entities may cause litigation in a number of proceedings; however, given that the issue of civil fines is beyond the scope of this proceeding, we do not discuss DOE's motion here. *See infra* P 32.

[21] According to the Corps' January 31, 2007 Civil Works Information Paper, all 75 of its hydropower plants are Civil Works projects. U.S. Army Corps of Engineers, *Civil Works Program Statistics* (January 31, 2007) *available at http://140.194.76.129/cw/cecwb/GWiz07.pdf.*

penalty proceeding is appropriate for resolving this broad issue involving multiple federal agencies and one or more cabinet-level departments. NRECA states that it would be more appropriate for the Commission to temporarily suspend the procedural schedule in this docket and confer with the Corps and other federal agencies. Interior states that the proceeding should be stayed to allow for prompt interagency resolution of the relevant jurisdictional issues. Southwest Utility Districts state that the Commission should create a list of specific issues and seek supplemental briefing of the parties who do intervene in this proceeding and of federal agencies that do not intervene but could file subsequent comments.

23. Texas Regional Entity, WECC, and ReliabilityFirst agree with NERC's conclusion that federal entities such as the Corps-Tulsa District are subject to mandatory Reliability Standards under section 215 of the FPA, including its penalty and sanction provisions. Texas Regional Entity reiterates the information described in NERC's Notice of Penalty and requests that the Commission affirm jurisdiction by the Commission and NERC over the Corps-Tulsa District under section 215 of the FPA. ReliabilityFirst asserts that a determination that exempts federal entities from the Commission's section 215 jurisdiction would have far-reaching implications for the reliability of the Bulk-Power System. According to ReliabilityFirst, federal entities are an important part of the users, owners, and operators of the Bulk-Power System in ReliabilityFirst's region and they have an even more substantial presence in other regions. Thus, according to ReliabilityFirst, exempting federal entities from compliance with mandatory Reliability Standards would impair the reliability and the resilience of the electric grid.

24. ReliabilityFirst identifies a number of potential consequences if federal entities are not required to comply with mandatory Reliability Standards. It states that such an exclusion ''would provide a disincentive to the interaction between users, owners, and operators that is necessary to preserve reliability.'' [22] It adds that not only do some Reliability Standards depend on the timely exchange of information and directives between registered entities, but the effectiveness of some Reliability Standards, in particular the Critical Infrastructure Protection standards, depends in large part on system-wide compliance. ReliabilityFirst further states that several Reliability Standards require reliability coordinators to issue directives to other registered entities so that necessary steps are taken to preserve reliability. It adds that if a federal entity fulfilling a transmission operator or generator operator function is exempt from the Commission's jurisdiction and refuses to acknowledge this reliability coordinator authority in an emergency situation, cascading outages or other manifestations of severe grid instability could result. Similarly, according to ReliabilityFirst, failure to heed a reliability coordinator's directive to return the system to within an Interconnection Reliability Operating Limit could have disastrous results for system reliability. Likewise, the failure of generators to notify their corresponding transmission operators and balancing authorities if they experience a protective relay or equipment failure may prevent the transmission operator from learning of this failure in time to take appropriate corrective action, thereby endangering system reliability.

25. Finally, ReliabilityFirst asserts that the application of Reliability Standards to federal entities is meaningless without the power to enforce those Reliability Standards. ReliabilityFirst states that without enforcement power, compliance would be voluntary, the situation that existed before the passage of section 215 of the FPA. ReliabilityFirst urges the Commission to conclude that federal entities are subject to section 215, including the penalty and sanction provisions and states that this is the plain meaning of the statute and to decide otherwise would contravene the intent of Congress and undermine all of the Commission's efforts to ensure the reliability of the Bulk-Power System and prevent a cascading blackout.

26. DOE, Interior, Tri-State and Southeastern Customers argue that federal agencies must comply with NERC's Reliability Standards but should not be subject to monetary penalties. DOE argues that the plain language of section 215(b)(1) makes it clear that the Commission has jurisdiction over ''all users, owners, and operators of the bulk-power system, including but not limited to the entities described in section 201(f) for purposes of approving Reliability Standards established under this section and enforcing compliance with this section.'' [23] DOE adds that the clear inclusion of federal entities described in section 201(f) is consistent with Congress's intent to ensure reliability nationwide. DOE further contends that section 201(b)(2) limits the Commission's section 215 jurisdiction over federal entities to the purposes described in section 215, providing:

> Notwithstanding section 201(f), the provisions of section * * * 215 * * * shall apply to the entities described in such provisions and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out the enforcement authorities of this Act with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section * * * 215 * * * shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

DOE argues that section 201(b)(2) supports Commission jurisdiction over DOE entities under section 215 and section 215 alone; it does not authorize the Commission to punish violations of section 215 by assessing criminal penalties or levying monetary civil fines under any other section of the FPA. DOE also asserts that the term ''penalty'' is not defined with sufficient clarity in section 215(e) to support the imposition of punitive monetary penalties on DOE entities under that section.

27. Tri-State argues that it is vital that all users, owners and operators, including federal agencies, obey the same mandatory Reliability Standards to ensure the reliability of the Bulk-Power System. Southeastern Customers state that the Commission has already determined that in the Southeast the Corps was appropriately registered as the transmission operator and the Corps did not challenge this application of the Reliability Standards.[24] Both Tri-State and Southeastern Customers, argue, however, that federal agencies should not be subject to monetary penalties for violation of Reliability Standards. Tri-State argues that federal agencies rely on appropriated funds from the U.S. Treasury to finance their statutory obligations and generally do not have the authority to pay civil penalties because they have limited discretion in allocating these funds. Tri-State adds that even where a court has found a claim to be valid under the law, the claim may not be paid unless Congress has enacted an appropriation available for that purpose.[25] In addition, both Tri-State and Southeastern Customers argue that the Anti-Deficiency Act prohibits a federal agency from paying monetary penalties because it may not spend or

[22] ReliabilityFirst Comments at 5.

[23] 16 U.S.C. 824o(b)(1) (2006).

[24] *Citing Southeastern Power Administration,* 125 FERC ¶ 61,294, at P 24 (2008).

[25] *Citing Office of Pers. Management* v. *Richmond,* 496 U.S. 414, 424–25 (1990); *Cincinnati Soap Co.* v. *United States,* 301 U.S. 308, 321 (1937).

obligate more capital than was appropriated through the congressional funding process for that particular purpose.[26] Likewise, Southwest Utility Districts argue that assessing a fine against a federal agency is much more complicated than assessing it against a private utility, in particular because the funds received by a federal agency are received with specific statutory instructions and limitations.

28. Federal Power Customers state that their members are purchasers of energy generated and/or marketed by federal agencies, specifically, the Corps, the U.S. Bureau of Reclamation, the Western Area Power Administration, and the Southwestern Power Administration. Federal Power Customers comment that it is unclear whether potential penalties assessed by NERC and the Commission against the aforementioned federal agencies may become subsumed in the costs passed on to Federal Power Customers or their members. Federal Power Customers request that, in reaching a jurisdictional determination, such determination not contain any inference regarding the federal agencies' ability to pass through penalties to customers.

Discussion

A. Procedural Matters

29. Pursuant to Rule 214 of the Commissions Rules of Practice and Procedure, 18 CFR 385.214 (2009), the timely unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 CFR 385.213(a)(2) (2009), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept NERC's or DOE's answers and will, therefore, reject them.

B. Commission Determination

30. As discussed below, we conclude that, pursuant to section 215 of the FPA, federal entities such as the Corps-Tulsa District that are users, owners, or operators of the Bulk-Power System must comply with mandatory Reliability Standards. The issue of whether a specific entity is a user, owner, or operator of the Bulk-Power System is a factual matter that is, in the first instance, determined by the ERO and the relevant Regional Entity in NERC's compliance registration process.[27] Thus, to the extent that the Corps raises concerns whether specific Corps facilities are Bulk-Power System facilities or a specific Corp District is a user, owner, or operator of the Bulk-Power System, these matters are appropriately raised in the first instance with the relevant Regional Entity pursuant to NERC's compliance registry procedures. In this order, we are not making factual determinations regarding specific entities or facilities. Rather, we address the legal applicability of section 215 of the FPA to federal entities such as the Corps-Tulsa District.

1. Procedural Arguments

31. At the outset, we disagree with comments suggesting that the Commission's process is the incorrect forum for determining the implementation of section 215, or that the proceedings should be stayed to allow for interagency resolution. Pursuant to section 215(b) of the FPA, all users, owners, and operators of the Bulk-Power System must comply with mandatory Reliability Standards that are developed by the ERO and approved by the Commission. We have in the first instance the authority to determine the scope of our jurisdiction.[28] Our authority to make this determination is not dependent on the ultimate outcome of the determination. Accordingly, we address here the issue of the Commission's authority pursuant to section 215 of the FPA to require that federal entities such as the Corps-Tulsa District comply with mandatory, Commission-approved Reliability Standards.

32. The Corps and several commenters address the additional question of whether federal entities are subject to monetary penalties for non-compliance with mandatory Reliability Standards. We view this as a separate and distinct issue. We need not and do not address it here.

2. Section 215 Jurisdiction Over Users, Owners, and Operators

33. With regard to the Commission's section 215 jurisdiction, FPA section 215(b)(1) states, in relevant part,

> Jurisdiction and applicability: (1) The Commission shall have jurisdiction * * * over * * * all users, owners and operators of the bulk-power system, including but not limited to the entities described in section 201(f), for purposes of approving reliability standards established under this section and enforcing compliance with [section 215]. All users, owners and operators of the bulk-power system shall comply with reliability standards that take effect under this section.[29]

FPA section 201(f) states, in relevant part,

> No provision in [Part II of the FPA] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a state, * * * or any agency, authority, or instrumentality of any one or more of the foregoing * * * unless such provision makes specific reference thereto.

34. The language of section 215(b) refers to entities within the Commission's section 215 jurisdiction as ''including but not limited to the entities described in section 201(f).'' In turn, section 201(f) specifically refers to ''the United States, a State or any political subdivision of a state, * * * or any agency, authority, or instrumentality of any one or more of the foregoing.'' FPA section 215(b) is clear that the Commission shall have jurisdiction over those described entities ''for purposes of approving reliability standards established under this section and enforcing compliance with this section.'' Had Congress intended, by its reference to section 201(f), to extend the section 201(f) exemption to section 215, there would have been no need to include the reference at all. Section 201(f) is in place, absent a specific reference to the contrary. Congress instead specifically included within the Commission's section 215 jurisdiction each entity described in section 201(f) that is a user, owner, or operator of the Bulk-Power System. Based on the expanded jurisdictional reach of the statute, the Commission concludes that Congress intended section 215 to be comprehensive; excluding federal agencies would create a significant gap

[26] *Citing* the Anti-Deficiency Act, 31 U.S.C. 1341(a)(1)(A) (2006).

[27] *See, e.g.,* Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 93–96. Pursuant to NERC's Rules of Procedure, an entity that disagrees with the ERO's registration determination can seek Commission review of that decision.

[28] *See, e.g., Nine Mile Point Nuclear Station LLC* v. *Niagara Mohawk Power Corp.,* 110 FERC ¶ 61,033, at P 30 & n.31 (2005), aff'd, 452 F.3d 822 (D.C. Cir. 2006); *accord New York* v. *FERC,* 535 U.S. 1, 22–23 (2002) (holding the Commission was within its authority to establish a seven-factor test to determine which facilities are local distribution facilities that fall outside of the Commission's jurisdiction pursuant to FPA section 201). *Cf. Western Massachusetts Electric Co.,* 61 FERC ¶ 61,182, at 61,661 (1992), *aff'd,* 165 F.3d 922, 926 (D.C. Cir. 1999) (concluding the Commission may examine contracts relating to transactions which may be subject to its jurisdiction prior to making its determination as to jurisdiction).

[29] 16 U.S.C. 824o(b)(1) (2006). Section 215 defines the Bulk-Power System as ''(A) facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and (B) the electric energy from generation facilities needed to maintain transmission system reliability.'' 16 U.S.C. 824o(a)(1) (2006).

in the ERO's and the Commission's reliability oversight.

35. Further, section 201(b)(2) adds additional weight to the argument, which we find persuasive, that Congress intended to include federal entities under the Commission's jurisdiction. Such section, as amended by the Energy Policy Act of 2005, states under the heading ''Declaration of Policy; Application of Part'':

> Notwithstanding section 201(f), the provisions of sections * * * 215 * * * shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this Act with respect to such provisions.

Prior to the Energy Policy Act of 2005, few provisions of Part II of the FPA applied to governmental and other non-public utility entities. Previously, section 201(b)(2) referred only to entities subject to FPA sections 210, 211, and 212. The Energy Policy Act of 2005 added new provisions that use broad terms such as ''all users, owners and operators,'' and these provisions apply to governmental as well as private entities. In turn, EPAct 2005 amended section 201(b)(2) to make clear that the Commission's jurisdiction over otherwise exempt public utilities under certain substantive provisions of the FPA, including the reliability provision, is only for the narrow purposes of implementing and enforcing those provisions. When Congress amended 201(b)(2), it also specifically added the phrase ''[n]otwithstanding section 201(f),'' at the beginning of the provision to make clear that entities (including governmental entities) otherwise exempted from Commission regulation by virtue of section 201(f) are indeed subject to limited Commission regulation for purposes of certain FPA provisions. Had Congress not intended section 215 to apply to governmental and other exempt public utility entities, there would have been no reason to add the reference to section 215 in section 201(b)(2).

36. Finally, as NERC points out,[30] the legislative history of FPA section 215 supports the conclusion that Congress intended FPA section 215 to require that *all* users, owners, and operators of the Bulk-Power System, including federal entities, comply with Commission-approved Reliability Standards. FPA section 215 can be traced to the Thomas amendment and Senator Thomas, the author of that amendment stated that mandatory reliability rules will apply to all users of the transmission grid. There are no loopholes. No one is exempt.''[31]

37. Further, the legislative history makes clear that, among other things, the reliability provision was added to the FPA to prevent cascading blackouts. The debate during consideration of the Conference Report on the proposed bill states that mandatory, enforceable reliability rules began in response to the 1996 blackouts in the Pacific Northwest and gained more urgency with the Northeast blackout of 2003.[32] Exclusion of federal entities from the reliability provision would run counter to this legislative purpose as it would create significant gaps in an otherwise comprehensive program to apply mandatory Reliability Standards to better assure the reliability of the Bulk-Power System. As ReliabilityFirst attests, excluding federal entities from the requirements of the Reliability Standards raises serious potential consequences for the reliability of the Bulk-Power System. Thus, it stands to reason that Congress intended that all users, owners, and operators of the Bulk-Power System, including federal entities, be required to comply with the Reliability Standards. It would be contrary to Congressional intent and likely ineffective to return to a voluntary system based on individual discretion as the Corps proposes with respect to federal entities.[33]

38. Accordingly, we find that, pursuant to section 215 of the FPA, federal entities such as the Corps-Tulsa District that are registered by the ERO as users, owners, and operators of the Bulk-Power System must comply with mandatory Reliability Standards as to facilities that fall within the Bulk-Power System.

The Commission Orders

(A) The Commission grants NERC's request for a decision that, pursuant to section 215 of the FPA, federal entities that use, own, or operate the Bulk-Power System, must comply with mandatory Reliability Standards, as discussed in the body of this order.

(B) The Secretary is directed to publish a copy of this order in the **Federal Register**.

By the Commission. Commissioner Kelly is not participating.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–25224 Filed 10–20–09; 8:45 am]

BILLING CODE 6717–01–P

[30] *See supra* P 15.

[31] In addition, the General Accounting Office stated that ''[a]ll users, owners and operators of the bulk-power system would have to comply with the reliability standards.'' and ''We understand this would include both private entities and federal entities (such as the Tennessee Valley Authority, the Bonneville Power Administration, and other federal power marketing agencies), among others.'' General Accounting Office, *Draft Legislation Concerning an Electric Reliability Organization,* at 3, n.5 (March 18, 2003), available at *http://www.gao.gov/decisions/other/360241.pdf.*

[32] *See, e.g.,* 151 Cong. Rec. House 6943–44 (July 28, 2005) (statement of Rep. Hastings); 151 Cong. Rec. Senate 9344 (July 29, 2005) (statement of Sen. Maria Cantwell).

[33] NERC June 24, 2009 Notice of Penalty at 2–3 (citing October 3, 2007 Letter from Department of the Army, Southwestern Division, Corps of Engineers, to ERCOT).

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8971–2]

Agency Information Collection Activities; OMB Responses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This document announces the Office of Management and Budget (OMB) responses to Agency Clearance requests, in compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

FOR FURTHER INFORMATION CONTACT: Rick Westlund (202) 566–1682, or e-mail at *westlund.rick@epa.gov* and please refer to the appropriate EPA Information Collection Request (ICR) Number.

SUPPLEMENTARY INFORMATION:

OMB Responses to Agency Clearance Requests

OMB Approvals

EPA ICR Number 1884.04; Partial Update of the TSCA Section 8(b) Inventory Data Base, Production and Site Reports; 40 CFR part 710; was approved on 09/17/2009; OMB Number 2070–0162; expires on 09/30/2012; Approved without change.

EPA ICR Number 2034.04; NESHAP for the Wood Products Surface Coating Industry; 40 CFR part 63, subpart A and 40 CFR part 63, subpart QQQQ; was approved on 09/22/2009; OMB Number 2060–0510; expires on 09/30/2012; Approved without change.

EPA ICR Number 1712.06; NESHAP for Shipbuilding and Ship Repair Facilities—Surface Coating; 40 CFR part 63, subpart A and 40 CFR part 63, subpart II; was approved on 09/22/2009;

OMB Number 2060–0330; expires on 09/30/2012; Approved without change.

EPA ICR Number 2032.06; NESHAP for Hydrochloric Acid Production; 40 CFR part 63, subpart A and 40 CFR part 63, subpart NNNNN; was approved on 09/22/2009; OMB Number 2060–0529; expires on 09/30/2012; Approved without change.

EPA ICR Number 1899.05; Emission Guidelines for Hospital/Medical/Infectious Waste Incinerators; 40 CFR part 60, subpart A, 40 CFR part 60, subpart Ce, and 40 CFR part 62, subpart HHH, was approved on 09/27/2009; OMB Number 2060–0422; expires on 09/30/2012; Approved with change.

EPA ICR Number 1803.07; Drinking Water State Revolving Fund Program; 40 CFR 35.3545, 35.3550, and 35.3570; was approved on 09/30/2009; OMB Number 2040–0185; expires on 02/28/2010; Approved with change.

EPA ICR Number 1391.09; Clean Water Act State Revolving Fund Program; 40 CFR part 35, subpart K; was approved on 09/30/2009; OMB Number 2040–0118; expires on 12/31/2011; Approved with change.

EPA ICR Number 0938.17; General Administrative Requirements for Assistance Programs; 40 CFR parts 30 and 31; was approved on 09/30/2009; OMB Number 2030–0020; expires on 04/30/2012; Approved with change.

OMB Number Transfers

EPA ICR Number 1363.18; Toxic Chemical Release Reporting (Form R); 40 CFR part 372; the OMB number was changed from 2070–0093 to 2025–0009 on 09/16/2009.

EPA ICR Number 1704.10; Toxic Chemical Release Reporting, Alternate Threshold for Low Annual Reportable Amounts (Form A); 40 CFR part 372; the OMB number was changed from 2070–0143 to 2025–0010 on 09/16/2009.

Dated: October 13, 2009.

John Moses,

Director, Collections Strategies Division.

[FR Doc. E9–25365 Filed 10–20–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2009–0529; FRL–8971–1]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NSPS for Synthetic Fiber Production Facilities, EPA ICR Number 1156.11, OMB Control Number 2060–0059

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR which is abstracted below describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before November 20, 2009.

ADDRESSES: Submit your comments, referencing docket ID number EPA–OECA–2009–0529, to (1) EPA online using *www.regulations.gov* (our preferred method), or by e-mail to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 28221T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Robert C. Marshall, Jr., Office of Enforcement Compliance Assurance, 2223A, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–7021; e-mail address: *marshall.robert@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On July 30, 2009 (74 FR 38004), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2009–0529, which is available for public viewing online at *http://www.regulations.gov,* in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1752.

Use EPA's electronic docket and comment system at *http://www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov,* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *www.regulations.gov.*

Title: NSPS for Synthetic Fiber Production Facilities (Renewal).

ICR Numbers: EPA ICR Number 1156.11, OMB Control Number 2060–0059.

ICR Status: This ICR is scheduled to expire on October 31, 2009. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: This subpart applies to affected facilities at synthetic fiber production facilities including each solvent-spun synthetic process that produces more than 500 megagrams of fiber per year. The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A and any changes, or additions to the General Provisions specified at 40 CFR part 60, subpart HHH. Owners or operators of the affected facilities must make an initial notification, performance tests, periodic reports, and maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring

system is inoperative. Reports, at a minimum, are required semiannually.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 34 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Synthetic fiber production facilities.

Estimated Number of Respondents: 22.

Frequency of Response: Initially, occasionally, quarterly, and semiannually.

Estimated Total Annual Hour Burden: 1,859.

Estimated Total Annual Cost: $315,119, which includes $150,119 in labor costs, no annualized capital/startup costs and operation and maintenance (O&M) costs of $165,000.

Changes in the Estimates: There is no change in the labor hours or cost to the respondents in this ICR compared to the previous ICR. This is due to two considerations. First, the regulations have not changed over the past three years and are not anticipated to change over the next three years. Secondly, the growth rate for respondents is very low, negative, or non-existent. Therefore, the labor hours and cost figures in the previous ICR reflect the current burden to the respondents and are reiterated in this ICR.

Dated: October 13, 2009.

John Moses,

Director, Collection Strategies Division.

[FR Doc. E9–25362 Filed 10–20–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8970–7; Docket ID No. EPA–HQ–ORD–2009–0132]

Integrated Risk Information System (IRIS) Update Project; Announcement of 2009/2010 Agenda

AGENCY: Environmental Protection Agency.

ACTION: Notice of 2009/2010 IRIS Update Project and request for information.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is announcing the establishment of the Integrated Risk Information System (IRIS) Update Project. The purpose of the IRIS Update Project is to revisit a portion of the dose-response assessment values with a posting date on the IRIS database that is more than 10 years old. IRIS is an EPA data base containing human health risk information on possible adverse health effects that may result from chronic or long-term exposures to chemical substances found in the environment. This **Federal Register** notice (FRN) also announces the IRIS Update Project's 2009/2010 agenda and requests submission of new and relevant scientific information on health effects for the identified assessments listed in the Project's 2009/2010 agenda.

While EPA is not expressly soliciting comments on this notice, the Agency will accept information related to the substances included herein. Please submit any information in accordance with the instructions provided below.

DATES: Information must be submitted within 60 days of the publication of this notice. The 60-day period begins October 21, 2009 and ends December 21, 2009. Technical comments should be in writing and must be received by EPA by December 21, 2009.

ADDRESSES: Comments may be submitted electronically via *http://www.regulations.gov,* by mail, by facsimile, or by hand delivery/courier. Please follow the detailed instructions provided in the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: For information on the public comment period, contact the Office of Environmental Information Docket; telephone: 202–566–1752; facsimile: 202–566–1753; or e-mail: *ORD.Docket@epa.gov.* For information on the IRIS Update project, contact Dr. Chon Shoaf, National Center for Environmental Assessment, (mail code: B243–01), Office of Research and Development, U.S. Environmental Protection Agency, RTP, NC 27711; telephone: 919–541–4155, facsimile: 919–541–1818; or e-mail: *shoaf.chon@epa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The intent of the IRIS Update Project is to revisit all dose-response assessment toxicity values such as oral reference doses (RfDs), inhalation reference concentrations (RfCs), cancer oral slope factors, and cancer inhalation unit risks in IRIS with a posting or entry date more than 10 years old.

IRIS is a database of human health effects that may result from chronic exposure to various chemical substances or other contaminants found in the environment. IRIS currently provides information on health effects associated with more than 500 chemical substances. The database includes substance-specific summaries of qualitative and quantitative health information in support of the first two steps of the risk assessment process, *i.e.,* hazard identification and dose-response evaluation. Also, IRIS has included detailed Toxicological Reviews as support documents since 1995. Government and private entities use IRIS, combined with specific exposure information, to help characterize public health risks of chemical substances in a site-specific situation and thereby support risk management decisions designed to protect public health. IRIS is prepared and maintained by the EPA's National Center for Environmental Assessment within the Office of Research and Development.

While separate from the regular IRIS program, the IRIS Update Project draws on the IRIS data base as the source of human health assessments in need of update. The purpose of the IRIS Update Project is to replace existing IRIS assessment toxicity values and their supporting information that are more than 10 years old with new and relevant scientific information on health effects. As updated assessments are completed as part of this process, they will be posted on IRIS.

The IRIS Update Project defines ''assessment'' as an individual IRIS toxicity value along with its supporting information. For example, the Project identifies the values for an oral RfD, an inhalation RfC, and a cancer evaluation along with supporting information, as three assessments. Certain IRIS entries, however, may contain values that do not qualify for the update process. For example, a particular substance with an oral RfD derived 15 years ago would qualify for the update process, but a

cancer evaluation derived 3 years ago for that same substance would not qualify. Also, the IRIS Update Project will not address any substances or toxicity values that are not currently on IRIS.

The IRIS Update Project's process consists of: (1) Publishing an annual **Federal Register** notice announcing EPA's IRIS Update Project agenda and calling for scientific information from the public regarding assessments on the agenda; (2) conducting a comprehensive search of the current scientific literature on each assessment; (3) developing draft health assessment documents using state of the science methods and guidelines; (4) conducting a combined simultaneous review of the draft assessment documents by EPA and other Federal Agencies via the Federal Standing Science Committee; (5) soliciting public comments on draft assessments, followed by independent external peer review under the Federal Advisory Committee Act (FACA); (6) preparing final IRIS assessments that reflect public comments and independent expert review; and (7) replacing the existing assessments with the final updated IRIS assessments on the IRIS data base (*http://www.epa.gov/iris*).

This FRN describes only the first two steps of the update process. The literature and new data obtained in response to this FRN will be evaluated as to whether or not the assessment(s) can be completed within the resources and capacity of the IRIS Update Project. A subsequent FRN will announce the assessments proceeding through steps 3 through 6.

IRIS Update Agenda

Each year, EPA will develop a priority list of chemicals and an agenda of assessments to undergo the IRIS update process. EPA uses a variety of criteria to prioritize which assessments will be included on the agenda. General priority criteria include: Consideration of potential public health impact; EPA statutory, regulatory, or program-specific implementation needs; interest to other governmental agencies or the public; and availability of other scientific assessment documents that could serve as a basis for an update of an IRIS assessment. Specific priority criteria will take into consideration the frequency of occurrence in National Priority List (NPL) waste sites, occurrence as hazardous air pollutants used in residual risk assessments, and potential as a water pollutant based on the chemical contaminants list (CCL). The Update Project will strive to prevent duplication of effort with other assessment organizations. Thus, assessments currently on IRIS Track or assessments for pesticides that are available elsewhere within EPA have been eliminated from consideration for the IRIS Update Project.

EPA is soliciting public involvement in the process for those assessments on the IRIS Update Project's 2009/2010 agenda. While EPA conducts a thorough literature search for each assessment, there may be unpublished studies or other primary technical sources that are not available through the open literature. EPA would appreciate receiving scientific information from the public during the information gathering stage for the assessments listed in this notice. Interested persons should provide scientific analyses, studies, and other pertinent scientific information. This notice provides instructions for submitting scientific information to EPA pertinent to updating these assessments.

Assessments on 2009/2010 Agenda

The following IRIS assessments have been selected for inclusion in the IRIS Update Project agenda and are currently underway. The IRIS posting dates are provided to aid the submitter in determining whether information may have already been considered in the current online IRIS assessment.

Substance name	Assessment (IRIS posting date)	CASRN
barium	cancer (1998)	7440–39–3
bromoform	RfD (1989), cancer (1990)	75–25–2
carbon disulfide	RfD (1990), RfC (1995)	75–15–0
chlorobenzene	RfD (1989), cancer (1990)	108–90–7
2-chlorophenol	RfD (1988)	95–57–8
o-cresol	RfD (1988), cancer (1990)	95–48–7
cumene	RfD (1997), RfC (1997), cancer (1997)	98–82–8
1,1-dichloroethane	cancer (1990)	75–34–3
2,4-dimethylphenol	RfD (1990)	105–67–9
2,4-dinitrophenol	RfD (1991)	51–28–5
2,4-dinitrotoluene	RfD (1992)	121–14–2
hexachlorobenzene	RfD (1988), cancer (1991)	118–74–1
selenium	RfD (1991), cancer (1991)	7782–49–2
1,1,2-trichloroethane	RfD (1988), cancer (1994)	79–00–5
2,4,6-trichlorophenol	cancer (1990)	88–06–2

Information Requested on IRIS Update Assessments for 2009/2010

EPA is currently conducting literature searches for these assessments. The overall purpose of these literature searches is to identify new and relevant information for each assessment. Relevant information is that which improves the scientific understanding of the agent's toxicity in humans; new information is relevant information that is not included in the current online IRIS assessment. Based on the results of the literature searches and the information submitted in response to this announcement, EPA will evaluate assessments to determine whether they can be accommodated within the scope and resources of the IRIS Update Project.

With this IRIS update agenda announcement, EPA is actively soliciting information from the public at the beginning of the assessment update process. As literature searches are completed, they will be posted at *http://www.regulations.gov* for public inspection.

General Information

How To Submit Technical Comments to the Docket at http://www.regulations.gov

Submit your comments, identified by Docket ID No. EPA–HQ–ORD 2009–0132, by one of the following methods:

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

- *E-mail: ORD.Docket@epa.gov.*
- *Fax:* 202–566–1753.
- *Mail:* Office of Environmental Information (OEI) Docket (Mail Code: 2822T), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. The phone number is 202–566–1752.
- *Hand Delivery:* The OEI Docket is located in the EPA Headquarters Docket Center, Room 3334 EPA West Building, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is 202–566–1744. Such deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

If you provide comments by mail or hand delivery, please submit an original and three copies of the comments. For attachments, provide an index, number pages consecutively with the comments, and submit an unbound original and three copies.

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD–2009–0132. Please ensure that your comments are submitted within the specified comment period. Comments received after the closing date will be marked ''late,'' and may only be considered if time permits. It is EPA's policy to include all comments it receives in the public docket without change and to make the comments available online at *http://www.regulations.gov,* including any personal information provided, unless a comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

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

Dated: October 13, 2009.

Rebecca Clark,

Acting Director, National Center for Environmental Assessment.

[FR Doc. E9–25356 Filed 10–20–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8970–9]

Science Advisory Board Staff Office; Notification of a Clean Air Scientific Advisory Committee (CASAC) Carbon Monoxide Review Panel Meeting and Teleconference

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) Science Advisory Board (SAB) Staff Office announces a public meeting of the Clean Air Scientific Advisory Committee (CASAC) Carbon Monoxide Review Panel to peer review EPA's *Integrated Science Assessment for Carbon Monoxide: Second External Review Draft (September 2009)* and EPA's *Risk and Exposure Assessment to Support the Review of the Carbon Monoxide Primary National Ambient Air Quality Standards—First External Review Draft (October 2009).* The chartered CASAC will subsequently hold a public teleconference to review and approve the Panel's reports.

DATES: The public meeting will be held on Monday, November 16, 2009 from 8:30 a.m. to 5 p.m. (Eastern Time) and Tuesday, November 17, 2009 from 8 a.m. to 3 p.m. (Eastern Time). The public teleconference will be held on December 22, 2009 from 10 a.m. to 12 p.m. (Eastern Time).

ADDRESSES: The public meeting will be held at the Carolina Inn, 211 Pittsboro Street, Chapel Hill, NC 27516. The December 22, 2009 teleconference will be conducted by telephone only.

FOR FURTHER INFORMATION CONTACT: Any member of the public who wishes to submit a written or brief oral statement or wants further information concerning the November 16–17, 2009 meeting may contact Ms. Kyndall Barry, Designated Federal Officer (DFO), EPA Science Advisory Board (1400F), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; via telephone/voice mail (202) 343–9868; fax (202) 233–0643; or e-mail at *barry.kyndall@epa.gov.* For information on the CASAC teleconference on December 22, 2009, please contact Dr. Holly Stallworth, Designated Federal Officer (DFO), at the above listed address; via telephone/voice mail (202) 343–9867 or e-mail at *stallworth.holly@epa.gov.* General information concerning the CASAC and the CASAC documents can be found on the EPA Web site at *http://www.epa.gov/casac.*

SUPPLEMENTARY INFORMATION:

Background: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, 5 U.S.C., App. 2 (FACA), notice is hereby given that the CASAC Carbon Monoxide Panel will hold a public meeting to peer review two draft documents related to the NAAQS review for carbon monoxide and that the chartered CASAC will hold a public teleconference to review and approve the Panel's draft reports. The Clean Air Scientific Advisory Committee (CASAC) was established under section 109(d)(2) of the Clean Air Act (CAA or Act) (42 U.S.C. 7409) as an independent scientific advisory committee. CASAC provides advice, information and recommendations on the scientific and technical aspects of air quality criteria and national ambient air quality standards (NAAQS) under sections 108 and 109 of the Act. The CASAC Panel and chartered CASAC will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

Section 109(d)(1) of the CAA requires that the Agency periodically review and revise, as appropriate, the air quality criteria and the National Ambient Air Quality Standard (NAAQS) for the six ''criteria'' air pollutants, including carbon monoxide (CO). EPA is conducting scientific assessments to

review the primary (health-based) NAAQS for CO. CASAC has previously provided consultative advice on EPA's *Plan for Review of the National Ambient Air Quality Standards for Carbon Monoxide,* the first document in this review of the CO NAAQS. CASAC held a public meeting on May 12–13, 2009 (as announced in 74 FR 15265–15266) in Chapel Hill, North Carolina to review the *Integrated Science Assessment for Carbon Monoxide (First External Review Draft)* and provide consultative advice on the *Carbon Monoxide National Ambient Air Quality Standards: Scope and Methods Plan for Risk* and *Exposure Assessment.* The CASAC advisory reports are available on the EPA Web site at *http://www.epa.gov/casac*.

The purpose of the November 16–17, 2009 meeting is for the CASAC Panel to conduct a peer review the *Integrated Science Assessment for Carbon Monoxide: Second External Review Draft* (September 2009) published by EPA's Office of Research and Development (ORD) and to review the *Risk and Exposure Assessment to Support the Review of the Carbon Monoxide Primary National Ambient Air Quality Standards—First External Review Draft (October 2009)* recently issued by EPA's Office of Air and Radiation (OAR). The chartered CASAC will review and approve the Panel's draft reports by a public conference call on December 22, 2009.

Technical Contacts: Any questions concerning EPA's *Integrated Science Assessment for Carbon Monoxide: Second External Review Draft* should be directed to Dr. Tom Long, ORD, at *long.tom@epa.gov* or (919) 541–1880. Any questions concerning EPA's *Risk and Exposure Assessment to Support the Review of the Carbon Monoxide Primary National Ambient Air Quality Standards—First External Review Draft* should be directed to Dr. Ines Pagan, OAR, at *pagan.ines@epa.gov* or (919) 541–5469.

Availability of Meeting Materials: EPA–ORD's *Integrated Science Assessment for Carbon Monoxide: Second External Review Draft* can be accessed at: *http://www.epa.gov/ttn/naaqs/standards/co/s_co_cr_isa.html.* EPA–OAR's *Risk and Exposure Assessment to Support the Review of the Carbon Monoxide Primary National Ambient Air Quality Standards—First External Review Draft* will be available at: *http://www.epa.gov/ttn/naaqs/standards/co/s_co_index.html.* The agenda and other materials for the CASAC meetings will be posted on the SAB Web site at *http://www.epa.gov/casac*.

Procedures for Providing Public Input: Interested members of the public may submit relevant written or oral information for consideration on the topics included in this advisory activity. *Oral Statements:* To be placed on the public speaker list for the November 16–17, 2009 meeting, interested parties should notify Ms. Kyndall Barry, DFO, by e-mail no later than November 9, 2009. To be placed on the public speaker list for the December 22, 2009 teleconference, interested parties should notify Dr. Holly Stallworth, DFO, by e-mail no later than December 8, 2009. Individuals making oral statements will be limited to five minutes per speaker. *Written Statements:* Written statements for the November 16–17, 2009 meeting should be received in the SAB Staff Office by November 9, 2009, so that the information may be made available to the CASAC Panel for its consideration prior to this meeting. Written statements for the December 22, 2009 meeting should be received in the SAB Staff Office by December 8, 2009. Written statements should be supplied to the appropriate DFO in the following formats: one hard copy with original signature and one electronic copy via e-mail (acceptable file format: Adobe Acrobat PDF, MS Word, WordPerfect, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP format). Submitters are asked to provide versions of each document submitted with *and* without signatures, because the SAB Staff Office does not publish documents with signatures on its Web sites.

Accessibility: For information on access or services for individuals with disabilities, please contact Ms. Barry at the phone number or e-mail address noted above, preferably at least ten days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: October 14, 2009.

Anthony F. Maciorowski,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. E9–25360 Filed 10–20–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–0802; FRL–8795–7]

Notice of Receipt of a Pesticide Petition Filed for Residues of a Pesticide Chemical in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the Agency's receipt of an initial filing of a pesticide petition proposing the establishment/modification of regulations for residues of the biochemical pesticide 2,6-diisopropylnaphthalene (2,6-DIPN) in or on various food commodities.

DATES: Comments must be received on or before November 2, 2009.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2009–0802 and the pesticide petition (PP) number 9F7626, by one of the following methods:

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

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2009–0802 and the pesticide petition number 9F7626. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other

contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT:

Leonard Cole, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5412; e-mail address: *cole.leonard@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

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

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

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice*. EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the biochemical pesticide discussed in this document, compared to the general population.

II. What Action is the Agency Taking?

EPA is announcing receipt of a pesticide petition filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, proposing the establishment/modification of regulations in 40 CFR part 180 for residues of the biopesticide chemical 2,6-DIPN in or on various food commodities. EPA has determined that the pesticide petition described in this notice contains data or information prescribed in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA can make a final determination on this petition.

Pursuant to 40 CFR 180.7(f), a summary of the petition that is the subject of this notice, prepared by the petitioner, is included in a docket EPA has created for this rulemaking. The docket for this petition is available on-line at *http://www.regulations.gov*.

As specified in FFDCA section 408(d)(3), (21 U.S.C. 346a(d)(3)), EPA is publishing notice of the petition so that the public has an opportunity to comment on this request for the establishment/modification of regulations for residues of 2,6-DIPN in or on various food commodities. Further information on the petition may be obtained through the petition summary referenced in this unit.

EPA has received a pesticide petition PP 9F7626 from Loveland Products Inc., 7251 W. 4th Street, Greeley, CO 80634 proposing pursuant to section 408(d) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C.346a(d) to amend 40 CFR part 180 by establishing permanent tolerances for residues of the biochemical pesticide 2,6-DIPN in or on the following food commodities: Cattle, fat at 0.8 ppm; cattle, liver at 0.3 ppm; cattle, meat at 0.1 ppm; cattle, meat byproducts at 0.1 ppm; goat, fat at 0.8 ppm; goat, liver at 0.3 ppm; goat, meat at 0.1 ppm; goat, meat byproducts at 0.1 ppm; hog, fat at 0.8 ppm; hog, liver at 0.3 ppm; hog, meat at 0.1 ppm; hog, meat byproducts at 0.1 ppm; horse, fat at 0.8 ppm; horse, liver at 0.3 ppm; horse, meat at 0.1 ppm; horse, meat byproducts at 0.1 ppm; milk at 0.1 ppm;

potato at 2.0 ppm; potato, wet peel at 6.0 ppm; sheep, fat at 0.8 ppm; sheep, liver at 0.3 ppm; sheep, meat at 0.1 ppm; and sheep, meat byproducts at 0.1 ppm. The proposed tolerance levels are based on results of studies on the magnitude of 2,6-DIPN in potatoes and processed potatoes and in livestock edible commodities. EPA issued a final rule, published in the **Federal Register** of September 1, 2006 (71 FR 52003) (FRL–8081–9), which announced that it established time-limited tolerances for residues of the biochemical pesticide 2,6-DIPN in or on the above-listed commodities, with an expiration date of August 1, 2009. Because of a then-existing data gap, all initial tolerances were time-limited. The time limitation was established to provide sufficient time for the development and review of additional data, specifically a study on the nature of 2,6-DIPN residues in potatoes and animals, an independent laboratory validation of analytical methods in animal tissues, and a multiresidue method tryout. Loveland Products Inc. submitted the study on the nature of the residues in plants and animals on July 24, 2009, and a multiresidue method tryout report on October 8, 2009.

EPA is providing a shortened comment period of 10 days on this notice of filing. EPA is expediting action on this petition because the time-limited tolerances for 2,6-DIPN have expired. EPA has determined that 2,6-DIPN is a reduced risk pesticide and, given its wide-scale use on potatoes in cold storage, that it is in the public interest to have this reduced risk pesticide available as soon as possible for use on this valuable commodity. Application of 2,6-DIPN on stored potatoes decreases the number of applications necessary for a conventional pesticide on stored potatoes, thus posing less risks and providing better efficacy. EPA has previously evaluated the toxicity of 2,6-DIPN and determined that there is a reasonable certainty that no harm will result from dietary exposure to residues of 2,6-DIPN at the requested tolerance levels. Thus, EPA does not anticipate receiving any adverse comments on the subject petition. For these reasons, EPA is expediting the processing of this petition and is confident that a shortened 10–day comment period on the petition is appropriate.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: October 15, 2009.

Keith A. Matthews,

Acting Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. E9–25347 Filed 10–20–09; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0347; FRL–8795–2]

Carbaryl; Notice of Receipt of a Request To Voluntarily Cancel Pesticide Registrations To Terminate Use of Certain Products

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of a request by the registrant to voluntarily cancel their registrations to terminate uses of pet collar products containing the pesticide carbaryl. The request would terminate carbaryl use in or on pet collars for domestic pets, and would terminate the last carbaryl pet products registered for use in the United States. EPA intends to grant this request at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the request, or unless the registrant withdraws its request within the comment period. Upon acceptance of this request, any sale, distribution, or use of products listed in this notice will be permitted only if such sale, distribution, or use is consistent with the terms as described in the final order.

DATES: Comments must be received on or before November 20, 2009.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2008–0347, by one of the following methods:

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

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

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

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2008–0347. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Jacqueline Guerry, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (215) 814–2184; fax number: (215) 814–3113; e-mail address: *guerry.jacqueline@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background on the Receipt of Requests To Cancel and/or Amend Registrations to Delete Uses

This notice announces receipt by EPA of a request from Wellmark International to cancel two carbaryl product registrations. Carbaryl is a carbamate insecticide registered for use in agriculture, professional turf management and ornamental production, public health mosquito abatement programs, and residential areas. All carbaryl products registered for use on pet products, except collars, were voluntarily canceled by the registrants on February 17, 2006. Wellmark International is the only registrant with any remaining carbaryl pet products. In a letter dated September 30, 2009, Wellmark International requested EPA to cancel the affected product registrations identified in Table 1 of this notice. Specifically, Wellmark International has requested the cancellation of its pet collars treated with the active ingredient carbaryl effective September 30, 2010. This action will terminate the last carbaryl pesticide products registered in the United States for use on pets.

III. What Action Is the Agency Taking?

This notice announces receipt by EPA of a request from a registrant to cancel certain carbaryl product registrations. The affected products and the registrant making this request are identified in Tables 1 and 2 of this unit.

Under section 6(f)(1)(A) of FIFRA, registrants may request, at any time, that their pesticide registrations be canceled or amended to terminate one or more pesticide uses. Section 6(f)(1)(B) of FIFRA requires that before acting on a request for voluntary cancellation, EPA must provide a 30–day public comment period on the request for voluntary cancellation or use termination. In addition, section 6(f)(1)(C) of FIFRA requires that EPA provide a 180–day comment period on a request for voluntary cancellation or termination of any minor agricultural use before granting the request, unless:

1. The registrants request a waiver of the comment period, or

2. The Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

The carbaryl registrants have requested that EPA waive the 180–day comment period. EPA will provide a 30–day comment period on the proposed requests.

Unless a request is withdrawn by the registrant within 30 days of publication of this notice, or if the Agency determines that there are substantive comments that warrant further review of this request, an order will be issued canceling the affected registrations.

Wellmark International requested the cancellation of the registrations listed in the following Table 1:

TABLE 1—CARBARYL PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration Number	Product Name	Company
2724-272	Flea Collar RF-76 for Cats	Wellmark International
2724-273	Flea Collar RF-75 for Dogs	Wellmark International

Table 2 of this unit includes the name and address of record for the registrant of the products listed in Table 1 of this unit.

TABLE 2—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION AND/OR AMENDMENTS

EPA Company Number	Company Name and Address
2724	Wellmark International 1501 E. Woodfield Road, Suite 200 West Schaumburg, Illinois, 60173

IV. What Is the Agency's Authority for Taking this Action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter,

following the public comment period, the Administrator may approve such a request.

V. Procedures for Withdrawal of Request and Considerations for Reregistration of Carbaryl

Registrants who choose to withdraw a request for cancellation must submit such withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**, postmarked before [*30 days after date of publication in the* **Federal Register**]. This written withdrawal of the request for cancellation will apply only to the applicable FIFRA section 6(f)(1) request listed in this notice. If the products have been subject to a previous cancellation order, the effective date of cancellation and all other provisions of any earlier cancellation order are controlling.

VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which were packaged, labeled, and released for shipment prior to the effective date of the cancellation order.

In any order issued in response to this request for cancellation of product registrations, EPA proposes to include the following provisions for the treatment of any existing stocks of the products identified or referenced in Table 1 in Unit III. Wellmark International may sell or distribute such existing stocks until December 30, 2010. All sale or distribution of existing stocks by Wellmark is prohibited after December 30, 2010, unless that sale or distribution is solely for the purpose of facilitating disposal or export of the product.

The Agency will allow persons other than the registrant to continue to sell and/or use existing stocks of canceled products until such stocks are exhausted, provided that such use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled product. The order will specifically prohibit any use of existing stocks that is not consistent with such previously approved labeling. If, as the Agency currently intends, the final cancellation order contains the existing stocks provision just described, the order will be sent only to the affected registrants of the canceled products. If the Agency determines that the final cancellation order should contain existing stocks provisions different than the ones just described, the Agency will publish the cancellation order in the **Federal Register**.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: October 13, 2009.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. E9–24897 Filed 10–20–09; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8970–8]

EPA Science Advisory Board Staff Office; Request for Nominations of Experts for the SAB Polycyclic Aromatic Hydrocarbon (PAH) Mixtures Review Panel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice request for nominations.

SUMMARY: The Science Advisory Board (SAB) Staff Office is requesting public nominations of experts to form an SAB *Ad Hoc* Panel to review EPA's draft technical document entitled *Development of a Relative Potency Factor (RPF) Approach for Polycyclic Aromatic Hydrocarbon (PAH) Mixtures.*

DATES: Nominations should be submitted by November 12, 2009 per instructions below.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information regarding this Request for Nominations may contact Mr. Aaron Yeow, Designated Federal Officer (DFO), SAB Staff Office, by telephone/voice mail at (202) 343–9878; by fax at (202) 233–0643; or via e-mail at *yeow.aaron@epa.gov.* General information concerning the EPA Science Advisory Board can be found on the EPA SAB Web site at *http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION:

Background: EPA's Integrated Risk Information System (IRIS) is an electronic database containing descriptive and quantitative toxicological information on human health effects that may result from chronic exposure to various substances in the environment. This information supports human health risk assessments and includes hazard identification and dose-response data and derivations of oral reference doses (RfDs) and inhalation reference concentrations (RfCs) for noncancer effects and oral slope factors and oral and inhalation unit risks for cancer effects. IRIS is prepared and maintained by EPA's National Center for Environmental Assessment (NCEA) within the Office of Research and Development (ORD). NCEA's IRIS Program has developed a draft technical document entitled *Development of a Relative Potency Factor (RPF) Approach for Polycyclic Aromatic Hydrocarbon (PAH) Mixtures* for cancer risk from exposure to PAH mixtures. The relative potency factor approach assumes that individual PAH potencies relative to an index compound (i.e., benzo[a]pyrene, [BaP]) are added together to yield a cancer risk estimate for the whole mixture. ORD has requested that the SAB conduct a review of this draft document.

The SAB was established by 42 U.S.C. 4365 to provide independent scientific and technical advice, consultation and recommendations to the EPA Administrator on the technical basis for Agency positions and regulations. The SAB Staff Office will form an expert Panel to review ORD's draft IRIS PAH Mixtures document. The SAB Panel will comply with the provisions of the Federal Advisory Committee Act (FACA) and all appropriate SAB procedural policies. Upon completion, the Panel's report will be submitted to the chartered SAB for final approval for transmittal to the EPA Administrator. The PAH Mixtures Review Panel is being asked to comment on the scientific soundness of the Agency's draft IRIS document.

Availability of the Review Materials: The EPA draft IRIS document to be reviewed by the PAH Mixtures Review Panel will be made available by ORD at the following URL: *http://epa.gov/ncea* (under ''Recent Additions''). For questions concerning the review materials, please contact Dr. Lynn Flowers, at (703) 347–8537, or *flowers.lynn@epa.gov.*

Request for Nominations: The SAB Staff Office is requesting nominations of nationally recognized experts with expertise in one or more of the following areas, particularly with respect to PAH Mixtures: chemistry; general toxicology; toxicokinetics; carcinogenesis and mode of action; genetic toxicology; dose response assessment; biostatistics; risk assessment, specifically for chemical mixtures; and application of the relative potency factor methodology.

Process and Deadline for Submitting Nominations: Any interested person or organization may nominate qualified individuals for possible service on the PAH Mixtures Review Panel in the areas of expertise described above. Nominations should be submitted in electronic format (which is preferred over hard copy) following the

instructions for ''Nominating Experts to Advisory Panels and Ad Hoc Committees Being Formed'' provided on the SAB Web site. The instructions can be accessed through the ''Nomination of Experts'' link on the blue navigational bar on the SAB Web site at *http://www.epa.gov/sab.* To receive full consideration, nominations should include all of the information requested.

EPA's SAB Staff Office requests: Contact information about the person making the nomination; contact information about the nominee; the disciplinary and specific areas of expertise of the nominee; the nominee's curriculum vita; sources of recent grants and/or contracts; and a biographical sketch of the nominee indicating current position, educational background, research activities, and recent service on other national advisory committees or national professional organizations.

Persons having questions about the nomination procedures, or who are unable to submit nominations through the SAB Web site, should contact Mr. Aaron Yeow, DFO, as indicated above in this notice. Nominations should be submitted in time to arrive no later than November 12, 2009. EPA values and welcomes diversity. In an effort to obtain nominations of diverse candidates, EPA encourages nominations of women and men of all racial and ethnic groups.

The EPA SAB Staff Office will acknowledge receipt of nominations. The names and biosketches of qualified nominees identified by respondents to the **Federal Register** notice and additional experts identified by the SAB Staff will be posted on the SAB Web site at *http://www.epa.gov/sab.* Public comments on this ''Short List'' of candidates will be accepted for 21 calendar days. The public will be requested to provide relevant information or other documentation on nominees that the SAB Staff Office should consider in evaluating candidates.

For the EPA SAB Staff Office, a balanced subcommittee or review panel includes candidates who possess the necessary domains of knowledge, the relevant scientific perspectives (which, among other factors, can be influenced by work history and affiliation), and the collective breadth of experience to adequately address the charge. In establishing the PAH Mixtures Review Panel, the SAB Staff Office will consider public comments on the ''Short List'' of candidates, information provided by the candidates themselves, and background information independently gathered by the SAB Staff Office. Selection criteria to be used for Panel membership include: (a) Scientific and/or technical expertise, knowledge, and experience (primary factors); (b) availability and willingness to serve; (c) absence of financial conflicts of interest; (d) absence of an appearance of a lack of impartiality; and (e) skills working in committees, subcommittees and advisory panels; and, for the Panel as a whole, (f) diversity of, and balance among scientific expertise and viewpoints.

The SAB Staff Office's evaluation of an absence of financial conflicts of interest will include a review of the ''Confidential Financial Disclosure Form for Special Government Employees Serving on Federal Advisory Committees at the U.S. Environmental Protection Agency'' (EPA Form 3110–48). This confidential form allows Government officials to determine whether there is a statutory conflict between that person's public responsibilities (which includes membership on an EPA Federal advisory committee) and private interests and activities, or the appearance of a lack of impartiality, as defined by Federal regulation. The form may be viewed and downloaded from the following URL address *http://www.epa.gov/sab/pdf/epaform3110–48.pdf.*

The approved policy under which the EPA SAB Office selects subcommittees and review panels is described in the following document: *Overview of the Panel Formation* Process at the Environmental Protection Agency Science Advisory Board (EPA–SAB–EC–02–010), which is posted on the SAB Web site at *http://www.epa.gov/sab/pdf/ec02010.pdf.*

Dated: October 14, 2009.

Anthony F. Maciorowski,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. E9–25357 Filed 10–20–09; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection Being Submitted to the Office of Management and Budget for Review and Approval, Comments Requested

October 16, 2009.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Persons wishing to comment on this information collection should submit comments on November 20, 2009. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget (OMB), via fax at (202) 395–5167, or via the Internet at *Nicholas_A._Fraser@omb.eop.gov* and to Cathy Williams, Federal Communications Commission (FCC), 445 12th Street, SW, Washington, DC 20554. To submit your comments by e–mail send then to: *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.* To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to web page: *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called ''Currently Under Review'', (3) click on the downward–pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, and (6) when the FCC list appears, look for the title of this ICR (or its OMB Control Number, if there is one) and then click on the ICR.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection send an e–mail to PRA@fcc.gov or contact Cathy Williams on (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0580.

Title: Section 76.1710, Operator Interests in Video Programming.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for–profit entities.

Number of Respondents and Responses: 1,500 respondents; 1,500 responses.

Estimated Time per Response: 15 hours.

Frequency of Response: Recordkeeping requirement.

Obligation To Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 Section 154(i) of the Communications Act of 1934, as amended.

Total Annual Burden: 22,500 hours.

Total Annual Costs: None.

Privacy Impact Assessment(s): No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality and respondents are not being asked to submit confidential information to the Commission.

Needs and Uses: 47 CFR Section 76.1710 requires cable operators to maintain records in their public file for a period of three years regarding the nature and extent of their attributable interests in all video programming services. The records must be made available to members of the public, local franchising authorities and the Commission on reasonable notice and during regular business hours. The records will be reviewed by local franchising authorities and the Commission to monitor compliance with channel occupancy limits in respective local franchise areas.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9–25294 Filed 10–20–09; 8:45 am]

BILLING CODE 6712–01–S

FEDERAL COMMUNICATIONS COMMISSION

Revised Sunshine Notice To Open Commission Meeting, Thursday, October 22, 2009

October 16, 2009.

The FCC Sunshine Notice dated 10–15–09 inadvertently failed to include the following language: The Commission waives the Sunshine Period Prohibition on ex parte contacts with the Commission to the extent that those contacts are made through the Open Internet Blog, *http://blog.openinternet.gov.* Such contacts take place in a forum that is both instantaneously available to all interested parties and will not intrude on the Commission's decision making.

The Federal Communications Commission will hold an Open Meeting on the subject listed below on Thursday, October 22, 2009, which is scheduled to commence at 10:00 a.m. in Room TW–C305, at 445 12th Street, S.W., Washington, D.C.

Item No.	Bureau	Subject
	WIRELINE COMPETITION & WIRELESS TELE–COMMUNICATIONS.	TITLE: Preserving the Open Internet; Broadband Industry Practices (WC Docket No. 07–52) SUMMARY: The Commission will consider a Notice of Proposed Rule-making on policies to preserve the open Internet.

Additional information concerning this meeting may be obtained from Audrey Spivack or David Fiske, Office of Media Relations, (202) 418–0500; TTY 1–888–835–5322. Audio/Video coverage of the meeting will be broadcast live with open captioning over the Internet from the FCC's Audio/Video Events web page at *www.fcc.gov/live.*

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9–25397 Filed 10–19–09; 11:15 am]

BILLING CODE 6712-01-S

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than November 3, 2009.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. Roger and Mary Angela Baker, Cedar Rapids, Iowa, individually as husband and wife, and as a group acting in concert with Bruce and Janice Anderson, Marion, Iowa; The Elizabeth K. Dummermuth Revocable Trust, Elizabeth K. Dummermuth, Trustee, Cedar Rapids, Iowa; Kay S. Hill; Kent M. Hill; Brian C. and Molly E. Scott; Thomas C. and Clare L. Slattery; and Monica W. Vernon, all of Cedar Rapids, Iowa; to acquire control of City State Bancorporation, Inc., Central City, Iowa, and thereby indirectly control of M.S.B. Corporation and City State Bank, both of Central City, Iowa.

Board of Governors of the Federal Reserve System, October 16, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–25308 Filed 10–20–09; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*http://www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 011383–042.

Title: Venezuelan Discussion Agreement.

Parties: Hamburg-Süd, Seaboard Marine Ltd., King Ocean Service de Venezuela, and SeaFreight Line, Ltd.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell LLP; 1850 M Street, NW.; Suite 900; Washington, DC 20036.

Synopsis: The amendment would add Compania Sud Americana de Vapores S.A. as a party to the agreement.

Agreement No.: 012083.

Title: Hanjin/APL Mediterranean Space Charter Agreement.

Parties: American President Lines, Ltd.; and Hanjin Shipping Co., Ltd.

Filing Parties: Eric C. Jeffrey, Esq.; Goodwin Procter LLP; 901 New York Avenue, NW.; Washington, DC 20001.

Synopsis: The agreement authorizes Hanjin to charter space to APL in the trade between the U.S. East Coast and ports in Italy and Spain.

Agreement No.: 012084.

Title: HLAG/Maersk Line Gulf-South America Slot Charter Agreement.

Parties: A.P. Moller-Maersk A/S and Hapag-Lloyd AG.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell LLP; 1850 M Street, NW.; Suite 900; Washington, DC 20036.

Synopsis: The agreement authorizes Hapag-Lloyd to charter space to Maersk Line in the trade between U.S. Gulf Coast ports and ports in Mexico, the Dominican Republic, Brazil, Argentina and Uruguay.

By Order of the Federal Maritime Commission.

Dated: October 16, 2009.

Tanga S. FitzGibbon,

Assistant Secretary.

[FR Doc. E9–25323 Filed 10–20–09; 8:45 am]

BILLING CODE 6730–01–P

GENERAL SERVICES ADMINISTRATION

Federal Travel Regulation (FTR); Relocation Allowances—Data Dictionary and Collection Process for Transaction-Level Relocation Data; Notice of a Proposed Bulletin and Proposed Rule

AGENCY: Office of Governmentwide Policy, General Services Administration (GSA).

ACTION: Notice of a proposed bulletin and a proposed rule.

SUMMARY: This notice announces that GSA is posting online a proposed FTR bulletin on collection of relocation data, concurrent with a proposed rule. The proposed FTR Bulletin 10–XX provides the proposed data dictionary for both of these data collection processes. Proposed FTR Bulletin 10–XX may be viewed on GSA's Web site, at *http://www.gsa.gov/relopolicy,* and the proposed rule appears elsewhere in this issue of the **Federal Register**. By this Notice, GSA is seeking comment on the proposed bulletin. Among the questions for which GSA is seeking comment are:

- Have we identified the right data elements to allow managers to identify and modulate useful adjustments in policy and to identify and support proposed regulatory and legislative changes?
- Should any data elements be added or deleted?
- Have we described the data elements correctly, in the definitions, coding, field lengths, and suggested data sources?

GSA is taking the somewhat unusual step of concurrently publishing the proposed FTR bulletin and proposed rule because GSA believes that the final products will be improved by comments from Federal agencies, relocation service companies, and relocation software providers.

Once GSA has issued the FTR bulletin, GSA will modify it as needed. Modifications will be based on input from the industry and/or Federal agencies and will be discussed with the Executive Relocation Steering Committee (an interagency body chartered by GSA) before implementation.

DATES: GSA requests that Federal agencies and providers of relocation services and software comment on the proposed bulletin no later than December 21, 2009. This notice is effective October 21, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Henry Maury, Office of Governmentwide Policy (M), Office of Travel, Transportation, and Asset Management (MT), General Services Administration, at (202) 208–7928 or via e-mail at *henry.maury@gsa.gov.* Please cite FTR Bulletin 10–XX.

Dated: June 29, 2009.

Stan Kaczmarczyk,

Acting Associate Administrator, Office of Governmentwide Policy.

[FR Doc. E9–25333 Filed 10–20–09; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the National Vaccine Advisory Committee

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of Public Health and Science.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) is hereby giving notice that the National Vaccine Advisory Committee (NVAC) will hold a meeting via teleconference. The meeting is open to the public. Pre-registration is not required, however, individuals who wish to participate in the public comment session should either e-mail *nvpo@hhs.gov* or call 202–690–5566 to register and RSVP.

DATES: The meeting will be held on Friday, November 6, 2009, from 3 p.m. to 5 p.m. EST.

ADDRESSES: The meetings will occur by teleconference. To attend, please call 1–888–677–1385, passcode ''NVAC''. Please call up to 15 minutes prior to the start of the conference call to facilitate attendance.

FOR FURTHER INFORMATION CONTACT: Ms. Andrea Krull, Public Health Advisor, National Vaccine Program Office, Department of Health and Human Services, Room 443–H, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201. Phone: (202) 690–5566; Fax: (202) 260–1165; e-mail: *nvpo@hhs.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to Section 2101 of the Public Health Service Act (42 U.S.C. Section 300aa–1), the Secretary of Health and Human Services was mandated to establish the National Vaccine Program to achieve optimal prevention of human infectious diseases through immunization and to achieve optimal prevention against adverse reactions to vaccines. The National Vaccine Advisory Committee (NVAC) was established to provide advice and make recommendations to the Director of the National Vaccine Program, on matters related to the Program's responsibilities. The Assistant Secretary for Health serves as Director of the National Vaccine Program.

This is a special meeting of the NVAC. Discussions will surround issues related to the current status of the 2009 H1N1 influenza outbreak and response with a focus on vaccine activities. The Committee will discuss the actions of the various HHS agencies working on

H1N1 as it relates to the mission of NVAC. Representatives of state and local health associations will also provide their perspective.

For this special meeting, members of the public are invited to attend by teleconference via a toll-free call-in phone number. The call-in number will be operator assisted to provide members of the public the opportunity to provide comments to the Committee. Public comment will be limited to no more than three minutes per speaker. Pre-registration is required for public comment only. Individuals who plan to attend and need special assistance, such as accommodation for hearing impairment or other reasonable accommodations, should notify the designated contact person at least one week prior to the meeting.

Any members of the public who wish to have printed material distributed to NVAC should submit materials to the Executive Secretary, NVAC, through the contact person listed above prior to close of business one week before the meeting (conference call). A draft agenda and any additional materials will be posted on the NVAC Web site (*http://www.hhs.gov/nvpo/nvac/*) prior to the meeting.

Dated: October 15, 2009.

Bruce Gellin,

Deputy Assistant Secretary for Health, Director, National Vaccine Program Office, Executive Secretary, National Vaccine Advisory Committee.

[FR Doc. E9–25366 Filed 10–20–09; 8:45 am]

BILLING CODE 4150–44–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Performance Review Board Members

Title 5, U.S.C. Section 4314(c)(4) of the Civil Service Reform Act of 1978, Public Law 95–454, requires notice of appointment of individuals to serve as a member of the Performance Review Board shall be published in the **Federal Register**.

The following individuals are hereby appointed to serve on Performance Review Boards within the Department of Health and Human Services. These individuals supplement membership on existing Performance Review Boards.

Office of the Secretary

Moulds, Donald, Principal Deputy Assistant Secretary.

Monahan, John, Director, Office of Global Health Affairs.

Centers for Disease Control and Prevention

Branche, Christine, Associate Director for NIOSH.

Health Resources and Services Administration (HRSA)

Morford, Thomas G., Associate Administrator, Office of Operations.

Indian Health Service (IHS)

Karol M.D., Susan, Chief Medical Officer.

Dated: October 16, 2009.

Antonia T. Harris,

Deputy Assistant Secretary for Human Resources, Department of Health and Human Services.

[FR Doc. E9–25452 Filed 10–20–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0287]

Wallace E. Gonsalves, Jr., MD: Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is issuing an order under the Federal Food, Drug, and Cosmetic Act (the act) permanently debarring Wallace E. Gonsalves, Jr., MD, from providing services in any capacity to a person that has an approved or pending drug product application. We base this order on a finding that Dr. Gonsalves was convicted of a felony under Federal law for conduct relating to the regulation of a drug product under the act. After being given notice of the proposed permanent debarment and an opportunity to request a hearing within the timeframe prescribed by regulation, Dr. Gonsalves failed to request a hearing. Dr. Gonsalves' failure to request a hearing constitutes a waiver of his right to a hearing concerning this action.

DATES: This order is effective October 21, 2009.

ADDRESSES: Submit applications for special termination of debarment to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Kenny Shade, Division of Compliance Policy (HFC–230), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 240–632–6844.

SUPPLEMENTARY INFORMATION:

I. Background

Section 306(a)(2)(B) of the act (21 U.S.C. 335a(a)(2)(B)) requires debarment of an individual if FDA finds that the individual has been convicted of a felony under Federal law for conduct relating to the regulation of any drug product under the act. On September 15, 2004, the U.S. District Court for the District of Rhode Island entered judgment against Dr. Gonsalves for two counts of product tampering in violation of 18 U.S.C. 1365(a) and two counts of drug adulteration in violation of 21 U.S.C. 331(k) and 333(a)(2). On September 14, 2004, the U.S. District Court for the District of Rhode Island accepted Dr. Gonsalves' plea of guilty, made under a plea agreement, and entered judgment against Dr. Gonsalves for one count of conspiracy to sell drug samples in violation of 18 U.S.C. 371 and 21 U.S.C. 333(a)(2) and 353(c)(1), one count of unlawful sale of drug samples in violation of 21 U.S.C. 331(t), 333(b)(1), and 353(c)(1), and one count of health care fraud in violation of 18 U.S.C. 1347(a) and 2.

FDA's finding that debarment is appropriate is based on two convictions relating to adulteration of a drug (two separate vaccines) and one conviction relating to sale of drug samples. The factual basis for those convictions is as follows: From March of 2000 until on or about August 26, 2002, with the intent to defraud and mislead, Dr. Gonsalves caused a quantity of Measles, Mumps, and Rubella (MMR) and Varicella Virus (varicella) vaccine to be adulterated while the vaccine was being held for sale and administered to patients after being shipped in interstate commerce, by reducing the quality and strength of the vaccine and by failing to properly store and maintain the vaccine, thereby causing the vaccines to become adulterated.

From July 3, 2000, and continuing until at least on or about August 16, 2002, Dr. Gonsalves knowingly sold and offered to sell quantities of drug samples for cash or other consideration. As a result of his convictions, FDA sent Dr. Gonsalves by certified mail on August 7, 2009, a notice proposing to permanently debar him from providing services in any capacity to a person that has an approved or pending drug product application. The proposal was based on a finding under section 306(a)(2)(B) of the act that Dr. Gonsalves was convicted of a felony under Federal law for conduct relating to the regulation of a drug product under the act. The

proposal also offered Dr. Gonsalves an opportunity to request a hearing, providing him 30 days from the date of receipt of the letter in which to file the request, and advised him that failure to request a hearing constituted a waiver of the opportunity for a hearing and of any contentions concerning this action. Dr. Gonsalves did not request a hearing and has, therefore, waived his opportunity for a hearing and waived any contentions concerning his debarment (21 CFR part 12).

II. Findings and Order

Therefore, the Acting Director, Office of Enforcement, Office of Regulatory Affairs, under section 306(a)(2)(B) of the act and under authority delegated to the Acting Director (Staff Manual Guide 1410.35), finds that Dr. Gonsalves has been convicted of a felony under Federal law for conduct relating to the regulation of a drug product under the act.

As a result of the foregoing finding, Dr. Gonsalves is permanently debarred from providing services in any capacity to a person with an approved or pending drug product application under sections 505, 512, or 802 of the act (21 U.S.C. 355, 360b, or 382), or under section 351 of the Public Health Service Act (42 U.S.C. 262), effective (see **DATES**) (see section 306(c)(1)(B) and (c)(2)(A)(ii) of the act and section 201(dd) of the act (21 U.S.C. 321(dd)). Any person with an approved or pending drug product application who knowingly employs or retains as a consultant or contractor, or otherwise uses the services of Dr. Gonsalves, in any capacity, during Dr. Gonsalves' debarment, will be subject to civil money penalties (section 307(a)(6) of the act (21 U.S.C. 335b(a)(6)). If Dr. Gonsalves, during his period of debarment, provides services in any capacity to a person with an approved or pending drug product application, he will be subject to civil money penalties (section 307(a)(7) of the act). In addition, FDA will not accept or review any abbreviated new drug applications submitted by or with the assistance of Dr. Gonsalves during his debarment (section 306(c)(1)(B) of the act).

Any application by Dr. Gonsalves for special termination of debarment under section 306(d)(4) of the act should be identified with Docket No. FDA–2009–N–0287 and sent to the Division of Dockets Management (see **ADDRESSES**). All such submissions are to be filed in four copies. The public availability of information in these submissions is governed by 21 CFR 10.20(j).

Publicly available submissions may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: September 29, 2009.

Brenda Holman,

Acting Director, Office of Enforcement, Office of Regulatory Affairs.

[FR Doc. E9–25322 Filed 10–20–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–D–0508]

Draft Guidance for Industry on Registration and Product Listing for Owners and Operators of Domestic Tobacco Product Establishments; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled ''Registration and Product Listing for Owners and Operators of Domestic Tobacco Product Establishments.'' The draft guidance document is intended to assist persons making tobacco product establishment registration and product listing submissions to FDA under The Family Smoking Prevention and Tobacco Control Act (FSPTCA).

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit written or electronic comments on the draft guidance by October 30, 2009.

ADDRESSES: Submit written requests for single copies of the draft guidance document entitled ''Registration and Product Listing for Owners and Operators of Domestic Tobacco Product Establishments'' to the Center for Tobacco Products, Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850–3229. Send one self-addressed adhesive label to assist that office in processing your request or include a fax number to which the draft guidance document may be sent. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

Submit written comments on the guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Michele Mital, Center for Tobacco Products, Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850–3229, 301–796–4800, *Michele.Mital@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On June 22, 2009, the President signed the FSPTCA (Public Law 111–31) into law. The FSPTCA amended the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 301 *et seq.*) by, among other things, adding a new chapter granting FDA important new authority to regulate the manufacture, marketing, and distribution of tobacco products to protect the public health generally and to reduce tobacco use by minors.

Section 905(b) of the act (21 U.S.C. 395(b)), as amended by the FSPTCA, requires that ''every person who owns or operates any establishment in any State engaged in the manufacture, preparation, compounding, or processing of a tobacco product or tobacco products'' register with FDA the name, places of business, and all establishments owned or operated by that person. Every person must register by December 31 of each year. Section 905(i)(1) of the act, as amended by the FSPTCA, requires that all registrants ''shall, at the time of registration under any such subsection, file with [FDA] a list of all tobacco products which are being manufactured, prepared, compounded, or processed by that person for commercial distribution,'' along with certain accompanying consumer information, such as all labeling and a representative sampling of advertisements.

While electronic submission of registration and listing information is not required, FDA is strongly encouraging electronic submission to facilitate efficiency and timeliness of data management and collection. To that end, FDA designed the eSubmitter application to streamline the data entry process for registration and product listing. This tool allows for importation of large quantities of structured data, attachments of files (e.g., in portable document format (PDFs) and certain media files), and automatic acknowledgement of FDA's receipt of submissions.

II. Significance of Guidance

FDA is issuing this draft guidance document consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on ''Registration and Product Listing for Owners and Operators of Domestic Tobacco Product Establishments.'' It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

III. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The guidance document and received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

IV. Paperwork Reduction Act of 1995

This draft guidance contains proposed collections of information 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). As required by the PRA, FDA has published an analysis of, among others, the information collection concerning the submission of tobacco product establishment registration and product listing information (74 FR 45219, September 1, 2009, as corrected by 74 FR 47257, September 15, 2009) and will submit them for OMB approval.

V. Electronic Access

An electronic version of the guidance document is available on the Internet at *http://www.regulations.gov* and *http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/default.htm*.

Dated: October 15, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–25235 Filed 10–16–09; 11:15 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–D–0503]

Draft Guidances for Industry and Food and Drug Administration Staff; Computer-Assisted Detection Devices Applied to Radiology Images and Radiology Device Data—Premarket Notification [510(k)] Submissions and Clinical Performance Assessment: Considerations for Computer-Assisted Detection Devices Applied to Radiology Images and Radiology Device Data—Premarket Approval (PMA) and Premarket Notification [510(k)] Submissions; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of two related draft guidance documents. One is a draft guidance entitled, ''Computer-Assisted Detection Devices Applied to Radiology Images and Radiology Device Data—Premarket Notification [510(k)] Submissions'' (''CADe 510(k) draft guidance''). This draft guidance provides recommendations regarding premarket notification (510(k)) submissions of certain computer-assisted detection (CADe) devices applied to radiology images and radiology device data. The second draft guidance is entitled, ''Clinical Performance Assessment: Considerations for Computer-Assisted Detection Devices Applied to Radiology Images and Radiology Device Data—Premarket Approval (PMA) and Premarket Notification [510(k)] Submissions'' (''CADe clinical performance assessment draft guidance''). This draft guidance provides recommendations on how to design and conduct clinical performance studies for CADe devices applied to radiology images and radiology device data. These studies may be part of a premarket submission to FDA, whether it is a 510(k) submission, an application for premarket approval (PMA), an application for a humanitarian device exemption (HDE), or an application for an investigational device exemption (IDE). These draft guidances are not final nor are they in effect at this time.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the agency considers your comment on these draft guidances before it begins work on the final versions of these guidances, submit written or electronic comments on the draft guidances by January 19, 2010.

ADDRESSES: Submit written requests for single copies of the draft guidance document entitled ''Computer-Assisted Detection Devices Applied to Radiology Images and Radiology Device Data—Premarket Notification [510(k)] Submissions'' or the draft guidance document entitled ''Clinical Performance Assessment: Considerations for Computer-Assisted Detection Devices Applied to Radiology Images and Radiology Device Data—Premarket Approval (PMA) and Premarket Notification [510(k)] Submissions'' to the Division of Small Manufacturers, International, and Consumer Assistance, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., WO66–4613, Silver Spring, MD 20993. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–847–8149. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to these draft guidances.

Submit written comments concerning either of these draft guidances and the questions found in the supplementary information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*. Identify comments with the docket number found in brackets in the heading of this document. Please include your rationale and/or scientific justification with your comments.

FOR FURTHER INFORMATION CONTACT: Nicholas Petrick, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., White Oak Bldg. 62, rm. 4116, Silver Spring, MD 20993, 301–796–2563, and Joyce Whang, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., White Oak Bldg. 66, rm. G318, Silver Spring, MD 20993.

SUPPLEMENTARY INFORMATION:

I. Background

CADe devices are computerized systems that incorporate pattern recognition and data analysis capabilities (i.e., combine values, measurements, or features extracted from the patient radiological data) intended to identify, mark, highlight, or in any other manner direct attention to portions of an image, or aspects of radiology device data, that may reveal abnormalities during interpretation of

patient radiology images or patient radiology device data by the intended user (i.e., a physician or other health care professional). In drafting these documents, we considered the recommendations made during the Radiological Devices Panel on March 4 through 5, 2008. Further information on this public advisory committee meeting, including panel transcripts, can be found at: *http://www.fda.gov/ohrms/dockets/ac/cdrh08.html#radiology*.

The CADe 510(k) draft guidance provides recommendations on documentation and performance testing to be part of a 510(k) submission for Class II CADe devices applied to radiology images and radiology device data. The CADe clinical performance assessment draft guidance provides recommendations regarding clinical performance studies for both Class II and Class III CADe devices applied to radiology images and radiology device data.

II. Frequently Asked Questions

The agency anticipates including a section containing frequently asked questions (FAQs) in each of the guidances to further clarify the agency's recommendations regarding premarket notification (510(k)) submissions of certain computer-assisted detection (CADe) devices applied to radiology images and radiology, and on how to design and conduct clinical performance studies for CADe devices applied to radiology images and radiology device data. The agency is requesting public comment on the proposed sample questions provided in this document. Suggestions for additional questions and answers that are not included below but that may be helpful in understanding the guidances are also encouraged. The public comments will allow the agency to further refine the guidance and develop a FAQ section to communicate the recommended level of evidence for different premarket submissions. The agency also wants to ensure that these guidances adequately address these anticipated questions. The agency may adjust, add or delete questions based on received comments.

The first group of draft sample questions (Q1–Q7) has been developed to provide context to the principles discussed in the CADe 510(k) draft guidance. They may help in preparing a Premarket Notification [510(k)] Submission for your CADe device. Please comment on the following questions and what you believe would be the expectation of the agency based on the issues presented in the CADe 510(k) draft guidance.

Q1: Our CT CADe device is intended to be used on a variety of CT devices. Should any clinical trials we perform include every unit with which the CT CADe device is intended to be used?

Q2: Our CADe device is designed to detect lung nodules. Should we power our standalone performance assessment so that statistically significant results can be obtained for the clinically relevant subgroups of lesions, for example, nodules near the mediastinum versus the peripheral lung fields?

Q3: We have an already cleared CADe device and have updated one of its algorithms. Should we perform another clinical performance assessment (i.e., a reader study)?

Q4: We have a new CADe device and have done standalone testing comparing it to an already cleared CADe device. Our new CADe identified additional cancers and had fewer false positive marks than the cleared device but ours missed some of the cancers detected by the cleared device. Should we perform a clinical performance assessment?

Q5: We have an already cleared CADe device and have changed the prompt format (e.g., masses are now marked with a circle rather than an arrow). Should we perform another clinical performance assessment?

Q6: In a 510(k), can I reuse the test dataset that supported clearance of the predicate CADe device and if so what are the constraints on this reuse?

Q7: Our colon CADe device can be used for both 2D and 3D interpretation. Should we perform clinical tests using both interpretation modes?

The second set of draft sample questions (Q8–Q11) has been developed to provide context to the principles discussed in the CADe clinical performance assessment draft guidance. They may help in developing and conducting a clinical performance assessment of your CADe device to support clearance or approval. Again, please comment on these questions and what you believe would be the expectation of the agency based on the issues presented in the CADe clinical performance assessment draft guidance.

Q8: The guidance calls for the trial readers to be ''representative of the intended population of clinical users.'' Can you give some examples and should the number of readers in each of the subgroups be proportional to the numbers in the population of clinical users?

Q9: We have a new breast CADe device and would like to market it for use with all legally marketed Full Field Digital Mammography (FFDM). Should we perform reader studies with each legally marketed FFDM?

Q10: We have a breast CADe device approved for use with a specific legally marketed Full Field Digital Mammography (FFDM) based on a robust MRMC study. We would like to market it for use with an additional legally marketed FFDM. Should we perform a clinical performance assessment (i.e., reader study) to assess the CADe for use with the new FFDM or is standalone performance data enough to demonstrate comparable results based on the specifications of the device?

Q11: We have improved our legally marketed CADe device and will be submitting a new 510(k) for the upgraded version. Is image reading without CADe a suitable control arm against which to compare the upgraded CADe device?

The agency is seeking input to the previous sample questions and suggestions on additional questions so that it can further refine the guidance and develop a FAQ section to communicate the recommended level of evidence for different premarket submissions. Your input would allow us to consider multiple viewpoints of what is the adequacy of evidence for these devices.

III. Significance of Guidance

These draft guidances are being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidances, when finalized, will represent, respectively, the agency's current thinking on '' Computer-Assisted Detection Devices Applied to Radiology Images and Radiology Device Data—Premarket Notification [510(k)] Submissions'' and on ''Clinical Performance Assessment: Considerations for Computer-Assisted Detection Devices Applied to Radiology Images and Radiology Device Data—Premarket Approval (PMA) and Premarket Notification [510(k)] Submissions.'' The guidance documents do not create or confer any rights for or on any person and do not operate to bind FDA or the public. Alternative approaches may be used if such approaches satisfy the requirements of the applicable statute and regulations.

IV. Electronic Access

Persons interested in obtaining a copy of either draft guidance may do so by using the Internet. To receive ''Computer-Assisted Detection Devices Applied to Radiology Images and Radiology Device Data—Premarket Notification [510(k)] Submissions,'' you may either send an e-mail request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send

a fax request to 301–847–8149 to receive a hard copy. Please use the document number 1697 to identify the draft guidance you are requesting. To receive ''Clinical Performance Assessment: Considerations for Computer-Assisted Detection Devices Applied to Radiology Images and Radiology Device Data—Premarket Approval (PMA) and Premarket Notification [510(k)] Submissions,'' you may either send an e-mail request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to 301–847–8149 to receive a hard copy. Please use the document number 1698 to identify the draft guidance you are requesting.

CDRH maintains an entry on the Internet for easy access to information including text, graphics, and files that may be downloaded to a personal computer with Internet access. Updated on a regular basis, the CDRH home page includes device safety alerts, **Federal Register** reprints, information on premarket submissions (including lists of approved applications and manufacturers' addresses), small manufacturer's assistance, information on video conferencing and electronic submissions, mammography matters, and other device-oriented information. The CDRH web site may be accessed at *http://www.fda.gov/cdrh*. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/cdrh/guidance.html*. Guidance documents are also available at *http://www.regulations.gov*.

V. Paperwork Reduction Act of 1995

These draft guidances contain information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 USC 3501–3520) (the PRA). The collections of information addressed in these draft guidance documents have been approved by OMB in accordance with the PRA under the regulations governing premarket notification submissions (21 CFR part 807, subpart E, OMB No. 0910–0120), premarket approval applications (21 CFR part 814, OMB No. 0910–0231), investigational device exemptions (21 CFR part 812, OMB No. 0910–0078), and humanitarian use devices (21 CFR part 814, OMB No. 0910–0332). The labeling provisions addressed in the ''Computer-Assisted Detection Devices Applied to Radiology Images and Radiology Device Data—Premarket Notification [510(k)] Submissions'' draft guidance have been approved by OMB under OMB No. 0910–0485.

VI. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**), written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: October 15, 2009.

David Horowitz,

Assistant Commissioner for Policy.

[FR Doc. E9–25233 Filed 10–20–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–D–0473]

Guidance for Industry and Food and Drug Administration Staff; Class II Special Controls Guidance Document: Cardiac Allograft Gene Expression Profiling Test Systems; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the special controls guidance document entitled ''Class II Special Controls Guidance Document: Cardiac Allograft Gene Expression Profiling Test Systems.'' This guidance document describes a means by which cardiac allograft gene expression profiling test systems may comply with the requirement of special controls for class II devices. It includes recommendations for validation of performance characteristics and recommendations for product labeling. Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule codifying the classification of cardiac allograft gene expression profiling test systems into class II (special controls), and establishing this guidance document as the special control for this device.

DATES: Submit electronic or written comments on this guidance at any time. General comments on agency guidance documents are welcome at any time.

ADDRESSES: Submit written requests for single copies of the guidance document entitled ''Class II Special Controls Guidance Document: Cardiac Allograft Gene Expression Profiling Test Systems'' to the Division of Small Manufacturers, International, and Consumer Assistance, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 4613, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–847–8149. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit electronic comments to *http://www.regulations.gov*. Submit written comments concerning this guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Kellie B. Kelm, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 5625, Silver Spring, MD 20993, 301–796–6145.

SUPPLEMENTARY INFORMATION:

I. Background

Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule codifying the classification of cardiac allograft gene expression profiling test systems into class II (special controls) under section 513(f)(2) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360c(f)(2)) and establishing this guidance document as the special control for cardiac allograft gene expression profiling test systems classified under that regulation. Section 513(f)(2) of the act provides that any person who submits a premarket notification under section 510(k) of the act (21 U.S.C. 360(k)) for a device that has not previously been classified may, within 30 days after receiving an order classifying the device in class III under section 513(f)(1), request FDA to classify the device under the criteria set forth in section 513(a)(1). FDA shall, within 60 days of receiving such a request, classify the device by written order. This classification shall be the initial classification of the device. Within 30 days after the issuance of an order classifying the device, FDA must publish a notice in the **Federal Register** announcing such classification. Under this authority, on August 26, 2008, FDA by order classified into class II, subject to this special control guidance document, the XDx AlloMap Test.

II. Significance of Special Controls Guidance Documents

FDA believes that adherence to the recommendations described in this guidance document, in addition to the general controls, will provide reasonable assurance of the safety and effectiveness of cardiac allograft gene expression profiling test systems classified under § 862.1163 (21 CFR 862.1163). In order to be classified as a class II device under § 862.1163, a cardiac allograft gene expression profiling test system must comply with the requirement of special controls; manufacturers must address the issues requiring special controls as identified in the guidance documents, either by following the recommendations in the guidance documents or by some other means that provides equivalent assurances of safety and effectiveness.

III. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by using the Internet. To receive ''Class II Special Controls Guidance Document: Cardiac Allograft Gene Expression Profiling Test Systems,'' you may either send an e-mail request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to 301–847–8149 to receive a hard copy. Please use the document number 1686 to identify the guidance you are requesting.

CDRH maintains an entry on the Internet for easy access to information including text, graphics, and files that may be downloaded to a personal computer with Internet access. Updated on a regular basis, the CDRH home page includes device safety alerts, **Federal Register** reprints, information on premarket submissions (including lists of approved applications and manufacturers' addresses), small manufacturer's assistance, information on video conferencing and electronic submissions, Mammography Matters, and other device-oriented information. The CDRH Web site may be accessed at *http://www.fda.gov/cdrh*. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/cdrh/guidance.html*. Guidance documents are also available at *http://www.regulations.gov*.

IV. Paperwork Reduction Act of 1995

Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule establishing as special controls for the cardiac allograft gene expression profiling test systems the guidance document that is the subject of this notice. The preamble to that rule addresses the application of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) to the information collection provisions referenced in this guidance document.

V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) electronic or written comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: October 9, 2009.

Jeffrey Shuren,

Acting Director, Center for Devices and Radiological Health.

[FR Doc. E9–25313 Filed 10–20–09; 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. App.), 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; BSPH Member Conflict Applications.

Date: October 23, 2009.

Time: 3:30 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: Mark P. Rubert, Ph.D, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5218, MSC 7852, Bethesda, MD 20892, 301–435–1775, *rubertm@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(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: October 13, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–25269 Filed 10–20–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center on Minority Health and Health Disparities; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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 Center on Minority Health and Health Disparities Special Emphasis Panel; Conference Grant Review.

Date: November 10, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Prabha L. Atreya, Ph.D, Chief, Office of Scientific Review, National Center on Minority Health and Health Disparities, 6707 Democracy Boulevard, Suite 800, Bethesda, MD 20892, (301) 594–8696, *atreyapr@mail.nih.gov*.

Dated: October 14, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–25287 Filed 10–20–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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 Environmental Health Sciences Special Emphasis Panel; Competitive Revision—Gene-Environment Initiative.

Date: November 10, 2009.

Time: 10 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: NIEHS/National Institutes of Health, Building 4401, East Campus, 79 T.W. Alexander Drive, Research Triangle Park, NC 27709, (Telephone Conference Call).

Contact Person: RoseAnne M McGee, Associate Scientific Review Officer, Scientific Review Branch, Division of Extramural Research and Training, Nat. Institute of Environmental Health Sciences, P.O. Box 12233, MD EC–30, Research Triangle Park, NC 27709, (919) 541–0752, *mcgee1@niehs.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: October 14, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–25285 Filed 10–20–09; 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. App.), 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, The Role of Cardiomyocyte Mitochondria in Heart Disease: An Integrated Approach.

Date: November 5–6, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Sheraton Columbia Hotel, 10207 Wincopin Circle, Columbia, MD 21044.

Contact Person: David A Wilson, Ph.D, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7204, Bethesda, MD 20892–7924. 301–435–0299. *wilsonda2@nhlbi.nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Phase II Clinical Trials of Novel Therapies for Lung Diseases.

Date: November 5, 2009.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: YingYing Li-Smerin, MD, Ph.D, Deputy Chief, Heart and Lung Branch, Office of Scientific Review, National Heart, Lung, and Blood Institute, Rockledge Center II, Room 7184, Bethesda, MD 20892–7924. 301–435–0277 *lismerin@nhlbi.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Research Demonstration and Dissemination Projects.

Date: November 5, 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: Holly K Krull, Ph.D, 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, Program Project in Mental Stress Ischemia.

Date: November 10, 2009.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westin Arlington Gateway, 801 N. Glebe Road, Arlington, VA 22203.

Contact Person: Holly K Krull, Ph.D, 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, Program Project in Atrial Fibrillation.

Date: November 10, 2009.

Time: 10 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: William J Johnson, Ph.D, 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, Program Project in Cardiovascular Diseases.

Date: November 11, 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, Ph.D, 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*.

(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: October 14, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–25284 Filed 10–20–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel, Developmental Genetics.

Date: November 16, 2009.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Room 5B01, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Peter Zelazowski, Ph.D., Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Boulevard, Rm. 5B01, Bethesda, MD 20892–7510. 301–435–6902. *peter.zelazowski@nih.gov.*

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel, Chondrocyte Maturation and Chondrodysplasias.

Date: November 17, 2009.

Time: 11 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Room 5B01, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Peter Zelazowski, Ph.D., Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Boulevard, Rm. 5B01, Bethesda, MD 20892–7510. 301–435–6902. *peter.zelazowski@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: October 14, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–25283 Filed 10–20–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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 Child Health and Human Development Special Emphasis Panel, Women's Reproductive Health.

Date: November 16, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Dennis E. Leszczynski, Ph.D, Scientific Review Officer, Division Of Scientific Review, Eunice Kennedy Shriver National Institute, of Child Health and Human Development, NIH, 6100 Execuctive Blvd., Rm. 5B01, Bethesda, MD 20892. (301) 435–6884. *leszczyd@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: October 14, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–25282 Filed 10–20–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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 Child Health and Human Development Special Emphasis Panel, Bioinformatics Resource.

Date: October 27, 2009.

Time: 2:30 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Room 5B01, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Norman Chang, Ph.D, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health And Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, (301) 496–1485, *changn@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. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: October 14, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–25281 Filed 10–20–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Advisory Council on Nurse Education and Practice; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of the following meeting:

Name: National Advisory Council on Nurse Education and Practice (NACNEP).

Dates and Times: November 19, 2009, 8:30 a.m.–4:30 p.m. November 20, 2009, 8:30 a.m.–4 p.m.

Place: Hilton Washington DC/Rockville Hotel & Executive Meeting Center, 1750 Rockville Pike, Rockville, MD 20852.

Status: The meeting will be open to the public.

Agenda: Agency and Bureau administrative updates will be provided.

Purpose: The purpose of this meeting is to address issues relating to the role of nursing in primary care: implications for workforce. The objectives of the meeting are: (1) Delineate the variety of roles nurses play in primary care including health promotion, screening, public education, illness prevention primary care and management of stable chronic conditions when an expanded, comprehensive definition is used; (2) review and evaluate the data related to education preparation and supply of primary care nurses and advanced practice registered nurses; (3) describe factors that facilitate and sustain primary care practice by qualified, competent advanced practice registered nurses; (4) identify the financial and regulatory barriers to effective, accessible primary care delivered by nurses and recommended strategies for resolution; and (5) review and recommend community-based, nurse-directed models for primary care delivery that are cost effective and produce quality outcomes. Members from professional nursing, public and private organizations will present their initiatives on addressing the role of nursing in primary care. This meeting will form the basis for NACNEP's mandated Tenth Annual Report.

For Further Information Contact: Anyone interested in obtaining a roster of members, minutes of the meeting, or other relevant information can contact Lakisha Smith, Executive Secretary, National Advisory Council on Nurse Education and Practice, Parklawn Building, Room 8C–26, 5600 Fishers Lane, Rockville, Maryland 20857, telephone (301) 443–5688. Information can also be found at the following Web site: *http://bhpr.hrsa.gov/nursing/nacnep.htm.*

Dated: October 14, 2009.

Alexandra Huttinger,

Director, Division of Policy Review and Coordination.

[FR Doc. E9–25276 Filed 10–20–09; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Mechanisms of Diabetes Prevention.

Date: November 16, 2009.

Time: 10 a.m. to 11 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Paul A. Rushing, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 747, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–8895, *rushingp@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; CKD Biomarkers Ancillary Studies.

Date: November 16, 2009.

Time: 12 p.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Paul A. Rushing, Ph.D, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 747, 6707 Democracy Boulevard, Bethesda, Md 20892–5452, (301) 594–8895, *rushingp@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Digestive Diseases and Nutrition Mentored Awards.

Date: November 20, 2009.

Time: 11 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Paul A. Rushing, Ph.D, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 747, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–8895, *rushingp@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; HIV–Associated Nephropathy.

Date: November 30, 2009.

Time: 2 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Barbara A Woynarowska, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Bethesda, MD 20892–5452, (301) 402–7172, *woynarowskab@niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Vitamin D and CKD.

Date: December 2, 2009.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Atul Sahai, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 759, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–2242, *sahaia@niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: October 14, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–25264 Filed 10–20–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose

confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel, SMI Advanced and Developing Centers.
Date: November 10, 2009.
Time: 11 a.m. to 3 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).
Contact Person: Serena P. Chu, Ph.D, Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6154, MSC 9609, Rockville, MD 20892–9609, 301–443–0004, *sechu@mail.nih.gov.*

Name of Committee: National Institute of Mental Health Special Emphasis Panel, Advanced and Developing Intervention and Services Centers.
Date: November 13, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.
Contact Person: Serena P. Chu, Ph.D, Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6154, MSC 9609, Rockville, MD 20892–9609, 301–443–0004, *sechu@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: October 13, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–25267 Filed 10–20–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; NIDA–K Conflicts SEP.
Date: November 3, 2009.
Time: 5:30 p.m. to 7 p.m.
Agenda: To review and evaluate grant applications.
Place: Ritz Carlton Hotel, 1150 22nd Street, NW., Washington, DC 20037.
Contact Person: Gerald L. McLaughlin, Ph.D, Scientific Review Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Blvd., Bethesda, MD 20892–8401, 301–402–6626, *gm145a@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: October 14, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–25299 Filed 10–20–09; 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. App.), 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; Kidney Transplant Rejection Mechanism.
Date: November 12, 2009.
Time: 10 a.m. to 2 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: Priti Mehrotra, Ph.D, Chief, Immunology Review Branch, Scientific Review Program, DEA/NIAID/NIH/DHHS, 6700B Rockledge Drive, Room 3138, Bethesda, MD 20892–7616, 301–435–9369, *pm158b@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)

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–25288 Filed 10–20–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Research Resources; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Research Resources Special Emphasis Panel, ARRA STRB November Meeting 1.
Date: November 16–20, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).
Contact Person: Barbara J. Nelson, Ph.D, Scientific Review Officer, Office of Review, National Center for Research Resources, 6701 Democracy Blvd., Room 1080, 1 Democracy Plaza, Bethesda, MD 20892, 301–435–0806, *nelsonbj@mail.nih.gov.*

Name of Committee: National Center for Research Resources Special Emphasis Panel, STRB G20 AF.
Date: November 16–20, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Barbara J. Nelson, Ph.D, Scientific Review Officer, Office of Review, National Center for Research Resources, 6701 Democracy Blvd., Room 1080, 1 Democracy Plaza, Bethesda, MD 20892, 301–435–0806, *nelsonbj@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research; 93.371, Biomedical Technology; 93.389, Research Infrastructure, 93.306, 93.333; 93.702, ARRA Related Construction Awards., National Institutes of Health, HHS)

Dated: October 14, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–25266 Filed 10–20–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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 Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Small Grants in Endoscopic Research.

Date: December 1, 2009.

Time: 4 p.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Maria E. Davila-Bloom, Ph.D, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 758, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7637, *davila-bloomm@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: October 14, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–25265 Filed 10–20–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

National Communications System

[Docket No. NCS–2009–0004]

President's National Security Telecommunications Advisory Committee

AGENCY: National Communications System, DHS.

ACTION: Notice of a partially closed advisory committee meeting.

SUMMARY: The President's National Security Telecommunications Advisory Committee (NSTAC) will be meeting by teleconference; the meeting will be partially closed to the public.

DATES: November 19, 2009, from 12 p.m. until 1 p.m.

ADDRESSES: The meeting will take place by teleconference. For access to the conference bridge and meeting materials, contact Ms. Sue Daage at (703) 235–5526 or by e-mail at *sue.daage@dhs.gov* by 5 p.m. November 12, 2009. If you desire to submit comments regarding the November 19, 2009 meeting, they must be submitted by November 30, 2009. Comments must be identified by NCS–2009–0004 and may be submitted by *one* of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

E-mail: NSTAC1@dhs.gov. Include docket number in the subject line of the message.

Mail: Office of the Manager, National Communications System (Government Industry Planning and Management Branch), Department of Homeland Security, 245 Murray Lane SW., Washington, DC 20598–0615; Fax: 1–866–466–5370.

Instructions: All submissions received must include the words ''Department of Homeland Security'' and NCS–2009–0004, the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov*, including any personal information provided.

Docket: For access to the docket, background documents or comments received by the NSTAC, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Sue Daage, Government Industry Planning and Management Branch at (703) 235–5526, e-mail: *sue.daage@dhs.gov* or write the Deputy Manager, National Communications System, Department of Homeland Security, 245 Murray Lane SW., Washington, DC 20598–0615.

SUPPLEMENTARY INFORMATION: NSTAC advises the President on issues and problems related to implementing national security and emergency preparedness telecommunications policy. Notice of this meeting is given under the Federal Advisory Committee Act (FACA), Public Law 92–463 (1972), as amended appearing in 5 U.S.C. App. 2. At the upcoming meeting, between 12 p.m. and 12:35 p.m., the NSTAC Principals will receive government stakeholder comments, hold a discussion and vote on the Satellite Task Force Report, and discuss the January–May portion of the NSTAC Work Plan. This portion of the meeting will be open to the public. Between 12:35 p.m. and 1 p.m., the Principals will receive an update on the work of the Cybersecurity Collaboration Task Force.

Persons with disabilities who require special assistance should indicate this when arranging access to the teleconference and are encouraged to identify anticipated special needs as early as possible.

Basis For Closure: During the portion of the meeting to be held from 12:35 p.m. to 1 p.m., the NSTAC will discuss cybersecurity collaboration between the private sector and the Federal Government. Such discussions will likely include identification of network vulnerabilities and strategies for mitigating those vulnerabilities. NSTAC members will likely inform the discussion by contributing confidential and voluntarily-provided commercial information relating to private sector cybersecurity vulnerabilities that they would not customarily release to the public. Disclosure of this information can be reasonably expected to frustrate DHS's ongoing cyber security programs and initiatives, especially the National Cyber Incident Response Plan, and could be used to exploit vulnerabilities in the Federal Government's cyber network. Accordingly, the relevant portion of this meeting will be closed to the public pursuant to 5 U.S.C. 552b(c)(2), (4) and (9)(B).

Dated Signed: October 1, 2009.

James Madon,

Director, National Communications System.

[FR Doc. E9–25345 Filed 10–20–09; 8:45 am]

BILLING CODE 9110–09–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5281–N–78]

Public Housing Operating Fund Program: Operating Budget and Related Form

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

This information collection will ensure that Public Housing Agencies (PHAs) follow sound financial practices and that Federal funds are used for eligible expenditures. PHAs use the information as a financial summary and analysis of immediate and long-term operating programs and plans to provide control over operations and achieve objectives.

DATES: *Comments Due Date: November 20, 2009.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2577–0026) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the information collection described below. This notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Public Housing Operating Fund Program: Operating Budget and Related Form.

OMB Approval Number: 2577–0026.

Form Numbers: HUD–52574.

Description of the Need for the Information and its Proposed Use: This information collection will ensure that Public Housing Agencies (PHAs) follow sound financial practices and that federal funds are used for eligible expenditures. PHAs use the information as a financial summary and analysis of immediate and long-term operating programs and plans to provide control over operations and achieve objectives.

Frequency of Submission: Annually.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	3,141	1		7.651		24,034

Total Estimated Burden Hours: 24,034.

Status: Revision of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: October 13, 2009.

Lillian Deitzer,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. E9–25223 Filed 10–20–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5281–N–77]

HOME Investment Partnerships Program

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

This information describes the eligibility of HOME Investment Partnerships Program (HOME) beneficiaries, the eligibility of proposed HOME activities, HOME program agreements, and HOME Performance reports. The data identifies who benefits from the HOME program and how statutory and regulatory requirements are satisfied. The respondents are State and local government HOME Participating jurisdictions.

DATES: *Comments Due Date:* November 20, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2506–0171) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of

information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: HOME Investment Partnerships Program.

OMB Approval Number: 2506–0171.

Form Numbers: HUD–40093, SF–1199–A, HUD–20755, HUD–40107, and HUD–40107–A.

Description of the Need for the Information and its Proposed Use: This information describes the eligibility of HOME Investment Partnerships Program (HOME) beneficiaries, the eligibility of proposed HOME activities, HOME program agreements, and HOME Performance reports. The data identifies who benefits from the HOME program and how statutory and regulatory requirements are satisfied. The respondents are State and local government HOME Participating jurisdictions.

Frequency of Submission: On occasion, Annually.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	6,671	36.81		2.125		522,103

Total Estimated Burden Hours: 522,103.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: October 13, 2009.

Lillian Deitzer,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. E9–25227 Filed 10–20–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5281–N–76]

Multifamily Contractor's/Mortgagor's Cost Breakdowns and Certifications

AGENCY: Office of the Chief Information Officer, HUD

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

This information is collected from mortgagors and contractors to manage and monitor the process of advancing mortgage proceeds for multifamily mortgages on new or rehabilitated housing.

DATES: *Comments Due Date:* November 20, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0044) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the information collection described below. This notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Multifamily Contractor's/Mortgagor's Cost Breakdowns and Certifications.

OMB Approval Number: 2502–0044.

Form Numbers: HUD–2328, HUS–92330–A, and HUD–2205–A.

Description of the Need for the Information and Its Proposed Use: This information is collected from mortgagors and contractors to manage and monitor the process of advancing mortgage proceeds for multifamily mortgages on new or rehabilitated housing.

Frequency of Submission: On occasion, other, occurs once during the construction stage of a multifamily project.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	350	2.22		7.487		5,840

Total Estimated Burden Hours: 5,840.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: October 13, 2009.

Lillian Deitzer,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. E9–25230 Filed 10–20–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5300–C–23]

HUD's Fiscal Year (FY) 2009 NOFA for the HOPE VI Revitalization Grants Program; Technical Correction

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice; technical correction.

SUMMARY: On July 14, 2009, HUD posted its Notice of Funding Availability (NOFA) for the HOPE VI Revitalization Grants Program for Fiscal Year 2009. The technical corrections to the NOFA are available on the HUD Web site at *http://www.hud.gov/hopevi* and *http://www.hud.gov/offices/adm/grants/nofa09/grphopevirevi.cfm*, and on the Grants.gov Web site at *http://www.grants.gov.* The CFDA number for the HOPE VI Revitalization program is 14.866. The deadline for HOPE VI Revitalization grant applications under this NOFA remains unchanged (November 17, 2009).

FOR FURTHER INFORMATION CONTACT: For questions concerning these technical corrections, please contact Ms. Leigh van Rij, Office of Public Housing Investments, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–5000; telephone (202) 402–5788 (this is not a toll-free number); e-mail *leigh_e._van_rij@hud.gov.* Persons with hearing or speech impairments may access these numbers via TTY by calling the Federal Information Relay Service at (800) 877–8339.

Dated: October 14, 2009.

Sandra B. Henriquez,

Assistant Secretary for Public and Indian Housing.

[FR Doc. E9–25219 Filed 10–20–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[F–14885–A, F–14885–A2; AK–965000–L14100000–KC0000–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision approving the surface estate of certain lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to Qanirtuuq, Inc. The lands are in the vicinity of Quinhagak, Alaska, and are located in:

Seward Meridian, Alaska

T. 5 S., R. 72 W.,
Secs. 7, 18, 19, 30, and 31.
Containing 3,032.20 acres.
T. 7 S., R. 72 W.,
Sec. 5.
Containing 639.83 acres.
T. 5 S., R. 73 W.,
Secs. 1, 2, and 3;
Secs. 10 to 15, inclusive.
Containing approximately 5,613 acres.
T. 6 S., R. 73 W.,
Secs. 1, 2, 5, and 6;
Sec. 8, 9, 12, and 15;
Secs. 16, 22, 26, and 36.
Containing approximately 7,650.66 acres.
T. 7 S., R. 73 W.,
Secs. 6, 7, and 8;
Secs. 17 to 21, inclusive;
Secs. 28, 29, and 30;
Secs. 32 and 33.
Containing approximately 6,060 acres.
T. 3 S., R. 74 W.,
Secs. 1, 12, 13, and 24;
Secs. 25 and 36.
Containing approximately 3,386 acres.
T. 4 S., R. 74 W.,
Secs. 1, 12, 13, and 24.
Containing approximately 1,961 acres.
T. 6 S., R. 74 W.,
Secs. 1, 12, 13, and 24;
Secs. 25, 34, 35, and 36.
Containing approximately 4,215.67 acres.
T. 7 S., R. 74 W.,
Secs. 1 and 2;
Secs. 11, 12, and 13.
Containing approximately 1,543.28 acres.
T. 3 S., R. 75 W.,
Secs. 24, 25, and 36.
Containing approximately 543 acres.
Aggregating approximately 34,645 acres.

The subsurface estate in these lands will be conveyed to Calista Corporation when the surface estate is conveyed to Qanirtuuq, Inc. Notice of the decision will also be published four times in The Tundra Drums.

DATES: The time limits for filing an appeal are:

1. Any party claiming a property interest which is adversely affected by the decision shall have until November 20, 2009 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

FOR FURTHER INFORMATION CONTACT: The Bureau of Land Management by phone at 907–271–5960, or by e-mail at *ak.blm.conveyance@ak.blm.gov.* Persons who use a telecommunication device (TTD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, 24 hours a day, seven days a week, to contact the Bureau of Land Management.

Suzette Claypool,

Land Law Examiner, Land Transfer Adjudication II Branch.

[FR Doc. E9–25309 Filed 10–20–09; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNV952000–10–L14200000–BJ0000; 10–08807; TAS: 14X1109]

Filing of Plats of Survey; Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The purpose of this notice is to inform the public and interested State and local government officials of the filing of Plats of Survey in Nevada.

DATES: *Effective Dates:* Filing is effective at 10 a.m. on the dates indicated below.

FOR FURTHER INFORMATION CONTACT: David D. Morlan, Chief, Branch of Geographic Sciences, Bureau of Land Management (BLM), Nevada State Office, 1340 Financial Blvd., P.O. Box 12000, Reno, Nevada 89520, 775–861–6541.

SUPPLEMENTARY INFORMATION:

1. The Plats of Survey of the following described lands were officially filed at the Nevada State Office, Reno, Nevada, on August 6, 2009:

The plat representing the dependent resurvey of portions of the south and east boundaries and a portion of the

subdivisional lines of Township 22 South, Range 62 East, Mount Diablo Meridian, Nevada, under Group No. 849, was accepted August 4, 2009.

The plat, in four (4) sheets, representing the dependent resurvey of portions of the west and north boundaries and a portion of the subdivisional lines, and the subdivision of sections 6, 7 and 18, Township 23 South, Range 63 East, Mount Diablo Meridian, Nevada, under Group No. 850, was accepted August 4, 2009.

These surveys were executed to meet certain needs of the Bureau of Land Management.

2. The Plat of Survey of the following described lands was officially filed at the Nevada State Office, Reno, Nevada, on September 30, 2009:

The plat, representing the dependent resurvey of a portion of the Nevada-Utah State Line, from Mile Post 108+7.00 Chains to Witness Mile Post 106 and a portion of the subdivisional lines, and the subdivision of certain sections, Township 22 North, Range 70 East, Mount Diablo Meridian, Nevada, under Group No. 864, was accepted September 30, 2009.

This survey was executed to meet certain administrative needs of the Confederated Tribes of Goshute and the Bureau of Indian Affairs.

3. The Plat of Survey of the following described lands will be officially filed at the Nevada State Office, Reno, Nevada, on the first business day after thirty (30) days from the publication of this notice:

The plat, representing the survey of the west boundary, a portion of the north boundary and a portion of the subdivisional lines of Township 12 North, Range 31, Mount Diablo Meridian, Nevada, under Group No. 865, was accepted October 1, 2009.

This survey was executed to meet certain administrative needs of the Walker River Paiute Tribe and the Bureau of Indian Affairs.

4. Subject to valid existing rights, the provisions of existing withdrawals and classifications, the requirement of applicable laws, and other segregations of record, these lands are open to application, petition and disposal, including application under the mineral leasing laws. All such valid applications received on or before the official filing of the Plats of Survey described in paragraph 3, shall be considered as simultaneously filed at that time. Applications received thereafter shall be considered in order of filing.

5. The above-listed surveys are now the basic record for describing the lands for all authorized purposes. These surveys have been placed in the open files in the BLM Nevada State Office and are available to the public as a matter of information. Copies of the surveys and related field notes may be furnished to the public upon payment of the appropriate fees.

Dated: October 8, 2009.

David D. Morlan,

Chief Cadastral Surveyor, Nevada.

[FR Doc. E9–25295 Filed 10–20–09; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

DEPARTMENT OF AGRICULTURE

Forest Service

[LLNV912000.L12200000.PM0000. LXSS006F0000;1 10–08807; TAS: 14X1109]

Notice of Public Meeting: Recreation Subcommittee of the Resource Advisory Councils, NV.

AGENCIES: Bureau of Land Management, Interior and Forest Service, Agriculture.

ACTION: Notice of Recreation Advisory Subcommittee Meeting.

SUMMARY: In accordance with the Federal Lands Recreation Enhancement Act of 2004 (FLREA) (Pub. L. 108–447), the Humboldt-Toiyabe National Forest and Bureau of Land Management (BLM) Nevada joint Recreation Subcommittee will hold a meeting to discuss fee proposals at campgrounds managed by the Forest Service. The subcommittee is comprised of members of the BLM's three Nevada Resource Advisory Councils (RACs).

DATES: *Date and Time:* Wednesday, November 18, 2009, from 1 p.m. to 5 p.m. A general public comment period, where the public may submit oral or written comments to the Recreation Subcommittee will begin at 4:30 p.m. unless otherwise listed in the final meeting agenda. A news release will be sent to local and regional media at least 14 days before the meeting.

ADDRESSES: California Trail Interpretive Center, Hunter Exit, Interstate-80, Elko, Nevada.

FOR FURTHER INFORMATION CONTACT: Barbara Keleher, Outdoor Recreation Planner, telephone (775) 861–6628, BLM Nevada State Office, 1340 Financial Blvd., Reno, Nevada.

SUPPLEMENTARY INFORMATION: FLREA directs the Secretaries of the Interior and Agriculture to establish Recreation Resource Advisory Committees to provide advice and recommendations on recreation fees and fee areas in each State or region for Federal recreational lands and waters managed by the BLM or Forest Service. Nevada's recreation subcommittee includes members of the three existing BLM Nevada RACs and has responsibilities pertaining to both BLM and Forest Service managed Federal lands and waters according to a national interagency agreement between the Forest Service and BLM. This subcommittee will recommend new amenity fees and fee change proposals to the respective RAC(s) for each geographic region.

All meetings are open to the public. A final agenda will be available at *http://www.blm.gov/nv/st/en/res/resource_advisory/recreation_rac.html.* Individuals who need special assistance such as sign language interpretation or other reasonable accommodations may contact Barbara Keleher no later than 10 days prior to the meeting.

Ron Wenker,

BLM Nevada State Director.

Edward C. Monnig,

U.S. Forest Service, Supervisor, Humboldt-Toiyabe National Forest.

[FR Doc. E9–25291 Filed 10–20–09; 8:45 am]

BILLING CODE 4310–HC–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–689]

In the Matter of: Certain Dual Access Locks and Products Containing 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 September 15, 2009, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Safe Skies, LLC of Brooklyn, New York and David Tropp of Brooklyn, New York. An amended complaint was filed on October 5, 2009. The amended 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 dual access locks and products containing same by reason of infringement of certain claims of U.S. Patent Nos. 7,021,537 and 7,036,728. The amended 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 a cease and desist order.

ADDRESSES: The amended 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: Rett Snotherly, Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2599.

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 (2009).

Scope of Investigation: Having considered the amended complaint, the U.S. International Trade Commission, on October 14, 2009, 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 dual access locks or products containing same that infringe one or more of claims 1–21 of U.S. Patent No. 7,021,537 and claims 1–20 of U.S. Patent No. 7,036,728, 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—

Safe Skies, LLC, 165 Norfolk Street, Brooklyn, NY 11235

David Tropp, 165 Norfolk Street, Brooklyn, NY 11235

(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:

C&C Luggage Manufacturing Co., Ltd., No. 1, Crown Road, The Second Ind. Park, Sanxiang, Zhongshan, Guangdong, China

Formosa Tai Rank Industrial Corp., Room 1102, 11th Floor, 328 Sung Chiang Road, Taipei, Taiwan, 104, Hangzhou Gema Suitcases & Bags Co., Ltd

M16–1–5 Hangshou Economic and Technologic Development Zone, Hangzhou, Zhejiang, China

La Pearl Luggage and Leather Goods Co., Ltd., No. 441, Xihuan Road, Jiangmen Guangdong, 529000 China

Hinomoto Jomae, Ltd. 1–19–19 Nishigahara, Kita-Ku, Tokyo, Japan

Sinox Company, Ltd. 3F, No. 2, Lane 93, Chien-1 Road, Chung-Ho City, Taipei Hsien, 235, Taiwan

Yi Feng Manufacturing, Co., Ltd. Zhangyang Zone, Shangmutou Town, Dongguan City, China 523637

Jin Tay Industries Co., Ltd. 486 Section 3, Ming Chih Road, Taishan Hsiang, Taipei Hsien, Taiwan

FULLYEAR-Brother Enterprise, Co., Ltd., 41–21, Guan Tso Street, Fu Shing, Changhwa Taiwan, 506

Zhuhai SkyGood Tech. Industrial Corp., Ltd., 4/F., 3rd Building, 30 Nanwan Road (north), Nanping, Zhuhai, Guangdong, China

Ningbo Xianfeng Art & Craft Co., Ltd., Room B–303, Zhongshanyinzuo, No. 579, Zhongshan East Road, Ningbo, China

Paloma Enterprises Co., Ltd., 3F, No. 1320, Chung-Cheng Road, Taoyun City, Taiwan

Tekraft Industrial Co., Ltd., Room 5E10, No. 5 Hsin Yi Road, Sec. 5, Taipei, Taiwan

Hangzhou Travelsky Co., Ltd., 1–6–G Guodu Development Building, 182 Zhaohui Road, Hangshou, China

The Sun Lock Company Ltd., Room 5, Block C, 16/F, Hang Wai, Industrial Center, 6 Kin Tai Street, Tuen Mun, New Territories, Hong Kong

Alloy Metal Manufactory, Ltd., Flat H, 3/F, On Ho Industrial Building, 17–19 Shing Wan Road, Tai Wai, Shatin, New Territories, Hong Kong

Cometform, Ltd., Unit 24 Irving Way, Garrick Industrial Estate, Hendon, London NW9 6AQ, England

Design Go Ltd., Unit 1, Mill Hill Industrial Estate, Flower Lane, London NW7 2HU, England

Franzen International, S. Franzen Sohne GmbH, Fuerbachstrasse 8, D–42719 Solingen, Germany

M–Power Lock Manufactory, Unit 2702, Modern Warehouse, 6 Shing Yip Street, Kwun Tong, Kowloon, Hong Kong

(c) The Commission investigative attorney, party to this investigation, is Rett Snotherly, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, the Honorable Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the amended 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 amended complaint and the notice of investigation. Extensions of time for submitting responses to the amended 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 amended complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the amended 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 amended 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 a respondent.

Issued: October 14, 2009.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–25245 Filed 10–20–09; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1047 (Review)]

Ironing Tables From China

AGENCY: United States International Trade Commission.

ACTION: Notice of Commission determination to conduct a full five-year

review concerning the antidumping duty order on ironing tables from China.

SUMMARY: The Commission hereby gives notice that it will proceed with a full review pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)) to determine whether revocation of the antidumping duty order on ironing tables from China would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. A schedule for the review will be established and announced at a later date. 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:* October 5, 2009.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired 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: On October 5, 2009, the Commission determined that it should proceed to a full review in the subject five-year review pursuant to section 751(c)(5) of the Act. The Commission found that both the domestic and respondent interested party group responses to its notice of institution (74 FR 31755, July 2, 2009) were adequate. 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.

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: October 14, 2009.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–25247 Filed 10–20–09; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1046 (Review)]

Tetrahydrofurfuryl Alcohol From China

AGENCY: United States International Trade Commission.

ACTION: Scheduling of an expedited five-year review concerning the antidumping duty order on tetrahydrofurfuryl alcohol 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 tetrahydrofurfuryl alcohol 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:* October 5, 2009.

FOR FURTHER INFORMATION CONTACT: Angela M.W. Newell (202–708–5409), 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 October 5, 2009, the Commission determined that the domestic interested party group response to its notice of institution (74 FR 31752, July 2, 2009) 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 November 2, 2009, 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 November 5, 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 November 5, 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).

[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 Penn A Kem LLC to be individually adequate. Comments from other interested parties will not be accepted (*see* 19 CFR 207.62(d)(2)).

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.

By order of the Commission.

Issued: October 16, 2009.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–25319 Filed 10–20–09; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–208 (Third Review)]

Barbed Wire and Barbless Wire Strand From Argentina

AGENCY: United States International Trade Commission.

ACTION: Termination of five-year review.

SUMMARY: The subject five-year review was initiated in August 2009 to determine whether revocation of the antidumping duty order on barbed wire and barbless wire strand from Argentina would be likely to lead to continuation or recurrence of material injury. On October 1, 2009, the Department of Commerce published notice that it was revoking the order effective September 20, 2009, ''{b}ecause the domestic interested parties did not participate in this sunset review * * *'' (74 FR 50775). Accordingly, pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)), the subject review is terminated.

DATES: *Effective Date:* October 1, 2009.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*).

Authority: This review is being terminated under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.69 of the Commission's rules (19 CFR 207.69).

Issued: October 14, 2009.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–25251 Filed 10–20–09; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–770–773 and 775 (Second Review)]

Stainless Steel Wire Rod From Italy, Japan, Korea, Spain, and Taiwan

AGENCY: United States International Trade Commission.

ACTION: Notice of Commission determination to conduct full five-year reviews concerning the antidumping duty orders on stainless steel wire rod from Italy, Japan, Korea, Spain, and Taiwan.

SUMMARY: The Commission hereby gives notice that it will proceed with full reviews pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)) to determine whether revocation of the antidumping duty orders on stainless steel wire rod from Italy, Japan, Korea, Spain, and Taiwan would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. A schedule for the reviews will be established and announced at a later date. For further information concerning the conduct of these reviews 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:* October 5, 2009.

FOR FURTHER INFORMATION CONTACT: Edward Petronzio (202–205–3176), 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 these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION: On October 5, 2009, the Commission determined that it should proceed to full reviews in the subject five-year reviews pursuant to section 751(c)(5) of the Act. The Commission found that the domestic interested party group response to its notice of institution (74 FR 31765, July 2, 2009) was adequate and that the respondent interested party group responses with respect to Italy and Korea were adequate and decided to conduct full reviews with respect to the antidumping duty orders concerning stainless steel wire rod from Italy and Korea. The Commission found that the respondent interested party group responses with respect to Japan, Spain, and Taiwan were inadequate. However, the Commission determined to conduct full reviews concerning the antidumping duty orders on stainless steel wire rod from Japan, Spain, and Taiwan to promote administrative efficiency in light of its decision to conduct full reviews with respect to the antidumping duty orders concerning stainless steel wire rod from Italy and Korea. 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.

Authority: These reviews are 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: October 14, 2009.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–25250 Filed 10–20–09; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–44 (Third Review)]

Sorbitol From France

AGENCY: United States International Trade Commission.

ACTION: Notice of Commission determination to conduct a full five-year review concerning the antidumping duty order on sorbitol from France.

SUMMARY: The Commission hereby gives notice that it will proceed with a full review pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)) to determine whether revocation of the antidumping duty order on sorbitol from France would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. A schedule for the review will be established and announced at a later date. 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:* October 5, 2009.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired 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: On October 5, 2009, the Commission determined that it should proceed to a full review in the subject five-year review pursuant to section 751(c)(5) of the Act. The Commission found that the domestic interested party group response to its notice of institution (74 FR 31762, July 2, 2009) was adequate and that the respondent interested party group response was inadequate. The Commission also found that other circumstances warranted conducting a full review.[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.

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.

[1] Commissioners Irving A. Williamson and Dean A. Pinkert found that no other circumstances warranted conducting a full review and voted for an expedited review.

By order of the Commission.

Issued: October 14, 2009.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–25249 Filed 10–20–09; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–1043–1045 (Review)]

Polyethylene Retail Carrier Bags From China, Malaysia, and Thailand

AGENCY: United States International Trade Commission.

ACTION: Notice of Commission determination to conduct full five-year reviews concerning the antidumping duty orders on polyethylene retail carrier bags from China, Malaysia, and Thailand.

SUMMARY: The Commission hereby gives notice that it will proceed with full reviews pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)) to determine whether revocation of the antidumping duty orders on polyethylene retail carrier bags from China, Malaysia, and Thailand would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. A schedule for the reviews will be established and announced at a later date. For further information concerning the conduct of these reviews 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:* October 5, 2009.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired 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 these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION: On October 5, 2009, the Commission determined that it should proceed to full reviews in the subject five-year reviews pursuant to section 751(c)(5) of the Act. The Commission found that the domestic interested party group response to its notice of institution (74 FR 31750, July 2, 2009) was adequate and that the respondent interested party group response with respect to Malaysia was adequate and decided to conduct a full review with respect to the antidumping duty order concerning polyethylene retail carrier bags from Malaysia. The Commission found that the respondent interested party group responses with respect to China and Thailand were inadequate. However, the Commission determined to conduct full reviews concerning the antidumping duty orders on polyethylene retail carrier bags from China and Thailand to promote administrative efficiency in light of its decision to conduct a full review with respect to the antidumping duty order concerning polyethylene retail carrier bags from Malaysia. 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.

Authority: These reviews are 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: October 14, 2009.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–25248 Filed 10–20–09; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–149 (Third Review)]

Barium Chloride From China

AGENCY: United States International Trade Commission.

ACTION: Notice of Commission determination to conduct a full five-year review concerning the antidumping duty order on barium chloride from China.

SUMMARY: The Commission hereby gives notice that it will proceed with a full review pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)) to determine whether revocation of the antidumping duty

order on barium chloride from China would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. A schedule for the review will be established and announced at a later date. 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:* October 5, 2009.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired 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: On October 5, 2009, the Commission determined that it should proceed to a full review in the subject five-year review pursuant to section 751(c)(5) of the Act. The Commission found that the domestic interested party group response to its notice of institution (74 FR 31757, July 2, 2009) was adequate and that the respondent interested party group response was inadequate. The Commission also found that other circumstances warranted conducting a full review.[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.

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.

By order of the Commission.

Issued: October 14, 2009.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–25246 Filed 10–20–09; 8:45 am]

BILLING CODE 7020–02–P

[1] Commissioners Charlotte R. Lane, Irving A. Williamson, and Dean A. Pinkert found that no other circumstances warranted conducting a full review and voted for an expedited review.

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–394–A & 399–A (Second Review) (Remand)]

Ball Bearings From Japan and the United Kingdom

AGENCY: United States International Trade Commission.

ACTION: Notice of remand proceedings.

SUMMARY: The U.S. International Trade Commission (''Commission'') hereby gives notice of its second remand proceedings with respect to its affirmative determinations in the five-year reviews of the antidumping orders on ball bearings from Japan and the United Kingdom. For further information concerning the conduct of this proceeding 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, subpart A (19 CFR part 207).

DATES: *Effective Date:* October 14, 2009.

FOR FURTHER INFORMATION CONTACT: James McClure, Office of Investigations, telephone 202–205–3191, or David Goldfine, Office of General Counsel, telephone 202–708–5452, 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).*

SUPPLEMENTARY INFORMATION:

Background.—In June 2006, the Commission unanimously determined that revocation of the antidumping duty orders on ball bearings from France, Germany, Italy, Japan, and the United Kingdom would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonable foreseeable time. The Commission's determinations for Japan and the United Kingdom were appealed to the Court of International Trade (the ''Court''). On September 9, 2008, the Court issued a decision remanding the matter to the Commission for further proceedings. *NSK* v. *United States,* Slip Op. 08–95 (Ct. Int'l Trade, Sept. 9, 2008) (*NSK I*). In its opinion, the Court issued an order instructing the Commission to (1) ''[C]onduct a *Bratsk* analysis of non-subject imports as outlined in this opinion;''(2) ''reassess supply conditions within the domestic industry,'' *i.e.,* the industry's restructuring efforts during the period of review, and (3) ''reexamine its findings with regard to likely impact and its decision to cumulate imports from the United Kingdom in light of changes in its determinations that may result as a consequence of the foregoing remand instructions.''

On October 8, 2008, in accordance with the Court's order, the Commission initiated remand proceedings in the above-captioned reviews. The notice of initiation for the remand proceeding was published in the **Federal Register** at 73 FR 63217 (Oct. 20, 2008). The Commission re-opened its record to obtain information to conduct a *Bratsk* analysis of non-subject imports as outlined in the Court's opinion. The Commission also permitted parties to file comments pertaining to the specific issues that are the subject of the Court's remand instructions and to comment on the new information obtained on remand. *Id.*

On October 9, 2008, the Commission filed a motion for reconsideration with the Court. In the motion, the Commission requested that the Court reconsider its decision in light of the Federal Circuit's decision, *Mittal Steel Point Lisas Limited* v. *United States,* Court No. 2007–1552 (September 18, 2008) (*Mittal*). In its motion, the Commission also requested that the CIT issue a stay of the remand proceeding pending the Court's disposition of the Commission's motion for reconsideration. Defendant-Intervenor The Timken Company (''Timken'') filed a similar motion for reconsideration and a motion to stay the remand proceeding.

On October 29, 2008, the CIT granted the requests of the Commission and Timken to stay the Commission's remand proceeding pending its reconsideration of the Commission's and Timken's motions for reconsideration. Accordingly, the Commission stayed its remand proceeding on November 17, 2008 pending the Court's ruling on the motions for reconsideration. On December 29, 2008, the Court denied the motions for reconsideration by the Commission and Timken. *NSK Corp. et al.* v. *United States,* Slip Op. 08–145

(Dec. 29, 2008) (*NSK II*). Accordingly, on February 6, 2009, the Commission published a notice that it was resuming its remand proceeding. The Commission provided parties with an opportunity to file comments on the Court's remand instructions and the evidence obtained on remand, and directed that they be filed by March 23, 2009. 74 FR 6174.

The Commission also prepared a supplemental staff report regarding non-subject producer questionnaire information gathered in the remand proceeding. On March 23, 2009, comments on the remand were filed by petitioner The Timken Company, and the Japanese and United Kingdom respondents JTEKT Corp., Koyo Corp. of U.S.A., NSK Corporation, NSK Ltd., and NSK Europe Ltd. On May 4, 2009, the Commission issued its remand determinations in *Ball Bearings from Japan and the United Kingdom,* 731–TA–394A & 399A, (Second Review) (Remand), USITC Pub. 4082 (May 2009). By unanimous vote, the Commission again determined that revocation of the antidumping duty orders on ball bearings from France, Germany, Italy, Japan, and the United Kingdom would likely result in continuation or recurrence of material injury within a reasonably foreseeable time.

On August 31, 2009, the CIT issued an opinion in *NSK Corp. et al.* v. *United States,* Slip Op. 09–91 (*NSK III*), again remanding the Commission's affirmative determinations in *Certain Bearings and Parts Thereof from Japan and the United Kingdom,* Inv. Nos. 731–TA–394–A & 399–A (Second Review) (Remand), USITC Pub. 4082 (May 2009). In *NSK III,* the Court has remanded the same three issues which it previously remanded for further explanation in *NSK I* and *NSK II.* First, the Court remanded the Commission's analysis of non-subject imports, with instructions to ''to determine whether, in light of the significant presence of non-subject imports, the subject imports are more than a mere minimal or tangential factor in the material injury to the domestic industry that is likely to continue or recur in the absence of the antidumping duty order.'' *NSK III* at 29. Second, the Court directed the Commission to ''provide a more careful and reasoned explanation of (1) the large scale restructuring within the ball bearing industry and (2) the significant rise in non-subject imports in the U.S. market'' as part of its cumulation analysis of the subject imports from the United Kingdom. *Id.* Third, the Court directed the Commission to ''revisit its determination on the vulnerability of the domestic market and the likely impact of subject imports on the domestic market.'' *Id.* at 30.

The Court has ordered the Commission to file its remand determination with the Court by January 5, 2010.

Participation in the proceeding.—Only those persons who were interested parties to the reviews (*i.e.,* persons listed on the Commission Secretary's service list) and parties to the appeal may participate in the remand proceeding. Such persons need not make any additional filings with the Commission to participate in the remand proceeding, unless they are adding new individuals to the list of persons entitled to receive business proprietary information under administrative protective order. Business proprietary information (''BPI'') referred to during the remand proceeding will be governed, as appropriate, by the administrative protective order issued in the reviews.

Written submissions.—The Commission is not re-opening the record in this remand proceeding. The Commission will permit the parties to file comments pertaining to the specific issues that are the subject of the Court's remand instructions and, in this regard, may comment on the new information obtained on remand. Comments should be limited to no more than fifteen (15) double-spaced and single-sided pages of textual material. No appendices or other attachments are allowed. The parties may not themselves submit any new factual information in their comments and may not address any issue other than those that are the subject of the Court's remand instructions. Any such comments must be filed with the Commission no later than October 23, 2009.

All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also 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 (Nov. 8, 2002).

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigation must be served on all other parties to the investigation (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.

Parties are also advised to consult with the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subpart A (19 CFR part 207) for provisions of general applicability concerning written submissions to the Commission.

Issued: October 14, 2009.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–25244 Filed 10–20–09; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

Summary of Commission Practice Relating to Administrative Protective Orders

AGENCY: U.S. International Trade Commission.

ACTION: Summary of Commission practice relating to administrative protective orders.

SUMMARY: Since February 1991, the U.S. International Trade Commission (''Commission'') has issued an annual report on the status of its practice with respect to violations of its administrative protective orders (''APOs'') in investigations under Title VII of the Tariff Act of 1930 in response to a direction contained in the Conference Report to the Customs and Trade Act of 1990. Over time, the Commission has added to its report discussions of APO breaches in Commission proceedings other than under Title VII and violations of the Commission's rules including the rule on bracketing business proprietary information (''BPI'') (the ''24-hour rule''), 19 CFR 207.3(c). This notice provides a summary of investigations completed during calendar year 2008 of breaches in proceedings under Title VII, section 337 of the Tariff Act of 1930 and section 421 of the Trade Act of 1974. In addition, there is a summary of rules violation investigations completed in 2008. The Commission intends that this report inform representatives of parties to Commission proceedings as to some specific types of APO breaches and rules violations encountered by the Commission and the corresponding types of actions the Commission has taken.

FOR FURTHER INFORMATION CONTACT: Carol McCue Verratti, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone (202) 205–3088. Hearing impaired individuals

are advised that information on this matter can be obtained by contacting the Commission's TDD terminal at (202) 205–1810. General information concerning the Commission can also be obtained by accessing its Internet server (*http://www.usitc.gov*).

SUPPLEMENTARY INFORMATION: Representatives of parties to investigations or other proceedings conducted under Title VII of the Tariff Act of 1930, sections 202 and 204 of the Trade Act of 1974, section 421 of the Trade Act of 1974, section 337 of the Tariff Act of 1930, and North American Free Trade Agreement (NAFTA) Article 1904.13, 19 U.S.C. 1516a(g)(7)(A) may enter into APOs that permit them, under strict conditions, to obtain access to BPI (Title VII) or confidential business information (''CBI'') (section 421, sections 201–204, and section 337) of other parties. See 19 U.S.C. 1677f; 19 CFR 207.7; 19 CFR 207.100, *et seq.;* 19 U.S.C. 2252(i); 19 U.S.C. 2451a(b)(3); 19 CFR 206.17; 19 U.S.C. 1337(n); 19 CFR 210.5, 210.34. The discussion below describes APO breach investigations and rules violation investigations that the Commission has completed during calendar year 2008, including a description of actions taken in response to these breaches and rules violations.

Since 1991, the Commission has published annually a summary of its actions in response to violations of Commission APOs and the 24-hour rule. *See* 56 FR 4846 (Feb. 6, 1991); 57 FR 12335 (Apr. 9, 1992); 58 FR 21991 (Apr. 26, 1993); 59 FR 16834 (Apr. 8, 1994); 60 FR 24880 (May 10, 1995); 61 FR 21203 (May 9, 1996); 62 FR 13164 (March 19, 1997); 63 FR 25064 (May 6, 1998); 64 FR 23355 (April 30, 1999); 65 FR 30434 (May 11, 2000); 66 FR 27685 (May 18, 2001); 67 FR 39425 (June 7, 2002); 68 FR 28256 (May 23, 2003); 69 FR 29972 (May 26, 2004); 70 FR 42382 (July 25, 2005); 71 FR 39355 (July 12, 2006); 72 FR 50119 (August 30, 2007); and 73 FR 51843 (Sept. 5, 2008). This report does not provide an exhaustive list of conduct that will be deemed to be a breach of the Commission's APOs. APO breach inquiries are considered on a case-by-case basis.

As part of the effort to educate practitioners about the Commission's current APO practice, the Commission Secretary issued in March 2005 a fourth edition of *An Introduction to Administrative Protective Order Practice in Import Injury Investigations* (Pub. No. 3755). This document is available upon request from the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, tel. (202) 205–2000 and on the Commission's Web site at *http://www.usitc.gov.*

I. In General

The current APO form for antidumping and countervailing duty investigations, which was revised in March 2005, requires the applicant to swear that he or she will:

(1) Not divulge any of the BPI disclosed under this APO or otherwise obtained in this investigation and not otherwise available to him or her, to any person other than—

(i) Personnel of the Commission concerned with the investigation,

(ii) The person or agency from whom the BPI was obtained,

(iii) A person whose application for disclosure of BPI under this APO has been granted by the Secretary, and

(iv) Other persons, such as paralegals and clerical staff, who (a) are employed or supervised by and under the direction and control of the authorized applicant or another authorized applicant in the same firm whose application has been granted; (b) have a need thereof in connection with the investigation; (c) are not involved in competitive decisionmaking for an interested party which is a party to the investigation; and (d) have signed the acknowledgment for clerical personnel in the form attached hereto (the authorized applicant shall also sign such acknowledgment and will be deemed responsible for such persons' compliance with this APO);

(2) Use such BPI solely for the purposes of the above-captioned Commission investigation or for judicial or binational panel review of such Commission investigation;

(3) Not consult with any person not described in paragraph (1) concerning BPI disclosed under this APO or otherwise obtained in this investigation without first having received the written consent of the Secretary and the party or the representative of the party from whom such BPI was obtained;

(4) Whenever materials *e.g.,* documents, computer disks, *etc.* containing such BPI are not being used, store such material in a locked file cabinet, vault, safe, or other suitable container (N.B.: storage of BPI on so-called hard disk computer media is to be avoided, because mere erasure of data from such media may not irrecoverably destroy the BPI and may result in violation of paragraph C of this APO);

(5) Serve all materials containing BPI disclosed under this APO as directed by the Secretary and pursuant to section 207.7(f) of the Commission's rules;

(6) Transmit each document containing BPI disclosed under this APO:

(i) With a cover sheet identifying the document as containing BPI,

(ii) With all BPI enclosed in brackets and each page warning that the document contains BPI,

(iii) If the document is to be filed by a deadline, with each page marked ''Bracketing of BPI not final for one business day after date of filing,'' and

(iv) If by mail, within two envelopes, the inner one sealed and marked ''Business Proprietary Information—To be opened only by [name of recipient]'', and the outer one sealed and not marked as containing BPI;

(7) Comply with the provision of this APO and section 207.7 of the Commission's rules;

(8) Make true and accurate representations in the authorized applicant's application and promptly notify the Secretary of any changes that occur after the submission of the application and that affect the representations made in the application (*e.g.,* change in personnel assigned to the investigation);

(9) Report promptly and confirm in writing to the Secretary any possible breach of this APO; and

(10) Acknowledge that breach of this APO may subject the authorized applicant and other persons to such sanctions or other actions as the Commission deems appropriate, including the administrative sanctions and actions set out in this APO.

The APO further provides that breach of an APO may subject an applicant to:

(1) Disbarment from practice in any capacity before the Commission along with such person's partners, associates, employer, and employees, for up to seven years following publication of a determination that the order has been breached;

(2) Referral to the United States Attorney;

(3) In the case of an attorney, accountant, or other professional, referral to the ethics panel of the appropriate professional association;

(4) Such other administrative sanctions as the Commission determines to be appropriate, including public release of, or striking from the record any information or briefs submitted by, or on behalf of, such person or the party he represents; denial of further access to business proprietary information in the current or any future investigations before the Commission, and issuance of a public or private letter of reprimand; and

(5) Such other actions, including but not limited to, a warning letter, as the

Commission determines to be appropriate.

APOs in investigations other than those under Title VII contain similar, though not identical, provisions.

Commission employees are not signatories to the Commission's APOs and do not obtain access to BPI through APO procedures. Consequently, they are not subject to the requirements of the APO with respect to the handling of CBI and BPI. However, Commission employees are subject to strict statutory and regulatory constraints concerning BPI and CBI, and face potentially severe penalties for noncompliance. *See* 18 U.S.C. 1905; Title 5, U.S. Code; and Commission personnel policies implementing the statutes. Although the Privacy Act (5 U.S.C. 552a) limits the Commission's authority to disclose any personnel action against agency employees, this should not lead the public to conclude that no such actions have been taken.

An important provision of the Commission's Title VII and safeguard rules relating to BPI/CBI is the ''24-hour'' rule. This rule provides that parties have one business day after the deadline for filing documents containing BPI/CBI to file a public version of the document. The rule also permits changes to the bracketing of information in the proprietary version within this one-day period. No changes—other than changes in bracketing—may be made to the proprietary version. The rule was intended to reduce the incidence of APO breaches caused by inadequate bracketing and improper placement of BPI/CBI. The Commission urges parties to make use of the rule. If a party wishes to make changes to a document other than bracketing, such as typographical changes or other corrections, the party must ask for an extension of time to file an amended document pursuant to section 201.14(b)(2) of the Commission's rules.

II. Investigations of Alleged APO Breaches

Upon finding evidence of an APO breach or receiving information that there is a reason to believe one has occurred, the Commission Secretary notifies relevant offices in the agency that an APO breach investigation has commenced and that an APO breach investigation file has been opened. Upon receiving notification from the Secretary, the Office of the General Counsel (OGC) prepares a letter of inquiry to be sent to the possible breacher over the Secretary's signature to ascertain the possible breacher's views on whether a breach has occurred.[11] If, after reviewing the response and other relevant information, the Commission determines that a breach has occurred, the Commission often issues a second letter asking the breacher to address the questions of mitigating circumstances and possible sanctions or other actions. The Commission then determines what action to take in response to the breach. In some cases, the Commission determines that although a breach has occurred, sanctions are not warranted, and therefore finds it unnecessary to issue a second letter concerning what sanctions might be appropriate. Instead, it issues a warning letter to the individual. A warning letter is not considered to be a sanction.

Sanctions for APO violations serve two basic interests: (a) Preserving the confidence of submitters of BPI/CBI that the Commission is a reliable protector of BPI/CBI; and (b) disciplining breachers and deterring future violations. As the Conference Report to the Omnibus Trade and Competitiveness Act of 1988 observed, ''[T]he effective enforcement of limited disclosure under administrative protective order depends in part on the extent to which private parties have confidence that there are effective sanctions against violation.'' H.R. Conf. Rep. No. 576, 100th Cong., 1st Sess. 623 (1988).

The Commission has worked to develop consistent jurisprudence, not only in determining whether a breach has occurred, but also in selecting an appropriate response. In determining the appropriate response, the Commission generally considers mitigating factors such as the unintentional nature of the breach, the lack of prior breaches committed by the breaching party, the corrective measures taken by the breaching party, and the promptness with which the breaching party reported the violation to the Commission. The Commission also considers aggravating circumstances, especially whether persons not under the APO actually read the BPI/CBI. The Commission considers whether there are prior breaches by the same person or persons in other investigations and multiple breaches by the same person or persons in the same investigation.

The Commission's rules permit an economist or consultant to obtain access to BPI/CBI under the APO in a Title VII or safeguard investigation if the economist or consultant is under the direction and control of an attorney under the APO, or if the economist or consultant appears regularly before the Commission and represents an interested party who is a party to the investigation. 19 CFR 207.7(a)(3)(B) and (C); 19 CFR 206.17(a)(3)(B) and (C). Economists and consultants who obtain access to BPI/CBI under the APO under the direction and control of an attorney nonetheless remain individually responsible for complying with the APO. In appropriate circumstances, for example, an economist under the direction and control of an attorney may be held responsible for a breach of the APO by failing to redact APO information from a document that is subsequently filed with the Commission and served as a public document. This is so even though the attorney exercising direction or control over the economist or consultant may also be held responsible for the breach of the APO.

The records of Commission investigations of alleged APO breaches in antidumping and countervailing duty cases are not publicly available and are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552, and section 135(b) of the Customs and Trade Act of 1990, 19 U.S.C. 1677f(g). *See also* 19 U.S.C. 1333(h).

The two types of breaches most frequently investigated by the Commission involve the APO's prohibition on the dissemination of BPI or CBI to unauthorized persons and the APO's requirement that the materials received under the APO be returned or destroyed and that a certificate be filed indicating which action was taken after the termination of the investigation or any subsequent appeals of the Commission's determination. The dissemination of BPI/CBI usually occurs as the result of failure to delete BPI/CBI from public versions of documents filed with the Commission or transmission of proprietary versions of documents to unauthorized recipients. Other breaches have included: the failure to bracket properly BPI/CBI in proprietary documents filed with the Commission; the failure to report immediately known violations of an APO; and the failure to adequately supervise non-legal personnel in the handling of BPI/CBI.

In the past several years, the Commission completed APOB investigations that involved members of a law firm or consultants working with a firm who were granted access to APO materials by the firm although they were not APO signatories. In these cases, the firm and the person using the BPI

[11] Procedures for inquiries to determine whether a prohibited act such as a breach has occurred and for imposing sanctions for violation of the provisions of a protective order issued during NAFTA panel or committee proceedings are set out in 19 CFR 207.100–207.120. Those investigations are initially conducted by the Commission's Office of Unfair Import Investigations.

mistakenly believed an APO application had been filed for that person. The Commission determined in all of these cases that the person who was a non-signatory, and therefore did not agree to be bound by the APO, could not be found to have breached the APO. Action could be taken against these persons, however, under Commission rule 201.15 (19 CFR 201.15) for good cause shown. In all cases in which action was taken, the Commission decided that the non-signatory was a person who appeared regularly before the Commission and was aware of the requirements and limitations related to APO access and should have verified his or her APO status before obtaining access to and using the BPI. The Commission notes that section 201.15 may also be available to issue sanctions to attorneys or agents in different factual circumstances where they did not technically breach the APO but where their actions or inactions did not demonstrate diligent care of the APO materials even though they appeared regularly before the Commission and were aware of the importance the Commission placed on the care of APO materials.

The Commission's Secretary has provided clarification to counsel representing parties in investigations relating to global safeguard actions, section 202(b) of the Trade Act of 1974, investigations for relief from market disruption, section 421(b) or (o) of the Trade Act of 1974, and investigations for action in response to trade diversion, section 422(b) of the Trade Act of 1974, and investigations concerning dumping and subsidies under section 516A and title VII of the Tariff Act of 1930 (19 U.S.C. 1303, 1516A and 1671–1677n). The clarification concerns the requirement to return or destroy CBI/BPI that was obtained under a Commission APO.

A letter was sent to all counsel on active service lists in mid-March 2007. Counsel were cautioned to be certain that each authorized applicant files within 60 days of the completion of an investigation or at the conclusion of judicial or binational review of the Commission's determination a certificate that to his or her knowledge and belief all copies of BPI/CBI have been returned or destroyed and no copies of such material have been made available to any person to whom disclosure was not specifically authorized. This requirement applies to each attorney, consultant, or expert in a firm who has been granted access to BPI/CBI. One firm-wide certificate is insufficient. This same information is also being added to notifications sent to new APO applicants.

In addition, attorneys who are signatories to the APO representing clients in a section 337 investigation should send a notice to the Commission if they stop participating in the investigation or the subsequent appeal of the Commission's determination. The notice should inform the Commission about the disposition of CBI obtained under the APO that was in their possession or they could be held responsible for any failure of their former firm to return or destroy the CBI in an appropriate manner.

III. Specific Investigations

APO Breach Investigations

Case 1: The Commission determined that an attorney breached an APO when he served pleadings containing CBI upon Department of Justice (''DOJ'') attorneys during an appeal in the Court of International Trade of actions taken by U.S. Customs and Border Protection (''Customs'') to enforce the Commission's exclusion order issued in a section 337 investigation. The attorney erroneously assumed that because Customs officials who were directly involved in administering a section 337 exclusion order were permitted access to CBI by statute, he could provide CBI to the Customs officials' DOJ attorneys and the court officials in this appeal of Customs' actions. When the attorney was informed by the opposing counsel that his pleadings violated the APO, he informed the Commission of the possible violation. The DOJ attorneys were not able to return the documents containing CBI, because they were lost or destroyed, but the CIT successfully returned the pleadings containing CBI.

The mitigating factor noted by the Commission was that the attorney had not committed an APO breach in the past two years. The Commission also noted as a partially mitigating factor the fact that the attorney promptly notified an assistant general counsel at the Commission of the breach, although he failed to notify the Secretary of the breach until one week after it occurred. The aggravating factors that the Commission took into account were the fact that the attorney failed to seek guidance from the Commission as to whether his actions would constitute a breach of the APO, the fact that sixteen months passed between the time when the potential breach was identified and the time when the attorney took steps to retrieve the documents containing CBI, and the fact that it took the attorney almost four years to cure the breach, which made it likely that unauthorized persons saw the CBI. The Commission issued a private letter of reprimand to the attorney.

Case 2: The Commission determined that a lead attorney and a computer trade analyst violated an APO, by causing a computer disk containing CBI from a Commission investigation to be transmitted to a coordinator at a training seminar and seminar attendees. The information was put on the disk by the trade analyst at the direction of the lead attorney and it was transmitted to the coordinator of the seminar by a secretary at the attorney's firm. The secretary was not found to have breached the APO. The breach was discovered by an attorney attending the seminar, a non-signatory of the APO. The lead attorney made immediate efforts to cure the breach and retrieve the CBI but not all the documents containing the CBI were retrieved. The Commission considered the lead attorney and trade analyst's lack of prior breaches, the fact that the breach was unintentional, and the prompt and strenuous efforts made by the firm to cure the breach as mitigating factors.

The Commission declined to view the absence of claims of injury by the parties whose CBI was disclosed as a mitigating factor, stating that it considers the viewing of APO material by unauthorized persons to be an aggravating factor, regardless of whether evidence proves that a firm was injured by such a breach of the APO. The Commission also rejected the lead attorney's argument that his reliance on the trade analyst was reasonable because the trade analyst had significant experience. The Commission noted that the trade analyst lacked significant experience in Commission practice, having come from another type of work approximately one year before the breach.

The Commission viewed as aggravating the fact that the CBI was viewed by at least one unauthorized person and the breach was discovered by someone other than the lead attorney or a member of his firm. The Commission sent private letters of reprimand to the trade analyst and the lead attorney.

Case 3: The Commission determined that an economic analyst breached an APO when she lost a package containing BPI. The analyst signed for the package when it arrived at her firm, although it was not addressed to her. When the attorney to whom the package was intended inquired about its location, the economic analyst was unable to find it. She thought it may have been destroyed with other materials containing BPI which were located in her office. The

package was never found and the law firm called the Secretary to report the breach nine days after the analyst realized that she had signed for the package but could not locate it.

The Commission viewed as mitigating factors the fact that the breach was unintentional and that the analyst had not committed a breach in the past two years. The aggravating factors in this case were that the package was never found, and the fact that the firm failed to promptly notify the Commission Secretary of the breach as required by Commission rule 207.7(b)(9). The Commission sent a private letter of reprimand to the analyst.

The Commission also sent a letter to two attorneys and a legal secretary from the firm informing them that the Commission determined that they were not responsible for the breach of the APO. However, the letter also stated that the Commission did not believe that the firm had taken adequate measures to prevent similar breaches and it requested that they review their firm's procedures to ensure that a similar loss of BPI by firm personnel would not reoccur.

Case 4: The Commission found that two attorneys and a paralegal breached an APO when the public version of the firm's final comments, which contained BPI, was filed with the Commission. The BPI was contained on three pages that the paralegal inadvertently attached to the comments. The attorney primarily responsible for preparing the public version of the final comments for filing did not notice the addition of the BPI when he reviewed the submission and he gave it to the lead attorney for signing. The lead attorney signed on a page containing BPI. The document was then filed with the Commission.

The Commission determined to hold the lead attorney responsible for the breach because he was aware or should have been aware of the other attorney's previous breach of the APO. Consequently, the lead attorney should have engaged in at least a cursory review of the page he was signing. That page contained a conspicuous header stating that it contained BPI and there was unredacted BPI just two lines above the signature block. The Commission's decision to send warning letters to the paralegal and the lead attorney took into account the mitigating factors that the breach was unintentional, no BPI was read by any person not subject to the APO, the breach was remedied expeditiously by the firm, and neither the paralegal nor the lead attorney had committed APO breaches in the past two years.

In evaluating the filing attorney's conduct, the Commission viewed as an aggravating factor the fact that this was his second APO breach in 13 months and that he had been issued a warning letter for his prior breach. The Commission noted that the breach was caused by the attorney's carelessness in inadequately reviewing the comments before obtaining the lead attorney's signature and filing them. The Commission viewed as mitigating factors the facts that the breach was unintentional, the attorney's law firm acted expeditiously to remedy the breach, and the BPI was not read by any individuals who were not signatories to the APO. The Commission decided to send a private letter of reprimand to the attorney.

Case 5: The Commission found that an attorney had breached an APO when, after the completion of a section 337 investigation, he provided documents containing CBI to a non-signatory associate attorney at a law firm that was representing his client in an unrelated law suit. The associate attorney sought documents twice from the breaching attorney. For the first request the associate attorney provided a letter from an attorney for the party from which the CBI was originally obtained, and which was a respondent in the section 337 investigation, permitting the release of the information to the associate attorney. A second request for the release of information was made, but that time the associate attorney did not provide a letter permitting the release. He merely made a verbal assertion that he had approval to receive the information just as he had for the first request. The breaching attorney accepted his statement and provided the second set of information containing CBI originally obtained from the same section 337 respondent.

The breaching attorney learned from an attorney for the section 337 respondent that the associate attorney was not authorized to receive the second set of information. The breaching attorney contacted a partner at the associate's law firm about the matter and learned that the materials were destroyed and had never been copied, they had not been distributed to counsel or parties in the unrelated litigation, and no one at the firm including the associate attorney had substantively reviewed the materials prior to their destruction.

The Commission determined to issue a warning letter to the breaching attorney. It viewed as an aggravating factor that an unauthorized person briefly viewed the CBI, although no substantive review occurred. It also found several mitigating factors. The breach was unintentional and was based on an inaccurate representation by the associate attorney that he had the authority to receive the information containing CBI; the attorney expeditiously sought to remedy the breach and to notify the Commission of the breach, after being informed by respondent's counsel; and this was the only breach in which the attorney had been involved in the two-year period generally examined by the Commission for the purpose of determining sanctions.

The Commission also found that the attorney had not committed a second breach by retaining the information obtained under the APO after the Commission investigation had ended. The attorney and the lead counsel for respondents had agreed to retain the documents for purposes of a separate litigation. The attorney destroyed the documents containing CBI once the litigation terminated.

Case 6: The Commission found that an attorney had breached an APO in a section 337 investigation when he transmitted an administrative law judge-issued order containing CBI to an unauthorized person. The breach was discovered by a non-signatory to the APO, counsel in a different section 337 investigation, who alerted another non-signatory counsel from whom he had obtained a copy of the order. That attorney then notified the breaching attorney.

In deciding to sanction the attorney by issuing a private letter of reprimand, the Commission considered the mitigating circumstances that the breach was unintentional, that the attorney acted quickly to cure the breach, and that the attorney had not committed a breach in the past two years, the period generally examined by the Commission for the purpose of determining sanctions. The Commission also considered the aggravating circumstances that the CBI was viewed by at least one unauthorized person and that the breach was not discovered by the attorney or his firm.

The Commission denied the attorney's request that it consider an alleged lack of harm caused by the unauthorized disclosure of the CBI to be a mitigating circumstance. The Commission informed the breaching attorney that it has an established practice and policy of providing strong protection to CBI. Consistent with this, the Commission considers the viewing of APO material by unauthorized persons to be an aggravating factor, regardless of whether evidence proves

that a firm was injured by such a breach of the APO.

Case 7: The Commission found that an attorney breached an APO by failing to redact from the public version of his firm's final comments the name of a subscription service and information obtained from the subscription service under the Commission's APO. The Commission has consistently treated this type of information as BPI and the information had clearly been marked as BPI. A paralegal and a legal secretary who were involved in the matter were found not liable for the breach because they acted under the direction of the attorney.

The Commission viewed as mitigating factors that the attorney had not been found liable for a breach within the previous two years, the time period the Commission usually considers for the purpose of sanctions, no non-signatory read the BPI, and prompt action was taken to remedy the breach once the attorney was notified of the breach. The Commission also considered two aggravating circumstances. First, the Commission staff, not the attorney, discovered the breach. Second, the breach was not inadvertent, but rather, the attorney substituted his own judgment for the Commission's in treating the BPI in question as public information despite clear markings to the contrary. The Commission issued a private letter of reprimand to the breaching attorney.

Rules Violation Investigations

Case 1: The Commission found that two attorneys had violated Commission rule 207.3(b), 19 CFR 207.3(b), in a five-year review, when they served a brief, which was public because no BPI was used, by first class mail instead of by hand or overnight mail as required by the rules. The certificate of service, which stated that the brief would be sent by first class mail, was signed by the lead attorney after he had been reassured by the second attorney that, in the past, the firm had served public documents in Commission investigations by first class mail. The use of first class service resulted in a one day delay in receipt of the document.

The Commission decided to issue a warning letter to the lead attorney who had signed the certificate of service, in view of the fact that he had no violations in the past two years, the violation was unintentional, and the firm took measures to make sure that this kind of violation would not occur again.

The Commission issued to the second attorney a private letter of reprimand with two restrictions on his practice before the Commission. For a period of 18 months he was not permitted to serve as the final decisionmaker in any matter relating to proceedings before the Commission and all Commission submissions prepared by the attorney must be reviewed by another attorney before filing with the Commission. In determining to sanction the attorney in this manner, the Commission considered the mitigating circumstances that the breach was unintentional and the fact that other parties were not unduly prejudiced as a result of the improper service. The Commission also considered the aggravating circumstance that he had received two previous sanctions, the most recent of which included a restriction on his practice, for breaches of the APO in other Commission investigations within two years of the violation of the service rule. The Commission did take into account that the first of the underlying APO breaches had occurred more than four years prior to the issuance of the sanction in this rules violation proceeding.

There was one rules violation investigation in which no violation was found:

Case 1: The Commission determined that sanctions were unwarranted but cautioned three attorneys to ensure that their guidance to employees and clients in the future respects the Commission's need for accurate questionnaire responses to maintain the integrity of Commission investigations. A rules violation investigation had been conducted pursuant to Commission rule 201.15(a), 19 CFR 201.15(a), when comments on their client's completed questionnaire made it appear that the three attorneys had advised their clients to answer a question in a potentially misleading manner. In response to the letter of inquiry, the attorneys explained that the comments were inadvertently left on the questionnaire and were never transmitted to the client. They were, instead, intended for staff at the law firm to encourage them to seek more accurate information from the client. The firm's staff to whom the comments were sent recognized them as encouragement to obtain additional accurate information from the client and, in response to the comments, initiated follow-up contacts with the client to obtain additional, accurate information. This was confirmed by e-mail communications between the attorneys and the staff demonstrating a recognition of the need for accurate reporting.

Issued: October 15, 2009.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E9–25243 Filed 10–20–09; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Consistent with Section 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (''CERCLA''), 42 U.S.C. 9622(d), and 28 CFR 50.7, notice is hereby given that on October 9, 2009, the United States lodged a Consent Decree with the City of South Lake Tahoe, California (''the City'') in *United States of America* v. *El Dorado County, California, et al.,* Civil No. S–01–1520 MCE GGH (E.D. Cal.), with respect to the Meyers Landfill Site, located in Meyers, El Dorado County, California (the ''Site'').

On August 3, 2001, Plaintiff United States of America (''United States''), on behalf of the United States Department of Agriculture, Forest Service (''Forest Service''), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA''), 42 U.S.C. 9607, against Defendants, El Dorado County, California (the ''County'') and the City. The complaint filed by the United States seeks recovery of environmental response costs incurred by the Forest Service related to the release or threatened release and/or disposal of hazardous substances at or from the Meyers Landfill Site, a former municipal waste disposal facility located on National Forest Service System lands administered by the Lake Tahoe Basin Management Unit of the Forest Service, with accrued interest, and a declaration of the County's and the City's liability for future response costs incurred by the United States related to the Site. The City filed counterclaims against the United States pursuant to CERCLA. The proposed Consent Decree resolves the United States' CERCLA claims against the City and the City's CERCLA claims against the United States.

Under the proposed Consent Decree the City will pay $1.6 million, a portion of which will be deposited into a Forest Service Special account to fund future response actions at the Site and a portion of which will go to the Forest Service to fund response actions related

to groundwater at the Site, including a Remedial Investigation/Feasibility Study and the selection of a remedy for contaminated groundwater at the Site. In exchange for the City's payment, the City will receive from the United States a covenant not to sue or to take administrative action pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. 9606 and 9607, as amended, for the performance of response actions at the Site and the United States' past and future response costs at the Site. In addition, the City will dismiss its CERCLA claims against the Forest Service. The 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 Acting Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States of America* v. *El Dorado County, California, et al.,* Civil No. S–01–1520 MCE GGH (E.D. Cal.) (DOJ Ref. No. 90–11–3–06554)(Consent Decree with City).

The Consent Decree with the City may be examined at U.S. Department of Agriculture, Office of General Counsel, 33 New Montgomery Street, 17th Floor, San Francisco, CA 94150 (contact Rose Miksovsky, (415) 744–3158). During the public comment period, the Consent Decree with the District may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree with the City may also be obtained by mail from the Consent Decree Library, U.S. Department of Justice, P.O. Box 7611, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please refer *to United States of America* v. *El Dorado County, California, et al.,* Civil No. S–01–1520 MCE GGH (E.D. Cal.) (DOJ Ref. No. 90–11–3–06554) (Consent Decree with City), and enclose a check in the amount of $35.75 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Maureen Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E9–25216 Filed 10–20–09; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–317F]

Controlled Substances: Final Revised Aggregate Production Quotas for 2009

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Notice of final aggregate production quotas for 2009.

SUMMARY: This notice establishes final 2009 aggregate production quotas for controlled substances in schedules I and II of the Controlled Substances Act (CSA). The DEA has taken into consideration comments received in response to a notice of the proposed revised aggregate production quotas for 2009 published July 23, 2009 (74 FR 36511).

DATES: *Effective Date:* October 21, 2009.

FOR FURTHER INFORMATION CONTACT: Christine A. Sannerud, Ph.D, Chief, Drug and Chemical Evaluation Section, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, Virginia 22152, Telephone: (202) 307–7183.

SUPPLEMENTARY INFORMATION: Section 306 of the CSA (21 U.S.C. 826) requires that the Attorney General establish aggregate production quotas for each basic class of controlled substance listed in schedules I and II. This responsibility has been delegated to the Administrator of the DEA by 28 CFR 0.100. The Administrator, in turn, has redelegated this function to the Deputy Administrator, pursuant 28 CFR 0.104.

The 2009 aggregate production quotas represent those quantities of controlled substances in schedules I and II that may be produced in the United States in 2009 to provide adequate supplies of each substance for: The estimated medical, scientific, research, and industrial needs of the United States; lawful export requirements; and the establishment and maintenance of reserve stocks (21 U.S.C. 826(a) and 21 CFR 1303.11). These quotas do not include imports of controlled substances.

On July 23, 2009, a notice of the proposed revised 2009 aggregate production quotas for certain controlled substances in schedules I and II was published in the **Federal Register** (74 FR 36511). All interested persons were invited to comment on or object to these proposed aggregate production quotas on or before August 24, 2009.

Seven companies commented on a total of 18 schedules I and II controlled substances within the published comment period. Seven companies proposed that the aggregate production quotas for amphetamine (for sale), codeine (for conversion), dihydromorphine, fentanyl, hydrocodone (for sale), hydromorphone, lisdexamfetamine, methadone, methadone intermediate, methamphetamine (for sale), methylphenidate, nabilone, opium (tincture), oxycodone (for sale), oxycodone (for conversion), oxymorphone (for sale), phenylacetone, and thebaine were insufficient to provide for the estimated medical, scientific, research, and industrial needs of the United States, for export requirements and for the establishment and maintenance of reserve stocks.

DEA has taken into consideration the above comments along with the relevant 2008 year-end inventories, initial 2009 manufacturing quotas, 2009 export requirements, actual and projected 2009 sales, research, product development requirements, and additional applications received. Based on this information, the DEA has adjusted the final 2009 aggregate production quotas for amphetamine (for conversion), dihydromorphine, hydrocodone (for sale), hydromorphone, lisdexamfetamine, morphine (for sale), opium (tincture), oxycodone (for sale), oxycodone (for conversion), oxymorphone (for sale), and phenylacetone to meet the legitimate needs of the United States.

Regarding amphetamine (for sale), codeine (for conversion), fentanyl, methadone, methadone intermediate, methamphetamine (for sale), methylphenidate, nabilone, and thebaine, the DEA has determined that the proposed revised 2009 aggregate production quotas are sufficient to meet the current 2009 estimated medical, scientific, research, and industrial needs of the United States and to provide for adequate inventories.

Therefore, under the authority vested in the Attorney General by Section 306 of the CSA (21 U.S.C. § 826), and delegated to the Administrator of the DEA by 28 CFR 0.100, and redelegated to the Deputy Administrator, pursuant to 28 CFR 0.104, the Deputy Administrator hereby orders that the 2009 final aggregate production quotas for the following controlled substances,

expressed in grams of anhydrous acid or base, be established as follows:

Basic class—Schedule I	Final revised 2009 quotas
2,5–Dimethoxyamphetamine	2 g
2,5-Dimethoxy-4-ethylamphetamine (DOET)	2 g
3-Methylfentanyl	2 g
3-Methylthiofentanyl	2 g
3,4-Methylenedioxyamphetamine (MDA)	25 g
3,4-Methylenedioxy-N-ethylamphetamine (MDEA)	10 g
3,4-Methylenedioxymethamphetamine (MDMA)	20 g
3,4,5-Trimethoxyamphetamine	2 g
4-Bromo-2,5-dimethoxyamphetamine (DOB)	2 g
4-Bromo-2,5-dimethoxyphenethylamine (2-CB)	2 g
4-Methoxyamphetamine	27 g
4-Methylaminorex	2 g
4-Methyl-2,5-dimethoxyamphetamine (DOM)	2 g
5-Methoxy-3,4-methylenedioxyamphetamine	2 g
5-Methoxy-N,N-diisopropyltryptamine	5 g
Acetyl-alpha-methylfentanyl	2 g
Acetyldihydrocodeine	2 g
Acetylmethadol	2 g
Allylprodine	2 g
Alphacetylmethadol	2 g
Alpha-ethyltryptamine	2 g
Alphameprodine	2 g
Alphamethadol	2 g
Alpha-methylfentanyl	2 g
Alpha-methylthiofentanyl	2 g
Aminorex	2 g
Benzylmorphine	2 g
Betacetylmethadol	2 g
Beta-hydroxy-3-methylfentanyl	2 g
Beta-hydroxyfentanyl	2 g
Betameprodine	2 g
Betamethadol	2 g
Betaprodine	2 g
Bufotenine	3 g
Cathinone	3 g
Codeine-N-oxide	602 g
Diethyltryptamine	2 g
Difenoxin	3,000 g
Dihydromorphine	3,132,000 g
Dimethyltryptamine	3 g
Gamma-hydroxybutyric acid	24,200,00 g
Heroin	20 g
Hydromorphinol	2 g
Hydroxypethidine	2 g
Ibogaine	1 g
Lysergic acid diethylamide (LSD)	10 g
Marihuana	4,500,000 g
Mescaline	7 g
Methaqualone	5 g
Methcathinone	4 g
Methyldihydromorphine	2 g
Morphine-N-oxide	605 g
N-Benzylpiperazine	2 g
N,N-Dimethylamphetamine	7 g
N-Ethylamphetamine	2 g
N-Hydroxy-3,4-methylenedioxyamphetamine	2 g
Noracymethadol	2 g
Norlevorphanol	52 g
Normethadone	2 g
Normorphine	16 g
Para-fluorofentanyl	2 g
Phenomorphan	2 g
Pholcodine	2 g
Psilocybin	7 g
Psilocyn	7 g
Tetrahydrocannabinols	312,500 g
Thiofentanyl	2 g
Trimeperidine	2 g

Basic class—Schedule II	Final revised 2009 quotas
1-Phenylcyclohexylamine	2 g
1-Piperdinocyclohexanecarbonitrile	2 g
Alfentanil	8,000 g
Alphaprodine	2 g
Amobarbital	3 g
Amphetamine (for sale)	17,000,000 g
Amphetamine (for conversion)	7,500,000 g
Cocaine	247,000 g
Codeine (for sale)	39,605,000 g
Codeine (for conversion)	65,000,000 g
Dextropropoxyphene	106,000,000 g
Dihydrocodeine	1,200,000 g
Diphenoxylate	947,000 g
Ecgonine	83,000 g
Ethylmorphine	2 g
Fentanyl	1,428,000 g
Glutethimide	2 g
Hydrocodone (for sale)	55,500,000 g
Hydromorphone	3,340,000 g
Isomethadone	2 g
Levo-alphacetylmethadol (LAAM)	3 g
Levomethorphan	5 g
Levorphanol	10,000 g
Lisdexamfetamine	8,200,000 g
Meperidine	8,600,000 g
Meperidine Intermediate-A	3 g
Meperidine Intermediate-B	7 g
Meperidine Intermediate-C	3 g
Metazocine	1 g
Methadone (for sale)	25,000,000 g
Methadone Intermediate	26,000,000 g
Methamphetamine	3,130,000 g
Methylphenidate	50,000,000 g
Morphine (for sale)	36,300,000 g
Morphine (for conversion)	100,000,000 g
Nabilone	9,002 g
Noroxymorphone (for sale)	10,000 g
Noroxymorphone (for conversion)	9,000,000 g
Opium (powder)	230,000 g
Opium (tincture)	1,250,000 g
Oripavine	15,000,000 g
Oxycodone (for sale)	94,000,000 g
Oxycodone (for conversion)	4,500,000 g
Oxymorphone (for sale)	2,570,000 g
Oxymorphone (for conversion)	12,000,000 g
Pentobarbital	28,000,000 g
Phenazocine	1 g
Phencyclidine	20 g
Phenmetrazine	2 g
Phenylacetone	250,001 g
Racemethorphan	2 g
Remifentanil	500 g
Secobarbital	67,000 g
Sufentanil	10,300 g
Thebaine	126,000,000 g

DEA proposed the aggregate production quota for tapentadol at 519,000 g in the 2009 proposed revised aggregate production quota notice published on July 23, 2009, in the **Federal Register** (74 FR 36511). Tapentadol is no longer listed because the material will be imported into the United States and not manufactured domestically.

The Deputy Administrator further orders that the aggregate production quotas for all other schedules I and II controlled substances included in 21 CFR 1308.11 and 1308.12 shall be zero.

The Office of Management and Budget has determined that notices of aggregate production quotas are not subject to centralized review under Executive Order 12866.

This action does not preempt or modify any provision of state law; nor does it impose enforcement responsibilities on any state; nor does it diminish the power of any state to enforce its own laws. Accordingly, this action does not have federalism implications warranting the application of Executive Order 13132.

The Deputy Administrator hereby certifies that this action will have no significant impact upon small entities, whose interests must be considered under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* The establishment of aggregate production quotas for schedules I and II controlled substances is mandated by law and by international treaty obligations. The quotas are

necessary to provide for the estimated medical, scientific, research, and industrial needs of the United States, for export requirements and the establishment and maintenance of reserve stocks. While aggregate production quotas are of primary importance to large manufacturers, their impact upon small entities is neither negative nor beneficial. Accordingly, the Deputy Administrator has determined that this action does not require a regulatory flexibility analysis.

This action meets the applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988 Civil Justice Reform.

This action will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $120,000,000 or more in any one year, and 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.

This action is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This action will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Dated: October 13, 2009.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E9–25274 Filed 10–20–09; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[DEA # 318E]

Controlled Substances: Established Initial Aggregate Production Quotas for 2010

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Notice of aggregate production quotas for 2010.

SUMMARY: This notice establishes initial 2010 aggregate production quotas for controlled substances in schedules I and II of the Controlled Substances Act (CSA).

DATES: *Effective Date:* October 21, 2009.

FOR FURTHER INFORMATION CONTACT: Christine A. Sannerud, Ph.D, Chief, Drug & Chemical Evaluation Section, Drug Enforcement Administration, Washington, DC 20537, Telephone: (202) 307–7183.

SUPPLEMENTARY INFORMATION: Section 306 of the CSA (21 U.S.C. 826) requires that the Attorney General establish aggregate production quotas for each basic class of controlled substance listed in schedules I and II. This responsibility has been delegated to the Administrator of the DEA by 28 CFR 0.100. The Administrator, in turn, has redelegated this function to the Deputy Administrator, pursuant to 28 CFR 0.104.

The 2010 aggregate production quotas represent those quantities of controlled substances that may be produced in the United States in 2010 to provide adequate supplies of each substance for: the estimated medical, scientific, research and industrial needs of the United States; lawful export requirements; and the establishment and maintenance of reserve stocks (21 U.S.C. 826(a) and 21 CFR 1303.11). These quotas do not include imports of controlled substances for use in industrial processes.

On May 21, 2009, a notice of the proposed initial 2010 aggregate production quotas for certain controlled substances in schedules I and II was published in the **Federal Register** (74 FR 23881). All interested persons were invited to comment on or object to these proposed aggregate production quotas on or before June 22, 2009.

Twelve responses (eleven from DEA registered manufacturers, and one from a non-DEA registrant) were received within the published comment period, offering comments on a total of 28 schedule I and II controlled substances. One additional comment was received after the comment period ended and therefore was not considered. The commenters stated that the proposed aggregate production quotas for 3,4-methylenedioxyamphetamine, 3,4-methylenedioxyethylamphetamine, 3,4-methylenedioxymethamphetamine, alfentanil, amphetamine (for sale), codeine (for sale), codeine (for conversion), dihydromorphine, fentanyl, gamma hydroxybutyric acid, hydrocodone, hydromorphone, isomethadone, levo-desoxyephedrine, levorphanol, lisdexamfetamine, methamphetamine (for sale), morphine (for conversion), nabilone, opium (tincture), oxycodone (for sale), oxycodone (for conversion), oxymorphone (for sale), remifentanil, sufentanil, tapentadol, tetrahydrocannabinols, and thebaine were insufficient to provide for the estimated medical, scientific, research and industrial needs of the United States, for export requirements and for the establishment and maintenance of reserve stocks.

In arriving at the aggregate production quotas, DEA has taken into consideration the above comments along with the factors set forth at 21 CFR 1303.11(b) and other relevant 2009 factors, including 2009 manufacturing quotas, current 2009 sales and inventories, 2010 export requirements, additional applications received, and research and product development requirements. Based on this information, DEA has adjusted the initial aggregate production quotas for 4-methoxyamphetamine, alpha-methyltryptamine, amphetamine (for conversion), dihydromorphine, isomethadone, levo-desoxyephedrine, lisdexamfetamine, lysergic acid diethylamide, methamphetamine (for sale), methamphetamine (for conversion), methaqualone, oxycodone (for sale), oxycodone (for conversion), oxymorphone (for sale) and phenylacetone to meet the legitimate needs of the United States.

DEA proposed the aggregate production quota for tapentadol at 519,000 g in the 2010 proposed initial aggregate production quota notice published on May 21, 2009 in the **Federal Register** (74 FR 23881). Tapentadol is no longer listed because the material will be imported into the United States and not manufactured domestically.

Regarding 3,4-methylenedioxyamphetamine, 3,4-methylenedioxyethylamphetamine, 3,4-methylenedioxymethamphetamine, alfentanil, amphetamine (for sale), codeine (for sale), codeine (for conversion), fentanyl, gamma hydroxybutyric acid, hydrocodone, hydromorphone, levorphanol, morphine (for conversion), nabilone, opium (tincture), remifentanil, sufentanil, tetrahydrocannabinols, and thebaine DEA has determined that the proposed initial 2010 aggregate production quotas are sufficient to meet the current 2010 estimated medical, scientific, research and industrial needs of the United States.

Pursuant to 21 CFR 1303, the Deputy Administrator of DEA will, in 2010, adjust aggregate production quotas and individual manufacturing quotas allocated for the year based upon 2009 year-end inventory and actual 2009 disposition data supplied by quota recipients for each basic class of schedule I or II controlled substance.

Therefore, under the authority vested in the Attorney General by Section 306 of the CSA (21 U.S.C. 826), and delegated to the Administrator of DEA by 28 CFR § 0.100, and redelegated to the Deputy Administrator pursuant to 28 CFR 0.104, the Deputy Administrator hereby orders that the 2010 initial aggregate production quotas for the following controlled substances, expressed in grams of anhydrous acid or base, be established as follows:

Basic class—Schedule I	Established 2010 quotas
2,5-Dimethoxyamphetamine	2 g
2,5-Dimethoxy-4-ethylamphetamine (DOET)	2 g
3-Methylfentanyl	2 g
3-Methylthiofentanyl	2 g
3,4-Methylenedioxyamphetamine (MDA)	25 g
3,4-Methylenedioxy-N-ethylamphetamine (MDEA)	10 g
3,4-Methylenedioxymethamphetamine (MDMA)	20 g
3,4,5-Trimethoxyamphetamine	2 g
4-Bromo-2,5-dimethoxyamphetamine (DOB)	2 g
4-Bromo-2,5-dimethoxyphenethylamine (2–CB)	2 g
4-Methoxyamphetamine	77 g
4-Methylaminorex	2 g
4-Methyl-2,5-dimethoxyamphetamine (DOM)	2 g
5-Methoxy-3,4-methylenedioxyamphetamine	2 g
5-Methoxy-N,N-diisopropyltryptamine	5 g
Acetyl-alpha-methylfentanyl	2 g
Acetyldihydrocodeine	2 g
Acetylmethadol	2 g
Allylprodine	2 g
Alphacetylmethadol	2 g
Alpha-ethyltryptamine	2 g
Alphameprodine	2 g
Alphamethadol	2 g
Alpha-methylfentanyl	2 g
Alpha-methylthiofentanyl	2 g
Alpha-methyltryptamine	2 g
Aminorex	2 g
Benzylmorphine	2 g
Betacetylmethadol	2 g
Beta-hydroxy-3-methylfentanyl	2 g
Beta-hydroxyfentanyl	2 g
Betameprodine	2 g
Betamethadol	2 g
Betaprodine	2 g
Bufotenine	3 g
Cathinone	3 g
Codeine-N-oxide	602 g
Diethyltryptamine	2 g
Difenoxin	3,000 g
Dihydromorphine	3,300,000 g
Dimethyltryptamine	3 g
Gamma-hydroxybutyric acid	24,200,000 g
Heroin	20 g
Hydromorphinol	2 g
Hydroxypethidine	2 g
Ibogaine	1 g
Lysergic acid diethylamide (LSD)	15 g
Marihuana	4,500,000 g
Mescaline	7 g
Methaqualone	7 g
Methcathinone	4 g
Methyldihydromorphine	2 g
Morphine-N-oxide	605 g
N-Benzylpiperazine	2 g
N,N-Dimethylamphetamine	7 g
N-Ethylamphetamine	2 g
N-Hydroxy-3,4-methylenedioxyamphetamine	2 g
Noracymethadol	2 g
Norlevorphanol	52 g
Normethadone	2 g
Normorphine	16 g
Para-fluorofentanyl	2 g
Phenomorphan	2 g
Pholcodine	2 g
Psilocybin	7 g
Psilocyn	7 g
Tetrahydrocannabinols	312,500 g
Thiofentanyl	2 g
Trimeperidine	2 g

Basic class—Schedule II	Established 2010 quotas
1-Phenylcyclohexylamine	2 g
1-piperdinocyclohexanecarbonitrile	2 g
Alfentanil	8,000 g
Alphaprodine	2 g
Amobarbital	3 g
Amphetamine (for sale)	17,000,000 g
Amphetamine (for conversion)	6,500,000 g
Cocaine	247,000 g
Codeine (for sale)	39,605,000 g
Codeine (for conversion)	65,000,000 g
Dextropropoxyphene	106,000,000 g
Dihydrocodeine	1,200,000 g
Diphenoxylate	947,000 g
Ecgonine	83,000 g
Ethylmorphine	2 g
Fentanyl	1,428,000 g
Glutethimide	2 g
Hydrocodone (for sale)	55,000,000 g
Hydromorphone	3,300,000 g
Isomethadone	11 g
Levo-alphacetylmethadol (LAAM)	3 g
Levomethorphan	5 g
Levorphanol	10,000 g
Lisdexamfetamine	9,000,000 g
Meperidine	8,600,000 g
Meperidine Intermediate-A	3 g
Meperidine Intermediate-B	7 g
Meperidine Intermediate-C	3 g
Metazocine	1 g
Methadone (for sale)	25,000,000 g
Methadone Intermediate	26,000,000 g
Methamphetamine	3,130,000 g
[750,000 grams of levo-desoxyephedrine for use in a non-controlled, non-prescription product; 2,331,000 grams for methamphetamine mostly for conversion to a schedule III product; and 49,000 grams for methamphetamine (for sale)]	
Methylphenidate	50,000,000 g
Morphine (for sale)	35,000,000 g
Morphine (for conversion)	100,000,000 g
Nabilone	9,002 g
Noroxymorphone (for sale)	10,000 g
Noroxymorphone (for conversion)	9,000,000 g
Opium (powder)	230,000 g
Opium (tincture)	1,050,000 g
Oripavine	15,000,000 g
Oxycodone (for sale)	88,000,000 g
Oxycodone (for conversion)	4,000,000 g
Oxymorphone (for sale)	2,570,000 g
Oxymorphone (for conversion)	12,000,000 g
Pentobarbital	28,000,000 g
Phenazocine	1 g
Phencyclidine	20 g
Phenmetrazine	2 g
Phenylacetone	12,500,001 g
Racemethorphan	2 g
Remifentanil	500 g
Secobarbital	67,000 g
Sufentanil	10,300 g
Thebaine	126,000,000 g

The Deputy Administrator further orders that aggregate production quotas for all other schedules I and II controlled substances included in 21 CFR 1308.11 and 1308.12 be established at zero.

The Office of Management and Budget has determined that notices of aggregate production quotas are not subject to centralized review under Executive Order 12866. This action does not preempt or modify any provision of state law; nor does it impose enforcement responsibilities on any state; nor does it diminish the power of any state to enforce its own laws. Accordingly, this action does not have federalism implications warranting the application of Executive Order 13132.

The Deputy Administrator hereby certifies that this action will have no significant impact upon small entities whose interests must be considered under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* The establishment of aggregate production quotas for schedules I and II controlled substances is mandated by law and by international treaty obligations. The quotas are necessary to provide for the estimated medical, scientific, research and industrial needs of the United States, for export requirements and the

establishment and maintenance of reserve stocks. While aggregate production quotas are of primary importance to large manufacturers, their impact upon small entities is neither negative nor beneficial. Accordingly, the Deputy Administrator has determined that this action does not require a regulatory flexibility analysis.

This action meets the applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988 Civil Justice Reform.

This action will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $120,000,000 or more in any one year, and 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.

This action is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This action will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Dated: October 14, 2009.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E9–25275 Filed 10–20–09; 8:45 am]

BILLING CODE 4410–09–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (09–091)]

NASA Advisory Council; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announces a meeting of the National Space-Based Positioning, Navigation and Timing (PNT) Advisory Board.

DATES: Thursday, November 5, 2009, 9 a.m.–5 p.m.; Friday, November 6, 2009, 9 a.m.–1 p.m.

ADDRESSES: Hilton Old Town Alexandria, 1767 King Street, Alexandria, Virginia 22314. *Metro Station:* King Street.

FOR FURTHER INFORMATION CONTACT: Mr. James J. Miller, Space Operations Mission Directorate, National Aeronautics and Space Administration, Washington, DC 20546. Phone 202–358–4417.

SUPPLEMENTARY INFORMATION: The agenda for the meeting includes updates from each of the three PNT Panels (Leadership; Strategic Engagement; and Communication, Future Challenges), including discussion and deliberation of potential recommendations. The PNT Advisory Board will address U.S. Government interests in the following areas:

- Implementation of the President's 2004 U.S. Space-Based Positioning, Navigation and Timing Policy.
- National Space-Based PNT Executive Committee, and National Space-Based PNT Coordination Office.
- Global Positioning System (GPS) Constellation and Modernization Plans.
- U.S. GPS Technological Leadership and Competitiveness.
- Promoting and Branding Current and Future PNT Capabilities to the U.S. and International Communities.
- Global Technical and Market Trends for PNT Services.
- Future Areas of Study.

The meeting will be open to the public up to the seating capacity of the room. It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. E9–25351 Filed 10–20–09; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Advisory Committee on the Electronic Records Archives

AGENCY: National Archives and Records Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), the National Archives and Records Administration (NARA) announces a meeting of the Advisory Committee on the Electronic Records Archives (ACERA). The committee serves as a deliberative body to advise the Archivist of the United States, on technical, mission, and service issues related to the Electronic Records Archives (ERA). This includes, but is not limited to, advising and making recommendations to the Archivist on issues related to the development, implementation and use of the ERA system.

DATES: November 4–5, 2009, 9 a.m. to 4 p.m.

ADDRESSES: 700 Pennsylvania Avenue, NW. Washington, DC 20408–0001.

SUPPLEMENTARY INFORMATION:

Agenda

- Opening Remarks;
- Approval of Minutes;
- Committee Updates;
- Activities Reports;
- Adjournment.

This meeting will be open to the public. However, due to space limitations and access procedures, the name and telephone number of individuals planning to attend must be submitted to the Electronic Records Archives Program at *era.program@nara.gov.* This meeting will be recorded for transcription purposes.

FOR FURTHER INFORMATION CONTACT: Martha Morphy, Assistant Archivist for Information Services, (301) 837–1992.

Dated: October 15, 2009.

Mary Ann Hadyka,

Committee Management Officer.

[FR Doc. E9–25368 Filed 10–20–09; 8:45 am]

BILLING CODE 7515–01–P

National Labor Relations Board

Appointments of Individuals To Serve as Members of Performance Review Board

5 U.S.C. 4314(c)(4) requires that appointments of individuals to serve as members of Performance Review Boards be published in the **Federal Register**. Therefore, in compliance with this requirement, notice is hereby given that the individuals whose names and position titles appear below have been appointed to serve as members of Performance Review Boards in the National Labor Relations Board for the rating year beginning October 1, 2008 and ending September 30, 2009.

Name and Title

William B Cowen, Solicitor;
Gloria J. Joseph, Director of Administration;
Barry J. Kearney, Associate General Counsel, Advice;
Gary W. Shinners, Deputy Chief Counsel to Board Member;
Richard A. Siegel, Associate General Counsel, Operations Management;
Lafe E. Solomon, Director, Office of Representation Appeals;

John H. Ferguson, Associate General Counsel, Enforcement Litigation (Alternate);
Kathleen Nixon, Deputy Chief Counsel to Board Member (Alternate).

Washington, DC, by Direction of the Board.

Dated: October 15, 2009.

Lester A. Heltzer,

Executive Secretary.

[FR Doc. E9–25215 Filed 10–20–09; 8:45 am]

BILLING CODE 7545–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Intent To Seek Approval To Establish an Information Collection

AGENCY: National Science Foundation.

ACTION: Notice and Request for Comments.

SUMMARY: The National Science Foundation (NSF) is announcing plans to request clearance of this collection. In accordance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), we are providing opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting that OMB approve clearance of this collection for no longer than 3 years.

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 of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; or (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.

DATES: Written comments on this notice must be received by December 21, 2009 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

FOR ADDITIONAL INFORMATION OR COMMENTS: Contact Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230; telephone (703) 292–7556; or send e-mail to *splimpto@nsf.gov.* You also may obtain a copy of the data collection instrument and instructions from Ms. Plimpton.

SUPPLEMENTARY INFORMATION:

Title of Collection: Partnership for Innovation Program: Research and Technology Development Outcomes.

OMB Number: 3145–NEW.

Expiration Date of Approval: Not applicable.

Proposed Project: The proposed National Science Foundation Survey will collect data from a sample of about 443 companies that are partners on 84 PFI awards from 2003–2007 in order to examine research and technology development outcomes related to their participation on a PFI award.

Use of the Information: Analysis of these data is necessary to provide information to provide outcome evaluation and improvement evaluation of the Partnership for Innovation Program and to better understand the impact of some aspects of industry-university partnerships on companies.

Respondents: The Survey will be sent to companies that participated in 84 Partnerships for Innovation projects from 2003 to 2007. In total, we estimate that there are 443 companies affiliated with the 84 PFI projects.

Burden on the Public: The Foundation estimates about 300 responses annually at 20 minutes per response; this totals to approximately 75 hours annually.

Dated: October 16, 2009.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. E9–25329 Filed 10–20–09; 8:45 am]

BILLING CODE 7555–01–P

OFFICE OF PERSONNEL MANAGEMENT

Excepted Service; Consolidated Listing of Schedules A, B, and C Exceptions

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: This gives a consolidated notice of all positions excepted under Schedules A, B, and C as of June 30, 2009, as required by Civil Service Rule VI, Exceptions From the Competitive Service.

FOR FURTHER INFORMATION: Roland Edwards, Executive Resources Services Group, Center for Performance Management System and Evaluation, Human Capital Leadership and Merit System Accountability Division, 202–606–2246.

SUPPLEMENTARY INFORMATION: Civil Service Rule VI (5 CFR 6.1) requires the U.S. Office of Personnel Management (OPM) to publish notice of all exceptions granted under Schedules A, B, and C. Title 5, Code of Federal Regulations, 213.103(c), further requires that a consolidated listing, current as of June 30 of each year, be published annually as a notice in the **Federal Register** at *www.gpoaccess.gov/fr/.* Agencies will notice the change in format of this notice from previous editions. The format has changed because it is not appropriate to set out what appears to be regulatory text in a notice document and therefore references to specific sections of the Code of Federal Regulations have been removed. The notice that follows is a summary of all schedule A, B, and C Excepted authorities. OPM maintains continuing information on the status of all Schedule A, B, and C excepted appointing authorities. Some of these exceptions are codified in the Code of Federal Regulations at 5 CFR, part 213 while others are not. We have identified those authorities below which are codified and those which are not. We remind agencies to consult the CFR before using these governmentwide authorities. Agencies are also reminded to consult their agency headquarters before using any agency-specific authority. Additionally, the authorities are subject to the provisions of 5 CFR, part 302 unless specifically exempted from those procedures. Interested parties needing information about specific authorities during the year may obtain information by writing to the Executive Resources Services Group, Center for Performance Management Systems and Evaluation, Human Capital Leadership and Merit System Accountability Division, Office of Personnel Management, 1900 E Street, NW., Room 6484, Washington, DC 20415, or by calling (202) 606–2246.

The following listing summarizes the Schedule A excepted authorities authorized for Government-wide use. These authorities are codified in 5 CFR part 213. These excepted authorities are current as of June 30, 2009. Please consult the CFR to read the full authority.

Schedule A

The following are Schedule A authorities that are authorized for use by the entire Executive Civil Service:

1. Positions of Chaplain and Chaplain's Assistant.
2. Positions to which appointments are made by the President without confirmation by the Senate.
3. Attorneys.

4. Law clerk trainee positions.

5. Temporary and less-than-full time positions for which examining is impracticable. These are: positions in remote/isolated locations where examination is impracticable; positions for which a critical hiring needs exists; and other positions that OPM may determine are impracticable to examine.

6. Positions filled by current or former Federal employees eligible for placement under special statutory provisions.

7. Positions without compensation provided appointments thereto meet the requirements of applicable laws relating to compensation.

8. Positions requiring the temporary or intermittent employment of professional, scientific, and technical experts for consultation purposes.

9. Any local physician, surgeon, or dentist employed under contract or on a part-time or fee basis.

10. Positions of a scientific, professional or analytical nature when filled by bona fide members of the faculty of an accredited college or university who has special qualifications for the positions to which appointed.

11. Positions established in support of a fellowship and similar programs that are filled from limited applicant pools and operate under specific criteria developed by the employing agency and/or a non-Federal organization.

12. Positions with compensation fixed under 5 U.S.C. 5351–5356 when filled by student-employees assigned or attached to Government hospitals, clinics or medical or dental laboratories.

13. Appointment of Persons with Mental Retardation, Severe Physical Disabilities, or Psychiatric Disabilities.

14. Positions for which a local recruiting shortage exists when filled by inmates of Federal, District of Columbia, and State (including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands) penal and correctional institutions under work-release programs authorized by the Prisoner Rehabilitation Act of 1965, the District of Columbia Work Release Act, or under work-release programs authorized by the States.

15. Not to exceed 30 positions of assistants to top-level Federal officials when filled by persons designated by the President as White House Fellows.

16. Scientific and professional research associate positions at GS–11 and above when filled on a temporary basis by persons having a doctoral degree in an appropriate field of study for research activities of mutual interest to appointees and their agencies.

17. Positions when filled by aliens in the absence of qualified citizens.

18. Not to exceed 24 positions when filled in accordance with an agreement between OPM and the Department of Justice by persons in programs administered by the Attorney General of the United States under Public Law 91–452 and related statutes.

19. Positions of Fellows in the Presidential Management Fellows Program.

20. Positions of Senior Fellows in the Presidential Management Fellows Program.

21. Positions as needed of readers for blind employees, interpreters for deaf employees and personal assistants for handicapped employees.

22. Positions on the staffs of temporary organizations, as defined in 5 U.S.C. 3161(a).

The following summary of Schedule A exceptions, current as of June 30, 2009, are agency-specific and are not codified in the Code of Federal Regulations. Agencies should consult with their headquarters to read the full authority.

23. *Executive Office of the President.*

Office of Administration—Not to exceed 75 positions to provide administrative services and support to the White House Office.

Office of Management and Budget—Not to exceed 15 positions at grades GS–5/15.

Council on Environmental Quality—Professional and technical positions in grades GS–9 through GS–15 on the staff of the Council.

National Security Council—All positions on the staff of the Council.

Office of Science and Technology Policy—Thirty positions of Senior Policy Analyst, GS–15; Policy Analyst, GS–11/14; and Policy Research Assistant, GS–9, for employment of anyone not to exceed 5 years on projects of a high priority nature.

Office of National Drug Control Policy—Not to exceed 15 positions, GS–15 and below, of senior policy analysts and other personnel with expertise in drug-related issues and/or technical knowledge to aid in anti-drug abuse efforts.

24. *Department of State.*

Office of the Secretary—All positions, GS–15 and below, on the staff of the Family Liaison Office, Director General of the Foreign Service and the Director of Personnel, Office of the Under Secretary for Management.

One position of Museum Curator (Arts), in the Office of the Under Secretary for Management, whose incumbent, will serve as Director, Diplomatic Reception Rooms. No new appointments may be made after February 28, 1997.

American Embassy, Paris, France—Chief, Travel and Visitor Unit. No new appointments may be made under this authority after August 10, 1981.

Bureau of Population, Refugees, and Migration—Not to exceed 10 positions at grades GS–5 through 11 on the staff of the Bureau.

Bureau of Administration—One Presidential Travel Officer. No new appointments may be made under this authority after June 11, 1981.

One position of Director, Art in Embassies Program, GM–1001–15.

Up to 250 time-limited positions within the Department of State in support of the June 2004 Economic Summit of Industrial Nations. No new appointments may be made under this authority after June 30, 2004.

25. *Department of the Treasury.*

Office of the Secretary—Not to exceed 20 positions at the equivalent of GS–13 through GS–17 to supplement permanent staff in the study of complex problems relating to international financial, economic, trade, and energy policies and programs of the Government, when filled by individuals with special qualifications for the particular study being undertaken.

Not to exceed 20 positions, which will supplement permanent staff involved in the study and analysis of complex problems in the areas of domestic economic and financial policy.

Not to exceed 100 positions in the Office of the Under Secretary for Terrorism and Financial Intelligence.

U.S. Customs Service—Positions in foreign countries designated as ''interpreter-translator'' and ''special employees,'' when filled by appointment of persons who are not citizens of the United States; and positions in foreign countries of messenger and janitor.

Not to exceed 25 positions of Customs Patrol Officers in the Papago Indian Agency in the State of Arizona when filled by the appointment of persons of one-fourth or more Indian blood.

Office of Thrift Supervision (OTS)—All positions in the supervision policy and supervision operations functions of OTS. No new appointments may be made under this authority after December 31, 1993.

Internal Revenue Service—Twenty positions of investigator for special assignments.

Bureau of Alcohol, Tobacco, and Firearms—One hundred positions of criminal investigator for special assignments. One non-permanent Senior Level (SL) Criminal Investigator to serve as a senior advisor to the Assistant

Director (Firearms, Explosives, and Arson).

Office of Financial Stability—Positions needed to perform investment, risk, financial, compliance, and asset management requiring unique qualifications currently not established by OPM. Positions will be in the Office of Financial Stability at the General Schedule (GS) grade levels 12–15 or Senior Level (SL), for initial employment not to exceed 4 years. No new appointments may be made under this authority after December 31, 2009.

26. *Department of Defense.*

Office of the Secretary—One Executive Secretary, US–USSR Standing Consultative Commission and Staff Analyst (SALT), Office of the Assistant Secretary of Defense (International Security Affairs).

Entire Department (including the Office of the Secretary of Defense and the Departments of the Army, Navy, and Air Force)—Professional positions in Military Dependent School Systems overseas.

Positions in attache 1 systems overseas, including all professional and scientific positions in the Naval Research Branch Office in London.

Positions of clerk-translator, translator, and interpreter overseas; Positions of Educational Specialist the incumbents of which will serve as Director of Religious Education on the staffs of the chaplains in the military services.

Positions under the program for utilization of alien scientists, approved under pertinent directives administered by the Director of Defense Research and Engineering of the Department of Defense, when occupied by alien scientists initially employed under the program including those who have acquired United States citizenship during such employment.

Positions in overseas installations of the DOD when filled by dependents of military or civilian employees of the U.S. Government residing in the area.

Twenty secretarial and staff support positions at GS–12 or below on the White House Support Group.

Positions in DOD research and development activities occupied by participants in the DOD Science and Engineering Apprenticeship Program for High School Students.

Positions engaged in the reconstruction of Iraq; for hiring non-U.S. citizens when there is a severe shortage of candidates with U.S. citizenship. This authority is limited to appointments made on or before July 1, 2004, and is subject to any restrictions set forth in the Department of Defense FY 2002 Appropriations Act.

Temporary or time-limited positions in direct support of U.S. Government efforts to rebuild and create an independent, free and secure Iraq and Afghanistan, when no other appropriate appointing authority applies. Positions will generally be located in Iraq or Afghanistan, but may be in other locations, including the United States, when directly supporting operations in Iraq or in Afghanistan. No new appointments may be made under this authority after October 1, 2012.

General—Positions concerned with advising, administering, supervising, or performing work in the collection, processing, analysis, production, evaluation, interpretation, dissemination, and estimation of intelligence information, including scientific and technical positions in the intelligence function; and positions involved in the planning, programming, and management of intelligence resources when, in the opinion of OPM, it is impracticable to examine. This authority does not apply to positions assigned to cryptologic and communications intelligence activities/functions.

Positions involved in intelligence-related work of the cryptologic intelligence activities of the military departments. This includes all positions of intelligence research specialist, and similar positions in the intelligence classification series; all scientific and technical positions involving the applications of engineering, physical or technical sciences to intelligence work; and professional as well as intelligence technician positions in which a majority of the incumbent's time is spent in advising, administering, supervising, or performing work in the collection, processing, analysis, production, evaluation, interpretation, dissemination, and estimation of intelligence information or in the planning, programming, and management of intelligence resources.

Uniformed Services University of the Health Sciences—Positions of President, Vice President, Assistant Vice President, Dean, Deputy Dean, Associate Dean, Assistant Dean, Assistant to the President, Assistant to the Vice President, Assistant to the Dean, Professor, Associate Professor, Assistant Professor, Instructor, Visiting Scientist, Research Associate, Senior Research Associate, Postdoctoral Fellow, and positions established to perform work on projects funded from grants.

National Defense University—Not to exceed 16 positions of senior policy analyst, GS–15, at the Strategic Concepts Development Center.

Defense Communications Agency—Not to exceed 10 positions at grades GS–10/15 to staff and support the Crisis Management Center at the White House.

Defense Acquisition University—The Provost and professors.

George C. Marshall European Center for Security Studies, Garmisch, Germany—The Director, Deputy Director, and positions of professor, instructor, and lecturer at the George C. Marshall European Center for Security Studies, Garmisch, Germany.

Asia-Pacific Center for Security Studies, Honolulu, Hawaii—The Director, Deputy Director, Dean of Academics, Director of College, deputy department chairs, and senior positions of professor, associate professor, and research fellow within the Asia Pacific Center.

Business Transformation Agency—Fifty temporary or time-limited (not to exceed four years) positions, at grades GS–11through GS–15. The authority will be used to appoint persons in the following series: Management and Program Analyst, GS–343: Logistics Management, GS–346; Financial Management Programs, GS–501; Accounting, GS–510; Computer Engineering, GS–854; Business and Industry, GS–1101; Operations Research, GS–1515; Computer Science, GS–1550; General Supply, GS–2001; Supply Program Management, GS–2003; Inventory Management, GS–2010; and Information Technology, GS–2210.

Special Inspector General for Afghanistan—Positions needed to establish the Special Inspector General for Afghanistan Reconstruction. These positions provide for the independent and objective conduct and supervision of audits and investigations relating to the programs and operations funded with amounts appropriated and otherwise made available for the reconstruction of Afghanistan. These positions are established at General Schedule (GS) grade levels for initial employment not to exceed 3 years and may, with prior approval of OPM, be extended for an additional period of 2 years. No new appointments may be made under this authority after January 31, 2011.

27. *Department of the Army.*

U.S. Military Academy, West Point, New York—Civilian professors, instructors, teachers (except teachers at the Children's School), Cadet Social Activities Coordinator, Chapel Organist and Choir-Master, Director of Intercollegiate Athletics, Associate Director of Intercollegiate Athletics, Coaches, Facility Manager, Building Manager, three Physical Therapists (Athletic Trainers), Associate Director of

Admissions for Plans and Programs, Deputy Director of Alumni Affairs; and Librarian when filled by an officer of the Regular Army retired from active service, and the Military Secretary to the Superintendent when filled by a U.S. Military Academy graduate retired as a regular commissioned officer for disability.

Defense Language Institute—All positions (professors, instructors, lecturers) which require proficiency in a foreign language or knowledge of foreign language teaching methods.

Army War College, Carlisle Barracks, PA—Positions of professor, instructor, or lecturer associated with courses of instruction of at least 10 months duration for employment not to exceed 5 years, which may be renewed in 1-, 2-, 3-, 4-, or 5-year increments indefinitely thereafter.

U.S. Military Academy Preparatory School, Fort Monmouth, New Jersey—Positions of Academic Director, Department Head, and Instructor.

U.S. Army Command and General Staff College, Fort Leavenworth, Kansas—Positions of professor, associate professor, assistant professor, and instructor associated with courses of instruction of at least 10 months duration, for employment not to exceed up to 5 years, which may be renewed in 1-, 2-, 3-, 4-, or 5-year increments indefinitely thereafter.

28. *Department of the Navy.*

General—Marine positions assigned to a coastal or seagoing vessel operated by a naval activity for research or training purposes. All positions necessary for the administration and maintenance of the official residence of the Vice President.

Naval Academy, Naval Postgraduate School, and Naval War College—Professors, Instructors, and Teachers; the Director of Academic Planning, Naval Postgraduate School; and the Librarian, Organist-Choirmaster, Registrar, the Dean of Admissions, and Social Counselors at the Naval Academy.

Chief of Naval Operations—One position at grade GS–12 or above that will provide technical, managerial, or administrative support on highly classified functions to the Deputy Chief of Naval Operations (Plans, Policy, and Operations).

Military Sealift Command—All positions on vessels operated by the Military Sealift Command.

Pacific Missile Range Facility, Barking Sands, Hawaii—All positions. This authority applies only to positions that must be filled pending final decision on contracting of Facility operations. No new appointments may be made under this authority after July 29, 1988.

Office of Naval Research—Scientific and technical positions, GS–13/15, in the Office of Naval Research International Field Office which covers satellite offices within the Far East, Africa, Europe, Latin America, and the South Pacific. Positions are to be filled by personnel having specialized experience in scientific and/or technical disciplines of current interest to the Department of the Navy.

29. *Department of the Air Force.*

Office of the Secretary—One Special Assistant in the Office of the Secretary of the Air Force. This position has advisory rather than operating duties except as operating or administrative responsibilities may be exercised in connection with the pilot studies.

General—Professional, technical, managerial and administrative positions supporting space activities, when approved by the Secretary of the Air Force.

One hundred eighty positions, serviced by Hill Air Force Base, Utah, engaged in interdepartmental activities in support of national defense projects involving scientific and technical evaluations.

Norton and McClellan Air Force Bases, California—Not to exceed 20 professional positions, GS–11 through GS–15, in Detachments 6 and 51, SM–ALC, Norton and McClellan Air Force Bases, California, which will provide logistic support management to specialized research and development projects.

U.S. Air Force Academy, Colorado—Positions of Professor, Associate Professor, Assistant Professor, and Instructor, in the Dean of Faculty, Commandant of Cadets, Director of Athletics, and Preparatory School of the United States Air Force Academy.

Air Force Office of Special Investigations—Positions of Criminal Investigators/Intelligence Research Specialists, GS–5 through GS–15, in the Air Force Office of Special Investigations.

Wright-Patterson Air Force Base, Ohio—Not to exceed eight positions, GS–12 through 15, in Headquarters Air Force Logistics Command, DCS Material Management, Office of Special Activities, Wright-Patterson Air Force Base, Ohio, which will provide logistics support management staff guidance to classified research and development projects.

Air University, Maxwell Air Force Base, Alabama—Positions of Professor, Instructor, or Lecturer.

Air Force Institute of Technology, Wright-Patterson Air Force Base, Ohio—Civilian Deans and Professors.

Air Force Logistics Command—One Supervisory Logistics Management Specialist, GM–346–14, in Detachment 2, 2762 Logistics Management Squadron (Special), Greenville, Texas.

2762nd Logistics Squadron (Special)—One Supervisory Logistics Management Specialist, GS–346–15, in the 2762nd Logistics Squadron (Special), at Wright-Patterson Air Force Base, Ohio.

Air National Guard Readiness Center—One Commander, Air National Guard Readiness Center, Andrews Air Force Base, Maryland.

30. *Department of Justice.*

General—Deputy U.S. Marshals employed on an hourly basis for intermittent service. Positions at GS–15 and below on the staff of an office of a special counsel. Positions of Program Manager and Assistant Program Manager supporting the International Criminal Investigative Training Assistance Program in foreign countries.

Immigration and Naturalization Service—Not to exceed 500 positions of interpreters and language specialists, GS–1040–5/9.

Not to exceed 25 positions, GS–15 and below, with proficiency in speaking, reading, and writing the Russian language and serving in the Soviet Refugee Processing Program with permanent duty location in Moscow, Russia.

Drug Enforcement Administration—Four hundred positions of Intelligence Research Agent and/or Intelligence Operations Specialist in the GS–132 series, grades GS–9 through GS–15. Not to exceed 200 positions of Criminal Investigator (Special Agent). New appointments may be made under this authority only at grades GS–7/11.

National Drug Intelligence Center—All positions.

31. *Department of Homeland Security.*

Up to 50 positions at the GS–5 through GS–15 grade levels at the Department of Homeland Security. No new appointments may be made under this authority after September 30, 2005.

Ten positions for oversight policy and direction of sensitive law enforcement activities.

Up to 15 Senior Level and General Schedule (or equivalent) positions within the Homeland Security Labor Relations Board and the Homeland Security Mandatory Removal Board.

32. *Department of the Interior.*

General—Technical, maintenance, and clerical positions at or below grades GS–7, WG–10, or equivalent, in the field

service of the Department of the Interior, when filled by the appointment of persons who are certified as maintaining a permanent and exclusive residence within, or contiguous to, a field activity or district, and as being dependent for livelihood primarily upon employment available within the field activity of the Department.

All positions on Government-owned ships or vessels operated by the Department of the Interior.

Temporary or seasonal caretakers at temporarily closed camps or improved areas to maintain grounds, buildings, or other structures and prevent damages or theft of Government property. Such appointments shall not extend beyond 130 working days a year without the prior approval of OPM. Temporary, intermittent, or seasonal field assistants at GS–7, or its equivalent, and below in such areas as forestry, range management, soils, engineering, fishery and wildlife management, and with surveying parties.

Temporary positions established in the field service of the Department for emergency forest and range fire prevention or suppression and blister rust control not to exceed 180 working days a year: Provided that an employee may work as many as 220 working days a year when employment beyond 180 days is required to cope with extended fire seasons or sudden emergencies such as fire, flood, storm, or other unforeseen situations involving potential loss of life or property. Persons employed in field positions, the work of which is financed jointly by the Department of the Interior and cooperating persons or organizations outside the Federal service.

All positions in the Bureau of Indian Affairs and other positions in the Department of the Interior directly and primarily related to providing services to Indians when filled by the appointment of Indians. The Secretary of the Interior is responsible for defining the term ''Indian.''

Temporary, intermittent, or seasonal positions at GS–7 or below in Alaska, as follows: Positions in nonprofessional mining activities, such as those of drillers, miners, caterpillar operators, and samplers. Employment under this authority shall not exceed 180 working days a year and shall be appropriate only when the activity is carried on in a remote or isolated area and there is a shortage of available candidates for the positions.

Temporary, part-time, or intermittent employment of mechanics, skilled laborers, equipment operators and tradesmen on construction, repair, or maintenance work not to exceed 180 working days a year in Alaska, when the activity is carried on in a remote or isolated area and there is a shortage of available candidates for the positions.

Seasonal airplane pilots and airplane mechanics in Alaska, not to exceed 180 working days a year. Temporary staff positions in the Youth Conservation Corps Centers operated by the Department of the Interior. Employment under this authority shall not exceed 11 weeks a year except with prior approval from OPM.

Positions in the Youth Conservation Corps for which pay is fixed at the Federal minimum wage rate. Employment under this authority may not exceed 10 weeks.

Indian Arts and Crafts Board—The Executive Director.

Office of the Assistant Secretary, Territorial and International Affairs—Not to exceed four positions of Territorial Management Interns, grades GS–5, GS–7, or GS–9, when filled by territorial residents who are U.S. citizens from the Virgin Islands or Guam; U.S. nationals from American Samoa; or in the case of the Northern Marianas, will become U.S. citizens upon termination of the U.S. trusteeship. Employment under this authority may not exceed 6 months.

Special Assistants to the Governor of American Samoa who perform specialized administrative, professional, technical, and scientific duties as members of his or her immediate staff.

National Park Service—Positions established for the administration of Kalaupapa National Historic Park, Molokai, Hawaii, when filled by appointment of qualified patients and Native Hawaiians, as provided by Public Law 95–565.

Seven full-time permanent and 31 temporary, part-time, or intermittent positions in the Redwood National Park, California, which are needed for rehabilitation of the park, as provided by Public Law 95–250.

One Special Representative of the Director.

All positions in the Grand Portage National Monument, Minnesota, when filled by the appointment of recognized members of the Minnesota Chippewa Tribe.

Bureau of Reclamation—Appraisers and examiners employed on a temporary, intermittent, or part-time basis on special valuation or prospective-entrymen-review projects where knowledge of local values on conditions or other specialized qualifications not possessed by regular Bureau employees are required for successful results. Employment under this provision shall not exceed 130 working days a year in any individual case: Provided that such employment may, with prior approval from OPM, be extended not to exceed an additional 50 working days in any single year.

Office of the Deputy Assistant Secretary for Territorial Affairs—Positions of Territorial Management Interns, GS–5, when filled by persons selected by the Government of the Trust Territory of the Pacific Islands. No appointment may extend beyond 1 year.

33. *Department of Agriculture.*

General—Agents employed in field positions, the work of which is financed jointly by the Department and cooperating persons, organizations, or governmental agencies outside the Federal service. Except for positions for which selection is jointly made by the Department and the cooperating organization, this authority is not applicable to positions in the Agricultural Research Service or the National Agricultural Statistics Service. This authority is not applicable to the following positions in the Agricultural Marketing Service: Agricultural commodity grader (grain and meat, poultry, and dairy), agricultural commodity aid (grain), and tobacco inspection positions.

Temporary, intermittent, or seasonal employment in the field service of the Department in positions at and below GS–7 and WG–10 in the following types of positions: Field assistants for sub professional services; agricultural helpers, helper-leaders, and workers in the Agricultural Research Service and the Animal and Plant Health Inspection Service; and subject to prior OPM approval granted in the calendar year in which the appointment is to be made, other clerical, trades, crafts, and manual labor positions. Total employment under this subparagraph may not exceed 180 working days in a service year: Provided, that an employee may work as many as 220 working days in a service year when employment beyond 180 days is required to cope with extended fire seasons or sudden emergencies such as fire, flood, storm, or other unforeseen situations involving potential loss of life or property. This paragraph does not cover trades, crafts, and manual labor positions covered by paragraph (i) of Sec. 213.3102 or positions within the Forest Service.

Farm Service Agency—Members of State Committees: Provided, that employment under this authority shall be limited to temporary intermittent (WAE) positions whose principal duties involve administering farm programs within the State consistent with legislative and Departmental requirements and reviewing national

procedures and policies for adaptation at State and local levels within established parameters. Individual appointments under this authority are for 1 year and may be extended only by the Secretary of Agriculture or his designee. Members of State Committees serve at the pleasure of the Secretary.

Rural Development—County committeemen to consider, recommend, and advise with respect to the Rural Development program.

Professional and clerical positions in the Trust Territory of the Pacific Islands when occupied by indigenous residents of the Territory to provide financial assistance pursuant to current authorizing statutes.

Agricultural Marketing Service—Positions of Agricultural Commodity Graders, Agricultural Commodity Technicians, and Agricultural Commodity Aids at grades GS–9 and below in the tobacco, dairy, and poultry commodities; Meat Acceptance Specialists, GS–11 and below; Clerks, Office Automation Clerks, and Computer Clerks at GS–5 and below; Clerk-Typists at grades GS–4 and below; and Laborers under the Wage System. Employment under this authority is limited to either 1,280 hours or 180 days in a service year.

Positions of Agricultural Commodity Graders, Agricultural Commodity Technicians, and Agricultural Commodity Aids at grades GS–11 and below in the cotton, raisin, peanut, and processed and fresh fruit and vegetable commodities and the following positions in support of these commodities: Clerks, Office Automation Clerks, and Computer Clerks and Operators at GS–5 and below; Clerk-Typists at grades GS–4 and below; and, under the Federal Wage System, High Volume Instrumentation (HVI) Operators and HVI Operator Leaders at WG/WL–2 and below, respectively, Instrument Mechanics/Workers/Helpers at WG–10 and below, and Laborers. Employment under this authority may not exceed 180 days in a service year. In unforeseen situations such as bad weather or crop conditions, unanticipated plant demands, or increased imports, employees may work up to 240 days in a service year. Cotton Agricultural Commodity Graders, GS–5, may be employed as trainees for the first appointment for an initial period of 6 months for training without regard to the service year limitation.

Milk Market Administrators: All positions on the staffs of the Milk Market Administrators.

Food Safety and Inspection Service—Positions of Meat and Poultry Inspectors (Veterinarians at GS–11 and below and non-Veterinarians at appropriate grades below GS–11) for employment on a temporary, intermittent, or seasonal basis, not to exceed 1,280 hours a year.

Grain Inspection, Packers and Stockyards Administration—One hundred and fifty positions of Agricultural Commodity Aid (Grain), GS–2/4; 100 positions of Agricultural Commodity Technician (Grain), GS–4/7; and 60 positions of Agricultural Commodity Grader (Grain), GS–5/9, for temporary employment on a part-time, intermittent, or seasonal basis not to exceed 1,280 hours in a service year.

Alternative Agricultural Research and Commercialization Corporation—Executive Director.

34. *Department of Commerce.*

General—Not to exceed 50 scientific and technical positions whose duties are performed primarily in the Antarctic. Incumbents of these positions may be stationed in the continental United States for periods of orientation, training, analysis of data, and report writing.

Bureau of the Census—Managers, supervisors, technicians, clerks, interviewers, and enumerators in the field service, for time-limited employment to conduct a census. Current Program Interviewers employed in the field service.

Office of the Under Secretary for International Trade—Fifteen positions at GS–12 and above in specialized fields relating to international trade or commerce in units under the jurisdiction of the Under Secretary for International Trade. Incumbents will be assigned to advisory rather than to operating duties, except as operating and administrative responsibility may be required for the conduct of pilot studies or special projects.

Not to exceed 15 positions in grades GS–12 through GS–15, to be filled by persons qualified as industrial or marketing specialists; who possess specialized knowledge and experience in industrial production, industrial operations and related problems, market structure and trends, retail and wholesale trade practices, distribution channels and costs, or business financing and credit procedures applicable to one or more of the current segments of U.S. industry served by the Under Secretary for International Trade, and the subordinate components of his organization which are involved in domestic business matters.

National Oceanic and Atmospheric Administration—All civilian positions on vessels operated by the National Ocean Service. Temporary positions required in connection with the surveying operations of the field service of the National Ocean Service. Appointment to such positions shall not exceed 8 months in any 1 calendar year.

National Telecommunications and Information Administration—Thirty-eight professional positions in grades GS–13 through GS–15.

35. *Department of Labor.*

Office of the Secretary—Chairman and five members, Employees' Compensation Appeals Board. Chairman and eight members, Benefits Review Board.

Employment and Training Administration—Not to exceed 10 positions of Supervisory Manpower Development Specialist and Manpower Development Specialist, GS–7/15, in the Division of Indian and Native American Programs, when filled by the appointment of persons of one-fourth or more Indian blood. These positions require direct contact with Indian tribes and communities for the development and administration of comprehensive employment and training programs.

36. *Department of Health and Human Services.*

General—Intermittent positions, at GS–15 and below and WG–10 and below, on teams under the National Disaster Medical System including Disaster Medical Assistance Teams and specialty teams, to respond to disasters, emergencies, and incidents/events involving medical, mortuary and public health needs.

Public Health Service—Positions at Government sanatoria when filled by patients during treatment or convalescence.

Positions concerned with problems in preventive medicine financed or participated in by the Department of Health and Human Services and a cooperating State, county, municipality, incorporated organization, or an individual in which at least one-half of the expense is contributed by the participating agency either in salaries, quarters, materials, equipment, or other necessary elements in the carrying on of the work.

Not to exceed 50 positions associated with health screening programs for refugees.

All positions in the Public Health Service and other positions in the Department of Health and Human Services directly and primarily related to providing services to Indians when filled by the appointment of Indians. The Secretary of Health and Human Services is responsible for defining the term ''Indian.''

Health care positions of the National Health Service Corps for employment of any one individual not to exceed 4 years

of service in health manpower shortage areas.

Not to exceed 200 staff positions, GS–15 and below, in the Immigration Health Service, for an emergency staff to provide health related services to foreign entrants.

The President's Council on Physical Fitness—Four staff assistants.

37. *Department of Education.*

Positions concerned with problems in education financed and participated in by the Department of Education and a cooperating State educational agency, or university or college, in which there is joint responsibility for selection and supervision of employees, and at least one-half of the expense is contributed by the cooperating agency in salaries, quarters, materials, equipment, or other necessary elements in the carrying on of the work.

38. *Board of Governors, Federal Reserve System.*

All positions.

39. *Department of Veterans Affairs.*

Construction Division—Temporary construction workers paid from ''purchase and hire'' funds and appointed for not to exceed the duration of a construction project.

Alcoholism Treatment Units and Drug Dependence Treatment Centers—Not to exceed 400 positions of rehabilitation counselors, GS–3 through GS–11, in Alcoholism Treatment Units and Drug Dependence Treatment Centers, when filled by former patients.

Board of Veterans' Appeals—Positions, GS–15, when filled by a member of the Board. Except as provided by section 201(d) of Public Law 100–687, appointments under this authority shall be for a term of 9 years, and may be renewed.

Positions, GS–15, when filled by a non-member of the Board who is awaiting Presidential approval for appointment as a Board member.

Vietnam Era Veterans Readjustment Counseling Service—Not to exceed 600 positions at grades GS–3 through GS–11, involved in the Department's Vietnam Era Veterans Readjustment Counseling Service.

40. *Small Business Administration.*

When the President under 42 U.S.C. 1855–1855g, the Secretary of Agriculture under 7 U.S.C. 1961, or the Small Business Administration under 15 U.S.C. 636(b)(1) declares an area to be a disaster area, positions filled by time-limited appointment of employees to make and administer disaster loans in the area under the Small Business Act, as amended. Service under this authority may not exceed 4 years, and no more than 2 years may be spent on a single disaster. Exception to this time limit may only be made with prior Office of Personnel Management approval.

Appointments under this authority may not be used to extend the 2-year service limit contained below. No one may be appointed under this authority to positions engaged in long-term maintenance of loan portfolios.

When the President under 42 U.S.C. 1855–1855g, the Secretary of Agriculture under 7 U.S.C. 1961, or the Small Business Administration under 15 U.S.C. 636(b)(1) declares an area to be a disaster area, positions filled by time-limited appointment of employees to make and administer disaster loans in that area under the Small Business Act, as amended. No one may serve under this authority for more than an aggregate of 2 years without a break in service of at least 6 months. Persons who have had more than 2 years of service under paragraph (a) of this section must have a break in service of at least 8 months following such service before appointment under this authority. No one may be appointed under this authority to positions engaged in long-term maintenance of loan portfolios.

41. *Federal Deposit Insurance Corporation.*

Temporary or time-limited positions located at closed banks or savings and loan institutions that are concerned with liquidating the assets of the institutions, liquidating loans to the institutions, or paying the depositors of closed insured institutions. Appointments under this authority may not exceed 4 years.

42. *U.S. Soldiers' and Airmen's Home.*

Positions when filled by member-residents of the Home.

43. *Selective Service System.*

State Directors.

44. *National Aeronautics and Space Administration.*

One hundred and fifty alien scientists having special qualifications in the fields of aeronautical and space research where such employment is deemed by the Administrator of the National Aeronautics and Space Administration to be necessary in the public interest.

45. *Social Security Administration.*

Six positions of Social Insurance Representative in the district offices of the Social Security Administration in the State of Arizona when filled by the appointment of persons of one-fourth or more Indian blood.

Seven positions of Social Insurance Representative in the district offices of the Social Security Administration in the State of New Mexico when filled by the appointment of persons of one-fourth or more Indian blood.

Two positions of Social Insurance Representative in the district offices of the Social Security Administration in the State of Alaska when filled by the appointments of persons of one-fourth or more Alaskan Native blood (Eskimos, Indians, or Aleuts).

46. *The President's Crime Prevention Council.*

Up to 7 positions established in the President's Crime Prevention Council office created by the Violent Crime Control and Law Enforcement Act of 1994. No new appointments may be made under this authority after March 31, 1998.

47. *Chemical Safety and Hazard Investigation Board.*

Seven positions of either Chemical Incident Investigators or Chemical Safety Recommendation Specialists, in the Office of Investigations and Safety Programs. No new appointments may be made under this authority after October 15, 2002, or until the seventh person (who was given an offer of employment on September 13, 2002, and is waiting a physical examination clearance) is appointed, whichever is later.

48. *Court Services and Offender Supervision Agency of the District of Columbia.*

All positions, except for the Director, established to create the Court Services and Offender Supervision Agency of the District of Columbia. No new appointments may be made under this authority after March 31, 2004.

49. *Millennium Challenge Corporation.*

Positions of Resident Country Directors and Deputy Resident Country Directors. The length of appointments will correspond to the length or term of the compact agreements made between the Millennium Challenge Corporation (MCC) and the country in which MCC will work, plus one additional year to cover pre- and post-compact agreement related activities.

50. *Smithsonian Institution.*

All positions located in Panama which are part of or which support the Smithsonian Tropical Research Institute.

Positions at GS–15 and below in the National Museum of the American Indian requiring knowledge of, and experience in, tribal customs and culture. Such positions comprise approximately 10 percent of the Museum's positions and, generally, do not include secretarial, clerical, administrative, or program support positions.

51. *Woodrow Wilson International Center for Scholars.*

One Asian Studies Program Administrator, one International

Security Studies Program Administrator, one Latin American Program Administrator, one Russian Studies Program Administrator, one West European Program Administrator, one Environmental Change & Security Studies Program Administrator, one United States Studies Program Administrator, two Social Science Program Administrators, and one Middle East Studies Program Administrator.

52. *Community Development Financial Institutions Fund.*

All positions in the Fund and positions created for the purpose of establishing the Fund's operations in accordance with the Community Development Banking and Financial Institutions Act of 1994, except for any positions required by the Act to be filled by competitive appointment. No new appointments may be made under this authority after September 23, 1998.

53. *Utah Reclamation and Conservation Commission.*

Executive Director.

54. *National Foundation on the Arts and the Humanities.*

National Endowment for the Arts—Artistic and related positions at grades GS–13 through GS–15 engaged in the review, evaluation and administration of applications and grants supporting the arts, related research and assessment, policy and program development, arts education, access programs and advocacy or evaluation of critical arts projects and outreach programs. Duties require artistic stature, in-depth knowledge of arts disciplines and/or artistic-related leadership qualities.

55. *African Development Foundation.*

One Enterprise Development Fund Manager.

56. *Office of Personnel Management.*

Part-time and intermittent positions of test examiners at grades GS–8 and below.

57. *Department of Transportation.*

U.S. Coast Guard—Lamplighters. Professors, Associate Professors, Assistant Professors, Instructors, one Principal Librarian, one Cadet Hostess, and one Psychologist (Counseling) at the Coast Guard Academy, New London, Connecticut.

Maritime Administration—All positions on Government-owned vessels or those bareboats chartered to the Government and operated by or for the Maritime Administration.

U.S. Merchant Marine Academy, positions of: Professors, Instructors, and Teachers, including heads of Departments of Physical Education and Athletics, Humanities, Mathematics and Science, Maritime Law and Economics, Nautical Science, and Engineering; Coordinator of Shipboard Training; the Commandant of Midshipmen, the Assistant Commandant of Midshipmen; Director of Music; three Battalion Officers; three Regimental Affairs Officers; and one Training Administrator.

U.S. Merchant Marine Academy positions of: Associate Dean; Registrar; Director of Admissions; Assistant Director of Admissions; Director, Office of External Affairs; Placement Officer; Administrative Librarian; Shipboard Training Assistant; three Academy Training Representatives; and one Education Program Assistant.

58. *Federal Emergency Management Agency.*

Field positions at grades GS–15 and below, or equivalent, which are engaged in work directly related to unique response efforts to environmental emergencies not covered by the Disaster Relief Act of 1974, Public Law 93–288, as amended. Employment under this authority may not exceed 36 months on any single emergency. Persons may not be employed under this authority for long-term duties or for work not directly necessitated by the emergency response effort.

Not to exceed 30 positions at grades GS–15 and below in the Offices of Executive Administration, General Counsel, Inspector General, Comptroller, Public Affairs, Personnel, Acquisition Management, and the State and Local Program and Support Directorate which are engaged in work directly related to unique response efforts to environmental emergencies not covered by the Disaster Relief Act of 1974, Public Law 93–288, as amended. Employment under this authority may not exceed 36 months on any single emergency, or for long-term duties or work not directly necessitated by the emergency response effort. No one may be reappointed under this authority for service in connection with a different emergency unless at least 6 months have elapsed since the individual's latest appointment under this authority.

Not to exceed 350 professional and technical positions at grades GS–5 through GS–15, or equivalent, in Mobile Emergency Response Support Detachments (MERS).

59. *Temporary Organizations.*

Positions on the staffs of temporary organizations, as defined in 5 U.S.C. 3161(a). Appointments may not exceed 3 years, but temporary organizations may extend the appointments for 2 additional years if the conditions for extension are related to the completion of the study or project.

The following listing summarizes the Schedule B excepted authorities authorized for Government-wide use. These authorities are codified in 5 CFR part 213. These excepted authorities are current as of June 30, 2009. Please consult 5 CFR, part 213 to read the full authority.

Schedule B

The following are Schedule B authorities that are authorized for use by the entire Executive Civil Service:

1. Student Educational Employment Program—Student Temporary Employment Program.

2. Student Educational Employment Program—Student Career Experience Program.

3. Special executive development positions established in connection with Senior Executive Service candidate development programs which have been approved by OPM.

4. Positions when filled under any of the following conditions:

a. Appointment at grades GS–15 and above, or equivalent, in the same or a different agency without a break in service from a career appointment in the Senior Executive Service (SES) of an individual who has completed the SES probationary period; been removed from the SES because of less than fully successful executive performance, failure to be recertified, or a reduction in force; and is entitled to be placed in another civil service position under 5 U.S.C. 3594(b).

b. Appointment in a different agency without a break in service of an individual originally appointed under this paragraph.

c. Reassignment, promotion, or demotion within the same agency of an individual appointed under this authority.

5. Positions when filled by preference eligibles or veterans who have been separated from the armed forces under honorable conditions after 3 years or more of continuous active service and who, in accordance with 5 U.S.C. 3304(f) (Pub. L. 105–339), applied for these positions under merit promotion procedures when applications were being accepted by the agency from individuals outside its own workforce. These veterans may be promoted, demoted, or reassigned, as appropriate, to other positions within the agency but would remain employed under this excepted authority as long as there is no break in service. No new appointments may be made under this authority after November 30, 1999.

6. The Federal Career Intern Program.

The following summary of Schedule B exceptions, current as of June 30, 2009,

are agency-specific and are not codified in the Code of Federal Regulations (CFR). Agencies should consult with their headquarters to read the full authority.

7. *Executive Office of the President.*

Office of the Special Representative for Trade Negotiations—Seventeen positions of economist at grades GS–12 through GS–15.

8. *Department of State.*

One non-permanent senior level position to serve as Science and Technology Advisor to the Secretary.

Fourteen positions on the household staff of the President's Guest House (Blair and Blair-Lee Houses).

Scientific, professional, and technical positions at grades GS–12 to GS–15 when filled by persons having special qualifications in foreign policy matters.

9. *Department of the Treasury.*

Positions of Deputy Comptroller of the Currency, Chief National Bank Examiner, Assistant Chief National Bank Examiner, Regional Administrator of National Banks, Deputy Regional Administrator of National Banks, Assistant to the Comptroller of the Currency, National Bank Examiner, Associate National Bank Examiner, and Assistant National Bank Examiner, whose salaries are paid from assessments against national banks and other financial institutions.

Positions concerned with the protection of the life and safety of the President and members of his immediate family, or other persons for whom similar protective services are prescribed by law, when filled in accordance with special appointment procedures approved by OPM.

Positions, grades GS–5 through GS–12, of Treasury Enforcement Agent in the Bureau of Alcohol, Tobacco, and Firearms; and Treasury Enforcement Agent, Pilot, Marine Enforcement Officer, and Aviation Enforcement Officer in the U.S. Customs Service. Service under this authority may not exceed 3 years and 120 days.

10. *Department of Defense.*

Office of the Secretary—Professional positions at GS–11 through GS–15 involving systems, costs, and economic analysis functions in the Office of the Assistant Secretary (Program Analysis and Evaluation); and in the Office of the Deputy Assistant Secretary (Systems Policy and Information) in the Office of the Assistant Secretary (Comptroller).

Four Net Assessment Analysts.

Interdepartmental activities—Six positions to provide general administration, general art and information, photography, and/or visual information support to the White House Photographic Service.

Eight positions, GS–15 or below, in the White House Military Office, providing support for airlift operations, special events, security, and/or administrative services to the Office of the President.

National Defense University—Sixty-one positions of Professor, GS–13/15, for employment of any one individual on an initial appointment not to exceed 3 years, which may be renewed in any increment from 1 to 6 years indefinitely thereafter.

General—One position of Law Enforcement Liaison Officer (Drugs), GS–301–15, U.S. European Command.

Acquisition positions at grades GS–5 through GS–11, whose incumbents have successfully completed the required course of education as participants in the Department of Defense scholarship program authorized under 10 U.S.C. 1744.

Office of the Inspector General—Positions of Criminal Investigator, GS–1811–5/15.

Department of Defense Polygraph Institute, Fort McClellan, Alabama—One Director, GM–15.

Defense Security Assistance Agency—All faculty members with instructor and research duties at the Defense Institute of Security Assistance Management, Wright Patterson Air Force Base, Dayton, Ohio.

11. *Department of the Army.*

U.S. Army Command and General Staff College—Seven positions of professors, instructors, and education specialists. Total employment of any individual under this authority may not exceed 4 years.

12. *Department of the Navy.*

Naval Underwater Systems Center, New London, Connecticut—One position of Oceanographer, grade GS–14, to function as project director and manager for research in the weapons systems applications of ocean eddies.

Armed Forces Staff College, Norfolk, Virginia—All civilian faculty positions of professors, instructors, and teachers on the staff of the Armed Forces Staff College, Norfolk, Virginia.

Defense Personnel Security Research and Education Center—One Director and four Research Psychologists at the professor or GS–15 level in the Defense Personnel Security Research and Education Center.

Marine Corps Command and Staff College—All civilian professor positions at the Marine Corps Command and Staff College.

Executive Dining facilities at the Pentagon—One position of Staff Assistant, GS–301, whose incumbent will manage the Navy's Executive Dining facilities at the Pentagon.

Bachelor Quarters Management Study—One position of Housing Management Specialist, GM–1173–14, involved with the Bachelor Quarters Management Study. No new appointments may be made under this authority after February 29, 1992.

13. *Department of the Air Force.*

Air Research Institute at the Air University, Maxwell Air Force Base, Alabama—Not to exceed four interdisciplinary positions for the Air Research Institute at the Air University, Maxwell Air Force Base, Alabama, for employment to complete studies proposed by candidates and acceptable to the Air Force.

Air University—Positions of Instructor or professional academic staff at the Air University associated with courses of instruction of varying durations, for employment not to exceed 3 years, which may be renewed for an indefinite period thereafter.

U.S. Air Force Academy, Colorado—One position of Director of Development and Alumni Programs, GS–301–13, with the U.S. Air Force Academy, Colorado.

14. *Department of Justice.*

Drug Enforcement Administration—Criminal Investigator (Special Agent) positions in the Drug Enforcement Administration. New appointments may be made under this authority only at grades GS–5 through GS–11. Service under the authority may not exceed 4 years. Appointments made under this authority may be converted to career or career-conditional appointments under the provisions of Executive Order 12230, subject to conditions agreed upon between the Department and OPM.

Not to exceed 400 positions at grades GS–5 through GS–15 assigned to regional task forces established to conduct special investigations to combat drug trafficking and organized crime.

United States Trustees—Positions, other than secretarial, GS–6 through GS–15, requiring knowledge of the bankruptcy process, on the staff of the offices of United States Trustees or the Executive Office for U.S. Trustees.

15. *Department of Agriculture.*

Foreign Agricultural Service—Positions of a project nature involved in international technical assistance activities. Service under this authority may not exceed 5 years on a single project for any individual unless delayed completion of a project justifies an extension up to but not exceeding 2 years.

General—Temporary positions of professional Research Scientists, GS–15 or below, in the Agricultural Research Service, Economic Research Service, and the Forest Service, when such

positions are established to support the Research Associateship Program and are filled by persons having a doctoral degree in an appropriate field of study for research activities of mutual interest to appointees and the agency. Appointments are limited to proposals approved by the appropriate Administrator. Appointments may be made for initial periods not to exceed 2 years and may be extended for up to 2 additional years. Extensions beyond 4 years, up to a maximum of 2 additional years, may be granted, but only in very rare and unusual circumstances, as determined by the Human Resources Officer for the Research, Education, and Economics Mission Area, or the Human Resources Officer, Forest Service.

Not to exceed 55 Executive Director positions, GM–301–14/15, with the State Rural Development Councils in support of the Presidential Rural Development Initiative.

16. *Department of Commerce.*

Bureau of the Census—Not to exceed 50 Community Services Specialist positions at the equivalent of GS–5 through GS–12.

National Telecommunications and Information Administration—Not to exceed 10 positions of Telecommunications Policy Analysts, grades GS–11 through GS–15.

17. *Department of Labor.*

Administrative Review Board—Chair and a maximum of four additional Members.

Bureau of International Labor Affairs—Positions in the Office of Foreign Relations, which are paid by outside funding sources under contracts for specific international labor market technical assistance projects. Appointments under this authority may not be extended beyond the expiration date of the project.

18. *Department of Education.*

Seventy-five positions, not to exceed GS–13, of a professional or analytical nature when filled by persons, other than college faculty members or candidates working toward college degrees, who are participating in mid-career development programs authorized by Federal statute or regulation, or sponsored by private nonprofit organizations, when a period of work experience is a requirement for completion of an organized study program.

Fifty positions, GS–7 through GS–11, concerned with advising on education policies, practices, and procedures under unusual and abnormal conditions. Persons employed under this provision must be bona fide elementary school and high school teachers.

19. *Department of Veterans Affairs.*

Not to exceed 800 principal investigatory, scientific, professional, and technical positions at grades GS–11 and above in the medical research program.

Not to exceed 25 Criminal Investigator (Undercover) positions, GS–1811, GS–5 through GS–12, conducting undercover investigations in the Veterans Health Administration supervised by the VA, Office of Inspector General.

20. *Broadcasting Board of Governors.*

International Broadcasting Bureau—Not to exceed 200 positions at grades GS–15 and below in the Office of Cuba Broadcasting. Appointments may not be made under this authority to administrative, clerical, and technical support positions.

21. *U.S. Soldiers' and Airmen's Home.*

Director, Health Care Services; Director, Member Services; Director, Logistics; and Director, Plans and Programs.

22. *National Archives and Records Administration.*

Executive Director, National Historical Publications and Records Commission.

23. *National Aeronautics and Space Administration.*

Not to exceed 40 positions of Astronaut Candidates at grades GS–11 through GS–15. Employment under this authority may not exceed 3 years.

24. *Social Security Administration.*

Temporary and time-limited positions in the Ticket to Work and Work Incentives Advisory Panel. No employees may be appointed after November 17, 2007.

25. *Smithsonian Institution.*

Freer Gallery of Art—Not to exceed four positions of Oriental Art Restoration Specialist at grades GS–9 through GS–15.

26. *Appalachian Regional Commission.*

Two Program Coordinators.

27. *Armed Forces Retirement Home.*

Naval Home, Gulfport, Mississippi—One Resource Management Officer position and one Public Works Officer position, GS/GM–15 and below.

28. *National Foundation on the Arts and the Humanities.*

National Endowment for the Humanities—Professional positions at grades GS–11 through GS–15 engaged in the review, evaluation, and administration of grants supporting scholarship, education, and public programs in the humanities, the duties of which require in-depth knowledge of a discipline of the humanities.

29. *Office of Personnel Management.*

Not to exceed eight positions of Associate Director at the Executive Seminar Centers at grades GS–13 and GS–14. Appointments may be made for any period up to 3 years and may be extended without prior approval for any individual. Not more than half of the authorized faculty positions at any one Executive Seminar Center may be filled under this authority.

Twelve positions of faculty members at grades GS–13 through GS–15, at the Federal Executive Institute.

The following summary of Schedule C exceptions, current as of June 30, 2009, are agency-specific and are not codified in the Code of Federal Regulations.

Schedule C

Office of Government Ethics

GGGS02900 Confidential Assistant to the Director

Office of Management and Budget

BOGS60027 Confidential Assistant to the Administrator, Office of Information and Regulatory Affairs
BOGS90010 Confidential Assistant to the Director, Office of Management and Budget
BOGS90011 Confidential Assistant to the Chief of Staff
BOGS90012 Special Assistant to the Deputy Director, Office of Management and Budget
BOGS90014 Special Assistant to the Director, Office of Management and Budget
BOGS90015 Special Assistant to the Director, Office of Management and Budget
BOGS90016 Confidential Assistant to the Executive Associate Director and Associate Director for Economic Policy
BOGS90017 Confidential Assistant to the Associate Director for General Government Programs
BOGS90018 Confidential Assistant to the Associate Director for National Security Programs
BOGS90019 Confidential Assistant to the Director, Office of Management and Budget
BOGS90021 Confidential Assistant to the Deputy Director, Office of Management and Budget
BOGS90022 Confidential Assistant to the Associate Director, Strategic Planning and Communications
BOGS90024 Confidential Assistant to the Associate Director for Legislative Affairs
BOGS90025 Special Assistant to the Director, Office of Management and Budget
BOGS90026 Confidential Assistant to the Associate Director for Education, Income Maintenance and Labor
BOGS90027 Confidential Assistant to the Associate Administrator

BOGS90028 Confidential Assistant to the Director, Office of Management and Budget
BOGS90029 Confidential Assistant to the General Counsel
BOGS90031 Deputy to the Associate Director for Legislative Affairs (House)
BOGS90032 Deputy Press Secretary to the Associate Director, Strategic Planning and Communications
BOGS90033 Deputy to the Associate Director for Legislative Affairs (House)

Office of National Drug Control Policy

QQGS90001 Confidential Assistant to the Director
QQGS90002 Program Support Specialist (Office of Public Affairs) to the Chief of Staff
QQGS90003 Policy Analyst to the Deputy Director for State, Local and Tribal Affairs

Office of Personnel Management

PMGS31230 Deputy Chief of Staff
PMGS31255 Deputy Chief of Staff to the Chief of Staff and Director of External Affairs
PMGS31263 Senior Advisor to the Director
PMGS31265 Counselor to the Director of External Affairs
PMGS31267 Senior Advisor to the Director
PMGS31315 Senior Policy Counsel to the General Counsel
PMGS31316 Special Assistant to the Director
PMGS31318 Speech Writer to the Director, Office of Communications and Public Liaison
PMGS31335 Public Affairs Specialist to the Director, Office of Communications and Public Liaison
PMGS31346 Public Affairs Specialist to the Director, Office of Communications and Public Liaison
PMGS31347 Public and Congressional Affairs Specialist to the Director, Office of Congressional Relations
PMGS31348 Congressional Relations Officer to the Director, Office of Congressional Relations
PMGS31350 Public Affairs Specialist to the Director, Office of Communications and Public Liaison

Official Residence of the Vice President

RVGS00005 Deputy Social Secretary and Residence Manager to the Assistant to the Vice President and Deputy Chief of Staff

Office of Science and Technology Policy

TSGS09001 Executive Assistant to the Assistant to the President for Science and Technology

Office of the United States Trade Representative

TNGS00007 Public Affairs Specialist to the Assistant United States Trade Representative for Public and Media Affairs
TNGS70002 Special Assistant to the Deputy United States Trade Representative
TNGS90001 Deputy Assistant United States Trade Representative to the Assistant United States Trade Representative for Intergovernmental Affairs and Public Liaison
TNGS90002 Congressional Affairs Specialist to the Assistant United States Trade Representative for Congressional Affairs
TNGS90003 Personal Assistant to the United States Trade Representative
TNGS90004 Deputy Assistant United States Trade Representative to the Assistant United States Trade Representative for Public and Media Affairs
TNGS90005 Confidential Assistant to the Chief of Staff
TNGS90006 Deputy Assistant United States Trade Representative to the Assistant United States Trade Representative for Congressional Affairs
TNGS90008 Writer-Editor to the Assistant United States Trade Representative for Public and Media Affairs

President's Commission on White House Fellowships

WHGS00018 Special Assistant to the Director, President's Commission on White House Fellowships
WHGS00020 Staff Assistant to the Associate Director
WHGS31270 Associate Director to the Director, President's Commission on White House Fellowships
WHGS31271 Staff Assistant to the Director, President's Commission on White House Fellowships
WHGS31288 Education Director to the Director, President's Commission on White House Fellowships

Department of State

DSGS61224 Legislative Management Officer to the Assistant Secretary for Legislative and Intergovernmental Affairs
DSGS64833 Protocol Officer, Ceremonials to the Chief of Protocol
DSGS69798 Staff Assistant to the Deputy Secretary
DSGS69800 Staff Assistant to the Director, Policy Planning Staff
DSGS69801 Staff Assistant to the Special Advisor for the Gulf and Southwest Asia
DSGS69805 Special Assistant to the Director, Policy Planning Staff
DSGS69808 Staff Assistant to the Deputy Secretary
DSGS69809 Staff Assistant to the Assistant Secretary for Public Affairs
DSGS69810 Staff Assistant to the Assistant Secretary for Public Affairs
DSGS69811 Confidential Assistant to the Secretary of State
DSGS69812 Special Assistant/ Speechwriter to the Director, Policy Planning Staff
DSGS69813 Staff Assistant to the Under Secretary for Management
DSGS69816 Special Assistant to the Secretary of State
DSGS69817 Staff Assistant to the Chief of Protocol
DSGS69818 Staff Assistant to the Secretary of State
DSGS69820 Staff Assistant to the Director, Policy Planning Staff
DSGS69822 Staff Assistant to the Secretary of State
DSGS69825 IT Specialist—Policy and Planning to the Under Secretary for Management
DSGS69829 White House Liaison to the Under Secretary for Management
DSGS69830 Senior Advisor to the Under Secretary for Public Diplomacy and Public Affairs
DSGS69834 Program Assistant, Visits to the Chief of Protocol
DSGS69836 Assistant Chief of Protocol, Ceremonials to the Chief of Protocol
DSGS69837 Staff Assistant to the Secretary of State
DSGS69839 Staff Assistant to the Secretary of State
DSGS69843 Special Coordinator for Regional Affairs to the Secretary of State
DSGS69845 Deputy Chief of Staff for Operations to the Secretary of State
DSGS69847 Deputy Director to the Director, Policy Planning Staff
DSGS69848 Executive Assistant to the Deputy Secretary
DSGS69849 Staff Assistant to the Ambassador At Large and HIV/AIDS Coordinator
DSGS69850 Staff Assistant to the Under Secretary for Management
DSGS69851 Special Assistant to the Secretary of State
DSGS69852 Special Assistant to the Under Secretary for Public Diplomacy and Public Affairs
DSGS69853 Staff Assistant to the Assistant Secretary, Bureau of Educational and Cultural Affairs
DSGS69854 Policy Advisor/Chief Speechwriter to the Director, Policy Planning Staff
DSGS69857 Staff Assistant to the Under Secretary for Management

DSGS69858 Senior Advisor to the Assistant Secretary for Public Affairs
DSGS69859 Protocol Officer, Visits to the Chief of Protocol
DSGS69860 Staff Assistant to the Secretary of State
DSGS69861 Staff Assistant to the Under Secretary for Management
DSGS69862 Special Assistant to the Legal Adviser
DSGS69863 Deputy Chief of Staff for Policy to the Secretary of State
DSGS69864 Staff Assistant to the Deputy Chief of Staff for Operations
DSGS69865 Special Assistant to the Chief of Staff/Counselor
DSGS69866 Staff Assistant to the Assistant Secretary for Consular Affairs
DSGS69868 Deputy Assistant Secretary-House to the Assistant Secretary for Legislative and Intergovernmental Affairs
DSGS69869 Legislative Management Officer to the Assistant Secretary for Legislative and Intergovernmental Affairs
DSGS69871 Legislative Management Officer to the Assistant Secretary for Legislative and Intergovernmental Affairs

Department of State

DSGS69873 Legislative Management Officer to the Assistant Secretary for Legislative and Intergovernmental Affairs
DSGS69875 Confidential Assistant to the Secretary of State
DSGS69883 Staff Assistant to the Director, Policy Planning Staff
DSGS69884 Staff Assistant to the Assistant Secretary
DSGS69885 Staff Assistant to the Assistant Secretary for Legislative and Intergovernmental Affairs
DSGS69896 Chief of Staff to the Assistant Secretary for Legislative and Intergovernmental Affairs
DSGS69898 Special Assistant to the Secretary of State
DSGS69899 Staff Assistant to the Assistant Secretary for Near Eastern and South Asian Affairs
DSGS69902 Senior Advisor to the Assistant Secretary for Public Affairs
DSGS69903 Deputy Director, Overseas Buildings Operations to the Under Secretary for Management
DSGS69904 Director for Global and Functional Affairs to the Assistant Secretary for Legislative and Intergovernmental Affairs
DSGS69905 Special Assistant to the Secretary of State
DSGS69909 Supervisory Protocol Officer—Visits to the Chief of Protocol
DSGS69914 Senior Advisor to the Secretary of State
DSGS69915 Staff Assistant to the Secretary of State
DSGS69916 Special Assistant to the Assistant Secretary for Public Affairs
DSGS69918 Assistant Chief of Protocol to the Chief of Protocol
DSGS69942 Staff Assistant to the Secretary of State
DSGS69945 Staff Assistant to the Assistant Secretary for European and Eurasian Affairs
DSGS69946 Senior Advisor to the Director, Policy Planning Staff
DSGS69947 Assistant Chief of Protocol, (Visits) to the Deputy Chief of Protocol
DSGS69948 Deputy Assistant Secretary to the Assistant Secretary for Legislative and Intergovernmental Affairs
DSGS69949 Legislative Management Officer to the Assistant Secretary for Legislative and Intergovernmental Affairs

Department of the Treasury

DYGS00250 Deputy Assistant Secretary (Public Affairs Operations) to the Assistant Secretary for Public Affairs
DYGS00359 Senior Advisor to the Under Secretary for International Affairs
DYGS00372 Special Assistant to the Assistant Secretary for Financial Markets
DYGS00375 Director of Legislative and Governmental Affairs to the Director of the Mint
DYGS00384 Special Assistant to the Chief of Staff
DYGS00398 Senior Advisor to the Under Secretary for Domestic Finance
DYGS00407 Executive Assistant to the Senior Advisor
DYGS00413 White House Liaison to the Chief of Staff
DYGS00419 Special Assistant to the Executive Secretary
DYGS00423 Special Assistant to the Secretary
DYGS00424 Special Assistant to the Assistant Secretary (Economic Policy)
DYGS00430 Senior Advisor to the Assistant Secretary for Financial Markets
DYGS00434 Special Assistant to the Deputy Chief of Staff
DYGS00435 Executive Assistant to the Counselor to the Secretary
DYGS00436 Public Affairs Specialist to the Deputy Assistant Secretary for Public Affairs Operations
DYGS00446 Special Assistant to the Assistant Secretary (Deputy Under Secretary) for Legislative Affairs
DYGS00448 Special Assistant to the Senior Advisor
DYGS00450 Special Assistant to the Deputy Assistant Secretary for Public Affairs Operations
DYGS00457 Deputy Executive Secretary to the Executive Secretary
DYGS00459 Special Assistant to the Director of Legislative and Intergovernmental Affairs
DYGS00460 Senior Advisor and Chief of Staff to the Under Secretary for Terrorism and Financial Crimes
DYGS00461 Senior Advisor to the Assistant Secretary for Tax Policy
DYGS00464 Staff Assistant to the Assistant Secretary (Deputy Under Secretary) for Legislative Affairs
DYGS00468 Public Affairs Specialist to the Deputy Assistant Secretary for Public Affairs Operations
DYGS00479 Speechwriter
DYGS00482 Deputy Executive Secretary to the Executive Secretary
DYGS00483 Senior Advisor to the Assistant Secretary for Terrorist Financing
DYGS00486 Special Assistant to the Director of Scheduling and Advance
DYGS00487 Deputy Executive Secretary to the Executive Secretary
DYGS00490 Special Assistant to the Special Envoy for China and the Strategic Economic Dialogue
DYGS00494 Special Assistant to the Director of the Mint
DYGS00495 Associate Director of Operations for Advance to the Director of Operations
DYGS00496 Senior Advisor to the Deputy Assistant Secretary for Business Affairs and Public Liaison
DYGS00497 Senior Advisor to the Assistant Secretary for Financial Institutions
DYGS00499 Deputy Chief of Staff for External Affairs to the Chief of Staff for External Affairs
DYGS00501 Special Assistant to the Under Secretary for Domestic Finance
DYGS00503 Senior Advisor to the Director of the Mint
DYGS00504 Special Assistant to the Assistant Secretary for Financial Markets
DYGS00506 Special Assistant to the Chief of Staff
DYGS00507 Special Assistant to the Secretary
DYGS00508 Special Assistant to the Executive Secretary
DYGS00510 Senior Advisor to the Chief of Staff
DYGS00511 Special Assistant to the Counselor to the Secretary
DYGS00513 Senior Advisor to the Counselor to the Secretary
DYGS00514 Special Assistant to the Deputy Secretary of the Treasury
DYGS00515 Counselor to the Secretary to the Chief of Staff

DYGS00518 Public Affairs Specialist to the Deputy Assistant Secretary for Public Affairs Operations
DYGS00519 Financial Restructuring Specialist to the Counselor to the Secretary
DYGS00520 Special Assistant to the Assistant Secretary for Economic Policy
DYGS00844 Public Affairs Specialist to the Deputy Assistant Secretary for Public Affairs Operations
DYGS01377 Staff Assistant to the Director of Scheduling and Advance
DYGS60139 Director of Scheduling and Advance to the Chief of Staff
DYGS60277 Speechwriter to the Assistant Secretary for Public Affairs
DYGS60317 Public Affairs Specialist to the Assistant Secretary for Public Affairs
DYGS60351 Senior Advisor to the Assistant Secretary for Public Affairs
DYGS60381 Special Assistant to the Deputy Assistant Secretary for Legislative Affairs (Appropriations and Management)
DYGS60391 Advance Specialist to the Director of Scheduling and Advance
DYGS60412 Advance Specialist to the Director of Scheduling and Advance
DYGS60418 Special Assistant to the Executive Secretary
DYGS60421 Special Assistant to the Deputy Assistant Secretary for Legislative Affairs (Tax and Budget)

Department of Defense

DDGS16692 Confidential Assistant to the Secretary of Defense
DDGS16874 Confidential Assistant to the Assistant Secretary of Defense (Reserve Affairs)
DDGS16908 Civilian Executive Assistant to the Special Assistant to the Secretary of Defense for White House Liaison
DDGS16909 Staff Assistant to the Special Assistant to the Secretary of Defense for White House Liaison
DDGS16914 Personal and Confidential Assistant to the Deputy Secretary of Defense
DDGS16945 Defense Fellow to the Special Assistant to the Secretary of Defense for White House Liaison
DDGS16962 Speechwriter to the Principal Deputy Assistant Secretary of Defense for Public Affairs
DDGS16988 Executive Assistant to the Director, Operational Test and Evaluation
DDGS17001 Speechwriter to the Assistant Secretary of Defense Public Affairs
DDGS17002 Confidential Assistant to the Under Secretary of Defense Personnel and Readiness
DDGS17029 Administrative Assistant to the Special Assistant to the Secretary of Defense for White House Liaison
DDGS17030 Staff Assistant to the Deputy Assistant Secretary of Defense (North Atlantic Treaty Organization and Europe)
DDGS17039 Confidential Assistant to the Secretary of Defense
DDGS17064 Protocol Specialist to the Special Assistant to the Secretary of Defense (Protocol)
DDGS17071 Special Assistant to the Assistant Secretary of Defense (Legislative Affairs)
DDGS17079 Special Assistant to the Assistant Secretary of Defense (International Security Affairs)
DDGS17083 Confidential Assistant to the Special Assistant to the Secretary and Deputy Secretary of Defense
DDGS17089 Public Affairs Specialist to the Public Affairs Specialist
DDGS17122 Public Affairs Specialist to the Public Affairs Specialist
DDGS17131 Special Assistant to the Assistant Secretary of Defense (Special Operations/Low Intensity Conflict and Interdependent Capabilities)
DDGS17150 Special Assistant to the Secretary and Deputy Secretary of Defense
DDGS17151 Special Assistant to the Secretary of Defense for Protocol to the Secretary of Defense
DDGS17157 Special Assistant to the Deputy Under Secretary of Defense for Budget and Appropriations Affairs
DDGS17166 Special Assistant to the Secretary of Defense for White House Liaison
DDGS17169 Defense Fellow to the Secretary of Defense for White House Liaison
DDGS17184 Deputy White House Liaison to the Secretary of Defense for White House Liaison
DDGS17185 Staff Assistant to the Under Secretary of Defense for Policy
DDGS17186 Staff Assistant to the Principal Deputy Under Secretary of Defense for Policy
DDGS17190 Special Assistant to the General Counsel
DDGS17191 Senior Advisor to the General Counsel
DDGS17192 Special Assistant to the Deputy Under Secretary of Defense for Strategy, Plans and Forces
DDGS17193 Principal Director, Western Hemisphere to the Deputy Assistant Secretary of Defense (Western Hemisphere Affairs)
DDGS17194 Special Assistant to the Secretary of Defense for White House Liaison
DDGS17195 Special Assistant to the Under Secretary of Defense (Comptroller)
DDGS17196 Principal Director (African Affairs) to the Deputy Assistant Secretary of Defense (Africa)
DDGS17197 Senior Advisor to the Under Secretary of Defense (Policy)
DDGS17200 Principal Director for Central Asia to the Deputy Assistant Secretary of Defense (Central Asia)
DDGS17201 Staff Assistant to the Deputy Assistant Secretary of Defense for Public Affairs (Press Secretary)
DDGS17202 Principal Director, Nuclear and Missile Defense Policy to the Assistant Secretary of Defense (Global Strategic Affairs)
DDGS17203 Advance Officer to the Special Assistant to the Secretary and Deputy Secretary of Defense
DDGS17204 Confidential Assistant to the Deputy Secretary of Defense
DDGS17205 Special Assistant to the Assistant Secretary of Defense for Homeland Defense and Americas' Security Affairs
DDGS17206 Special Assistant to the Deputy Under Secretary of Defense (Budget and Appropriations Affairs)
DDGS17207 Defense Fellow to the Special Assistant to the Secretary of Defense for White House Liaison
DDGS17208 Special Assistant to the Under Secretary of Defense (Comptroller)
DDGS17209 Special Assistant to the Under Secretary of Defense (Acquisition, Technology, and Logistics)
DDGS17210 Special Assistant to the Assistant Secretary of Defense (International Security Affairs)
DDGS17211 Special Assistant to the Deputy Assistant Secretary of Defense (Middle East)
DDGS17212 Special Assistant to the Principal Deputy Under Secretary of Defense (Policy)
DDGS17213 Special Assistant to the Assistant Secretary of Defense (Reserve Affairs)
DDGS17214 Special Assistant to the Assistant to the Secretary of Defense (Nuclear, Chemical, and Biological Defense Programs)
DDGS17215 Special Assistant to the Assistant Secretary of Defense (Legislative Affairs)
DDGS17216 Special Assistant to the Deputy Assistant Secretary of Defense (Central Asia)
DDGS17217 Special Assistant to the Director of Net Assessment
DDGS17218 Special Assistant to the Assistant Secretary of Defense (Legislative Affairs)
DDGS17219 Special Assistant, Policy Support Division to the Assistant Secretary of Defense (Legislative Affairs)

DDGS17220 Special Assistant to the Deputy Assistant Secretary of Defense for South and Southeast Asia
DDGS17224 Special Assistant to the Deputy Assistant Secretary of Defense (Middle East)
DDGS17225 Special Assistant to the Assistant Secretary of Defense for Asian and Pacific Security Affairs
DDGS17226 Special Assistant to the Deputy Assistant Secretary of Defense for Western Hemisphere Affairs
DDGS17227 Special Assistant to the Assistant Secretary of Defense (Global Strategic Affairs)
DDGS17228 Special Assistant to the Deputy Assistant Secretary of Defense for Russia, Ukraine, and Eurasia Policy
DDGS17229 Special Assistant to the Deputy Assistant Secretary of Defense (Special Operations and Combating Terrorism) and (Special Operations/Low Intensity Conflict and Interdependent Capabilities)
DDGS17230 Advance Officer to the Secretary and Deputy Secretary for Defense
DDGS17231 Director, Advance Office to the Secretary and Deputy Secretary of Defense
DDGS60312 Director, Cooperative Threat Reduction to the Assistant Secretary of Defense (Global Strategic Affairs)
DDGS60369 Executive Assistant to the Director of Force Transformation

Department of the Army

DWGS00065 Special Assistant to the Deputy Assistant Secretary of the Army for Privatization and Partnerships
DWGS00077 Confidential Assistant to the Assistant Secretary of the Army (Civil Works)
DWGS00090 Special Assistant to the General Counsel
DWGS00092 Special Assistant to the General Counsel
DWGS00095 Personal and Confidential Assistant (Installations and Environment) to the Assistant Secretary of the Army (Installations and Environment)
DWGS00096 Personal and Confidential Assistant to the Deputy Under Secretary of the Army
DWGS60002 Special Assistant to the Secretary of the Army
DWGS60019 Business Transformation Initiatives Analyst to the Special Assistant for the Secretary of the Army
DWGS60024 Personal and Confidential Assistant to the Under Secretary the Army
DWGS60028 Personal and Confidential Assistant to the Assistant Secretary of the Army (Installations and Environment)
DWGS60032 Special Assistant to the Deputy Assistant Secretary of the Army (Environment, Safety and Occupational Health) to the General Counsel
DWGS60064 Personal and Confidential Assistant to the Principal Deputy Assistant Secretary of the Army (Manpower and Reserve Affairs) and (Training, Readiness and Mobilization)
DWGS60076 Special Assistant to the Assistant Secretary of the Army (Civil Works)
DWGS60086 Special Assistant to the General Counsel
DWGS60095 Special Assistant to the Principal Deputy Assistant Secretary of the Army (Civil Works) and (Legislation)

Department of the Navy

DNGS09030 Residential Manager and Social Secretary of the Vice President to the Under Secretary of the Navy

Department of Justice

DJGS00076 Public Affairs Specialist to the United States Attorney, Texas, Western District
DJGS00091 Staff Assistant to the Assistant Attorney General (Legislative Affairs)
DJGS00114 Special Assistant to the Attorney General
DJGS00143 Counsel to the Assistant Attorney General (Criminal Division)
DJGS00176 Public Affairs Specialist to the Director, Office of Public Affairs
DJGS00179 Counsel to the Principal Deputy Assistant Attorney General
DJGS00187 Counsel to the Assistant Attorney General (Civil Division)
DJGS00193 Senior Counsel to the Assistant Attorney General (Legal Policy)
DJGS00200 Senior Counsel to the Assistant Attorney General (Criminal Division)
DJGS00204 Senior Counsel to the Deputy Attorney General
DJGS00275 Senior Counsel to the Assistant Attorney General (Legal Policy)
DJGS00289 Counsel to the Deputy Attorney General
DJGS00406 Public Affairs Specialist to the Director, Office of Public Affairs
DJGS00410 Senior Advisor to the Assistant Attorney General, Office of Justice Programs
DJGS00413 Executive Assistant to the United States Attorney
DJGS00462 Counsel to the Assistant Attorney General
DJGS00463 Counselor to the Assistant Attorney General (Legal Policy)
DJGS00468 Press Assistant to the Director, Office of Public Affairs
DJGS00469 Media Affairs Specialist to the Director, Office of Public Affairs
DJGS00470 Confidential Assistant to the Attorney General
DJGS00476 Counsel to the Deputy Attorney General
DJGS00478 Counsel to the Attorney General
DJGS00480 Confidential Assistant to the Assistant Attorney General
DJGS00481 Confidential Assistant to the Assistant Attorney General (Criminal Division)
DJGS00482 Senior Advisor to the Director
DJGS00485 Counsel to the Counselor to the Attorney General for Executive Branch Relations
DJGS00486 Counsel to the Attorney General
DJGS00488 Public Affairs Specialist to the Director, Office of Public Affairs
DJGS00489 Senior Counsel to the Deputy Attorney General
DJGS00492 Counsel to the Deputy Assistant Attorney General
DJGS00493 Special Assistant to the Director
DJGS00494 Counsel to the Assistant Attorney General
DJGS00497 Special Assistant to the Director, Bureau of Justice Assistance
DJGS00498 Confidential Assistant to the Assistant Attorney General
DJGS00501 Speechwriter to the Director, Office of Public Affairs
DJGS00502 Special Assistant to the Director of the Violence Against Women Office
DJGS00503 Director of Scheduling to the Attorney General
DJGS00504 Director of Advance to the Attorney General
DJGS00506 New Media Specialist to the Director, Office of Public Affairs
DJGS00508 Confidential Assistant to the Director of the Violence Against Women Office
DJGS00512 Counsel to the Assistant Attorney General (Civil Division)
DJGS00515 Counselor to the Assistant Attorney General, Office of Justice Programs
DJGS00516 Counsel to the Assistant Attorney General (Civil Division)
DJGS00518 Counsel to the Assistant Attorney General (Civil Division)
DJGS00520 Attorney Advisor to the Assistant Attorney General for Legislative Affairs
DJGS00521 Associate Director to the Director
DJGS00538 Counsel to the Administrator, Office of Juvenile Justice and Delinquency Prevention
DJGS60173 Secretary (Office Automation) to the United States

Attorney, Oklahoma, Northern District
DJGS60418 Secretary (Office Automation) to the United States Attorney, Nebraska
DJGS60427 Secretary (Office Automation) to the United States Attorney, New Hampshire
DJGS60436 Secretary (Office Automation) to the United States Attorney, Alabama, Southern District
DJGS60437 Secretary (Office Automation) to the United States Attorney, Delaware

Department of Homeland Security

DMGS00051 Senior Business Liaison to the Assistant Secretary for Private Sector
DMGS00395 Senior Advisor to the Chief Medical Officer to the Assistant Secretary for Health Affairs
DMGS00396 Press Secretary to the Assistant Secretary for Public Affairs
DMGS00413 Legislative Policy Advisor to the Assistant Secretary for Policy
DMGS00437 Counselor to the Director, United States Citizenship and Immigration Services
DMGS00449 Director of Legislative Affairs to the Administrator for the Federal Emergency Management Agency
DMGS00507 Special Assistant to the Assistant Secretary for Policy
DMGS00541 Director/Executive Secretariat, Private Sector Advisory Committee to the Executive Director, Homeland Security Advisory Committees
DMGS00544 Advance Representative to the Director of Scheduling and Advance
DMGS00552 Confidential Legal Assistant to the General Counsel
DMGS00563 Assistant Press Secretary to the Deputy Assistant Secretary for Media Relations
DMGS00577 Deputy Director to the Director of the Center for Faith Based and Community Initiatives
DMGS00580 Associate Director of Strategic Communications to the Deputy Assistant Secretary for Public Affairs
DMGS00591 Senior Liaison Officer to the Executive Director for Operations and Administration
DMGS00600 Confidential Assistant to the Under Secretary for Protocol and Advance Briefings for Science and Technology
DMGS00610 Public Affairs and Press Assistant to the Assistant Secretary for Public Affairs
DMGS00613 Speechwriter to the Director of Speechwriting
DMGS00627 Counselor to the Director, Office of Counter Narcotics Enforcement
DMGS00629 Confidential Assistant to the General Counsel
DMGS00641 Policy Advisor to the Chief Medical Officer to the Assistant Secretary for Health Affairs
DMGS00642 Special Assistant to the Assistant Commissioner for Congressional Affairs for Customs and Border Protection
DMGS00649 Deputy White House Liaison to the White House Liaison
DMGS00651 Press Assistant to the Press Secretary
DMGS00656 Director of Speechwriting to the Assistant Secretary for Public Affairs
DMGS00662 Confidential Assistant to the Assistant Secretary, Immigration and Customs Enforcement
DMGS00664 Advance Representative to the Director of Scheduling and Advance
DMGS00669 Director of Legislative Affairs for Intelligence and Operations to the Assistant Secretary for Legislative Affairs
DMGS00671 Coordinator for State and Local Affairs to the Assistant Secretary for Intergovernmental Programs
DMGS00683 Deputy Director of Scheduling for Travel to the Director of Scheduling and Advance
DMGS00687 Director of Faith Based and Community Initiatives to the Administrator for the Federal Emergency Management Agency
DMGS00688 Special Advisor to the Assistant Secretary for Legislative Affairs
DMGS00689 Advance Representative to the Director of Scheduling and Advance
DMGS00693 Special Assistant to the Under Secretary for Intelligence and Analysis
DMGS00697 Special Assistant to the Assistant Secretary for Policy
DMGS00717 Business Liaison to the Assistant Secretary for Private Sector
DMGS00720 Confidential Assistant to the Chief of Staff to the Secretary (Policy)
DMGS00724 Executive Director, Homeland Security Advisory Committees to the Assistant Secretary for Policy
DMGS00729 Special Assistant to the Chief Privacy Officer
DMGS00738 Deputy Director of Scheduling and Protocol Coordination to the Director of Scheduling and Advance
DMGS00742 Deputy Secretary Briefing Book Coordinator to the Executive Director for Operations and Administration
DMGS00745 Confidential Assistant to the Deputy Assistant Secretary for Public Affairs
DMGS00749 Confidential Assistant to the Counselor
DMGS00754 Governor and Homeland Security Advisors Coordinator to the Assistant Secretary for Intergovernmental Programs
DMGS00760 Director of Intergovernmental Affairs to the Director of External Affairs and Communications
DMGS00761 Associate Director for Public Liaison to the Coordinator of the Recovery and Rebuilding of the Gulf Coast
DMGS00765 Special Assistant to the Chief of Staff
DMGS00766 Business Liaison to the Assistant Secretary for the Private Sector
DMGS00768 New Media Specialist to the Assistant Secretary for Public Affairs
DMGS00769 Confidential Assistant to the White House Liaison
DMGS00770 Confidential Assistant to the Secretary of the Department of Homeland Security
DMGS00772 Assistant Director of Legislative Affairs to the Assistant Secretary for Legislative Affairs
DMGS00773 Confidential Assistant to the Assistant Secretary for Legislative Affairs
DMGS00775 Special Assistant to the Director, United States Citizenship and Immigration Services
DMGS00776 Confidential Assistant to the Assistant Secretary for Policy
DMGS00777 Director of Strategy and Planning to the Assistant Secretary for Legislative Affairs
DMGS00778 Correspondence Liaison Officer to the Executive Director for Operations and Administration
DMGS00779 Confidential Assistant to the Assistant Secretary for Policy Development
DMGS00780 Advance Representative to the Director of Scheduling and Advance
DMGS00781 Special Assistant to the Under Secretary for Science and Technology
DMGS00782 Special Assistant to the Deputy Assistant Secretary for International Affairs
DMGS00784 Correspondence Liaison Officer to the Executive Director for Operations and Administration
DMGS00786 Legislative Assistant to the Assistant Secretary for Legislative Affairs
DMGS00787 Director for Local Affairs to the Assistant Secretary for Intergovernmental Programs
DMGS00788 Counselor to the Principal Deputy General Counsel

DMGS00789 Counselor to the Associate General Counsel for General Law
DMGS00792 Confidential Assistant to the Deputy Chief of Staff (Policy)
DMGS00793 Press Secretary to the Director of External Affairs and Communications
DMGS00794 Assistant for Special Projects to the Chief of Staff
DMGS00795 Advisor to the Director for Policy and Planning, Customs and Border Protection
DMGS00797 Special Assistant to the Assistant Secretary, Immigration and Customs Enforcement
DMGS00800 Deputy Chief of Staff (Policy) to the Secretary (Policy)
DMGS00801 Deputy Assistant Secretary for International Policy to the Assistant Secretary for Policy
DMGS00802 Special Assistant to the Assistant Secretary for Policy
DMGS00803 Senior Advisor for Media and Communications to the Assistant Commissioner of Public Affairs, Customs and Border Protection
DMGS00804 Confidential Assistant to the Assistant Secretary for Intergovernmental Programs
DMGS00805 Special Assistant to the Director, Office of Counter Narcotics Enforcement
DMGS00806 Confidential Assistant to the General Counsel
DMGS00808 Special Assistant to the Assistant Secretary for Policy
DMGS00810 Special Assistant to the Executive Director, Homeland Security Advisory Committees
DMGS00812 Press Assistant to the Assistant Secretary for Public Affairs
DMGS00813 Confidential Assistant to the Deputy Chief of Staff (Policy)
DMGS00814 Confidential Assistant to the Assistant Secretary, Immigration and Customs Enforcement
DMGS00815 Scheduling and Advance Assistant to the Deputy Director of Scheduling and Protocol Coordination
DMGS00818 Special Assistant to the Chief of Staff
DMGS00819 Deputy to the Federal Coordinator for Gulf Coast Rebuilding
DMGS00820 Advisor to the Deputy Secretary of the Department of Homeland Security
DMGS00821 Traveling Press Secretary to the Director of External Affairs and Communications
DMGS00822 Counselor to the Administrator for the Federal Emergency Management Agency
DMGS00826 Special Assistant to the Senior Advisor
DMGS00827 Special Assistant to the Senior Advisor
DMGS00831 Senior Advisor, Disability Issues, to the Director of External Affairs and Communications
DMGS00832 Confidential Assistant to the Assistant Secretary for International Affairs

Department of the Interior

DIGS01133 Special Assistant to the Chief of Staff
DIGS01134 Deputy Director to the Director, Office of Communications
DIGS01135 Special Assistant to the Secretary
DIGS01136 Special Assistant to the White House Liaison
DIGS01137 Special Assistant to the Deputy Chief of Staff
DIGS01138 Special Assistant to the Secretary
DIGS01139 Special Assistant to the Secretary
DIGS01141 Associate Director, External and Intergovernmental Affairs to the Secretary
DIGS01142 Special Assistant to the Director, External and Intergovernmental Affairs
DIGS01144 Senior Advisor for Alaskan Affairs to the Secretary
DIGS01146 Deputy Director, Congressional and Legislative Affairs
DIGS01147 Press Secretary to the Director, Office of Communications
DIGS01148 Special Assistant to the Assistant Secretary of Indian Affairs
DIGS01149 Director of Advance to the Secretary
DIGS01150 Special Assistant to the Deputy Secretary of the Interior
DIGS01152 Special Assistant to the Deputy Secretary of the Interior
DIGS01153 Deputy Director, Congressional and Legislative Affairs to the Director
DIGS01154 Director of New Media to the Director, Congressional and Legislative Affairs
DIGS01155 Associate Director, to the Director, External and Intergovernmental Affairs
DIGS01156 Special Assistant to the Secretary
DIGS01157 Special Assistant to the Secretary
DIGS01158 Special Assistant to the Secretary
DIGS01159 Deputy Alaska Director to the Senior Advisor for Alaskan Affairs
DIGS01160 Special Assistant to the Director, External and Intergovernmental Affairs
DIGS01161 Special Assistant to the Chief of Staff
DIGS01162 Chief of Staff to the Assistant Secretary for Fish and Wildlife and Parks
DIGS10118 Special Assistant to the Secretary

Department of Agriculture

DAGS00101 Confidential Assistant to the Chief of Staff
DAGS00102 Confidential Assistant to the Deputy Under Secretary for Marketing and Regulatory Programs
DAGS00109 Special Assistant to the Administrator, Food and Nutrition Service
DAGS00110 Deputy Director of Scheduling and Advance to the Director of Communications
DAGS00111 Special Assistant to the Administrator, Food and Nutrition Service
DAGS00114 Confidential Assistant to the Secretary
DAGS00116 Confidential Assistant to the Deputy Under Secretary for Marketing and Regulatory Programs
DAGS00117 Special Assistant to the Deputy Under Secretary for Food Safety
DAGS00118 Special Assistant to the Administrator, Rural Housing Service
DAGS00119 Senior Advisor for Labor Relations to the Assistant Secretary for Congressional Relations
DAGS00120 Deputy Press Secretary to the Director of Communications
DAGS00121 Confidential Assistant to the Deputy Under Secretary for Rural Development
DAGS00122 Confidential Assistant to the Under Secretary for Farm and Foreign Agricultural Services
DAGS00123 Confidential Assistant to the Chief, Natural Resources Conservation Service
DAGS00124 Chief of Staff to the Administrator, Foreign Agricultural Service
DAGS00125 Senior Advisor to the Administrator for Risk Management
DAGS00126 Senior Policy Analyst to the Administrator, Farm Service Agency
DAGS00127 Senior Advisor to the Deputy Secretary
DAGS00128 Confidential Assistant to the Administrator, Rural Housing Service
DAGS00130 Special Assistant to the Deputy Assistant Secretary for Civil Rights
DAGS00132 Confidential Assistant to the Under Secretary for Natural Resources and Environment
DAGS00133 Staff Assistant to the Administrator, Farm Service Agency
DAGS00134 Chief of Staff to the Administrator, Rural Housing Service
DAGS00135 Special Assistant to the Administrator, Rural Housing Service
DAGS00137 Confidential Assistant to the Administrator, Rural Housing Service
DAGS00138 Confidential Assistant to the Administrator, Rural Housing Service
DAGS00140 Director of the Office of Faith Based and Neighborhood Outreach

DAGS00141 Confidential Assistant to the Chief Financial Officer
DAGS00142 Senior Advisor to the Under Secretary for Food Safety
DAGS00143 Special Assistant to the Chief, Natural Resources Conservation Service
DAGS00144 Special Assistant to the Chief, Natural Resources Conservation Service
DAGS00145 Confidential Assistant to the Director of Communications
DAGS00146 Chief of Staff to the Administrator
DAGS00147 Special Assistant to the Administrator
DAGS00149 Staff Assistant to the Administrator for Risk Management
DAGS00150 Senior Advisor to the Administrator, Foreign Agricultural Service
DAGS00153 Confidential Assistant to the Assistant Secretary for Administration
DAGS00155 Director, Intergovernmental Affairs to the Assistant Secretary for Congressional Relations
DAGS00156 Deputy Director, Intergovernmental Affairs to the Assistant Secretary for Congressional Relations
DAGS01002 Confidential Assistant to the Deputy Under Secretary for Rural Development
DAGS01004 Confidential Assistant to the Deputy Under Secretary for Rural Development
DAGS01006 Confidential Assistant to the Deputy Under Secretary for Rural Development
DAGS01007 Confidential Assistant to the Chief of Staff
DAGS01010 Special Assistant to the Under Secretary for Marketing and Regulatory Programs for Specialty Crops
DAGS01013 Special Assistant to the Assistant Secretary for Civil Rights
DAGS01014 Director of Advance to the Director of Communications
DAGS01017 Special Assistant to the Deputy Under Secretary for Natural Resources and Environment
DAGS01018 Director of Speechwriting/Research to the Director of Communications
DAGS01019 Director, Economic and Community Development to the Deputy Under Secretary for Rural Development
DAGS01021 Confidential Assistant to the Deputy Under Secretary for Rural Development
DAGS01022 Confidential Assistant to the Deputy Under Secretary for Rural Development
DAGS01023 Advance Lead to the Director of Communications
DAGS01024 Director of Scheduling and Advance to the Director of Communications

Department of Commerce

DCGS00030 Special Assistant to the National Director, Minority Business Development Agency
DCGS00100 Special Assistant to the Chief of Staff
DCGS00181 Special Advisor to the Deputy Assistant Secretary for Communications and Information
DCGS00189 Special Advisor to the Director, Office of Policy and Strategic Planning
DCGS00199 Confidential Assistant to the Assistant Secretary for Legislative and Intergovernmental Affairs
DCGS00200 Legislative/Intergovernmental Specialist to the Assistant Secretary for Legislative and Intergovernmental Affairs
DCGS00202 Legislative Specialist to the Director for Legislative Affairs
DCGS00205 Special Assistant to the Administrator to the Under Secretary for Oceans and Atmosphere (Administrator National Oceanic and Atmospheric Administration)
DCGS00237 Special Assistant to the Under Secretary for International Trade
DCGS00268 Special Assistant to the Chief of Staff
DCGS00279 Chief of Staff for National Telecommunications and Information Administration to the Assistant Secretary for Communications and Information
DCGS00298 Special Advisor to the Assistant Secretary for Communications and Information
DCGS00351 Confidential Assistant to the Deputy General Counsel
DCGS00368 Legislative Affairs Specialist to the Director, Office of Legislative Affairs
DCGS00380 Confidential Assistant to the Chief of Staff for International Trade Administration
DCGS00382 Confidential Assistant to the Director, Office of Policy and Strategic Planning
DCGS00389 Senior Advisor to the Assistant Secretary for Import Administration
DCGS00395 Confidential Assistant to the Director of Global Trade Programs
DCGS00460 Director of Intergovernmental Affairs for the Assistant Secretary for Legislative and Intergovernmental Affairs
DCGS00465 Confidential Assistant to the Director, Office of the White House Liaison
DCGS00470 Confidential Assistant to the Director, Executive Secretariat
DCGS00473 Special Assistant to the General Counsel
DCGS00476 Deputy Director to the Director, Executive Secretariat
DCGS00484 Director, Office of Faith Based and Neighborhood Partnerships for the Secretary and Deputy Chief of Staff
DCGS00485 Deputy Director for Faith Based and Neighborhood Partnerships for the Secretary and Deputy Chief of Staff
DCGS00492 Advance Specialist to the Director of Advance
DCGS00494 Press Secretary to the Director of Public Affairs
DCGS00540 Chief Protocol Officer to the Director of Scheduling and Advance
DCGS00564 Confidential Assistant to the Secretary
DCGS00569 Confidential Assistant to the Director of Public Affairs
DCGS00574 Confidential Assistant to the Director, Office of Business Liaison
DCGS00576 Director of Advance to the Director for Scheduling and Advance
DCGS00579 Director for Legislative Affairs to the Assistant Secretary for Legislative and Intergovernmental Affairs
DCGS00590 Confidential Assistant to the Director, Executive Secretariat
DCGS00593 Senior Advisor to the Chief of Staff
DCGS00599 Confidential Assistant to the Director of Communications
DCGS00608 Confidential Assistant to the Deputy Secretary
DCGS00620 Director of Legislative Affairs, International Trade Administration for the Under Secretary for International Trade
DCGS00628 Confidential Assistant to the Director of Scheduling and Advance
DCGS00629 Deputy Director for Public Affairs to the Director of Public Affairs
DCGS00639 New Media Director to the Director of Public Affairs
DCGS00652 Confidential Assistant to the Director of Public Affairs
DCGS00667 Senior Policy Advisor to the Under Secretary for International Trade
DCGS00684 Director of Speechwriting to the Director for Public Affairs
DCGS00686 Director of Scheduling and Advance for the Chief of Staff
DCGS00689 Special Assistant to the Director, Executive Secretariat
DCGS60001 Deputy Director, Office of Business Liaison to the Director, Office of Business Liaison
DCGS60532 Associate General Counsel to the General Counsel
DCGS60544 Chief of Staff for International Trade Administration to the Under Secretary for International Trade

Department of Labor

DLGS00108 Special Assistant to the Director of Scheduling and Advance
DLGS00166 Staff Assistant to the Chief Economist
DLGS09039 Speech Writer to the Assistant Secretary for Public Affairs
DLGS60017 Senior Legislative Officer to the Assistant Secretary for Congressional and Intergovernmental Affairs
DLGS60025 Senior Legislative Officer to the Assistant Secretary for Congressional and Intergovernmental Affairs
DLGS60041 Staff Assistant to the Deputy Chief of Staff
DLGS60042 Special Assistant to the Assistant Secretary for Public Affairs
DLGS60066 Special Assistant to the Assistant Secretary for Policy
DLGS60089 Special Assistant to the Secretary of Labor
DLGS60093 Special Assistant to the Director of Scheduling and Advance
DLGS60118 Staff Assistant to the Secretary of Labor
DLGS60120 Senior Legislative Officer to the Assistant Secretary for Congressional and Intergovernmental Affairs
DLGS60135 Special Assistant to the Director of Planning, Scheduling, and Advance
DLGS60160 Senior Speechwriter to the Assistant Secretary for Public Affairs
DLGS60170 Special Assistant to the Secretary of Labor
DLGS60174 Special Assistant to the Director of Planning, Scheduling, and Advance
DLGS60175 Senior Advisor to the Deputy Assistant Secretary for Policy
DLGS60180 Chief of Staff to the Assistant Secretary for Congressional and Intergovernmental Affairs
DLGS60194 Director of Scheduling and Advance to the Secretary of Labor
DLGS60199 Special Assistant to the Assistant Secretary for Public Affairs
DLGS60231 Office Clerk to the Deputy Secretary of Labor
DLGS60267 Staff Assistant to the Director of Planning, Scheduling, and Advance
DLGS60273 Special Assistant to the Assistant Secretary for Administration and Management

Department of Health and Human Services

DHGS00492 Deputy White House Liaison for Political Personnel, Boards and Commissions to the White House Liaison for Political Personnel, Boards and Commissions
DHGS60031 Confidential Assistant to the Assistant Secretary for Public Affairs
DHGS60035 Confidential Assistant to the Administrator, Centers for Medicare and Medicaid Services
DHGS60063 Confidential Assistant to the Director of Public Affairs
DHGS60070 Special Assistant to the Assistant Secretary for Planning and Evaluation
DHGS60111 Confidential Assistant to the Assistant Secretary for Public Affairs
DHGS60345 Director of Public Affairs to the Assistant Secretary for Children and Families
DHGS60399 Special Assistant to the Assistant Secretary for Children and Families
DHGS60436 Associate Commissioner to the Assistant Secretary for Children and Families
DHGS60661 Special Assistant to the Deputy Secretary, Health and Human Services
DHGS60711 Special Assistant to the Deputy Assistant Secretary for Public Affairs (Policy and Strategy)
DHGS60714 Special Assistant to the Deputy Secretary, Health and Human Services

Department of Education

DBGS00143 Special Assistant for College Access to the Deputy Chief of Staff for Strategy
DBGS00184 Confidential Assistant to the Deputy Assistant Secretary
DBGS00202 Deputy Assistant Secretary for Enforcement to the Assistant Secretary for Civil Rights
DBGS00219 Special Assistant to the Deputy Under Secretary
DBGS00226 Confidential Assistant to the Director, Faith-Based and Community Initiatives Center
DBGS00227 Confidential Assistant to the Director, White House Liaison
DBGS00229 Confidential Assistant to the Chief of Staff
DBGS00230 Confidential Assistant to the Chief of Staff
DBGS00250 Confidential Assistant to the Deputy Chief of Staff for Strategy
DBGS00262 Confidential Assistant to the Deputy Chief of Staff for Strategy
DBGS00276 Confidential Assistant to the Deputy Chief of Staff for Strategy
DBGS00283 Special Assistant to the Press Secretary
DBGS00284 Confidential Assistant (Protocol) to the Deputy Chief of Staff for Operations
DBGS00288 Confidential Assistant to the Assistant Secretary for Legislation and Congressional Affairs
DBGS00303 Director, White House Initiative on Educational Excellence for Hispanic Americans for the Deputy Chief of Staff for Strategy
DBGS00306 Deputy Assistant Secretary to the Assistant Secretary for Legislation and Congressional Affairs
DBGS00344 Special Assistant to the Assistant Secretary for Legislation and Congressional Affairs
DBGS00359 Special Assistant to the Assistant Secretary for Civil Rights
DBGS00376 Director, Scheduling and Advance Staff to the Deputy Chief of Staff for Strategy
DBGS00394 Confidential Assistant to the Assistant Secretary for Elementary and Secondary Education
DBGS00396 Special Assistant to the Deputy Chief of Staff for Strategy
DBGS00400 Deputy Assistant Secretary to the Assistant Secretary for Planning, Evaluation, and Policy Development
DBGS00404 Special Assistant to the General Counsel
DBGS00409 Deputy Assistant Secretary to the Assistant Secretary for Vocational and Adult Education
DBGS00415 Confidential Assistant to the Assistant Secretary for Planning, Evaluation, and Policy Development
DBGS00431 Press Secretary to the Assistant Secretary, Office of Communications and Outreach
DBGS00433 Deputy Assistant Secretary for External Affairs and Outreach
DBGS00442 Confidential Assistant to the Assistant Secretary for Civil Rights
DBGS00460 Deputy Assistant Secretary for Communication Development to the Assistant Secretary, Office of Communications and Outreach
DBGS00462 Special Assistant to the Assistant Secretary, Office of Communications and Outreach
DBGS00467 Director, Faith-Based and Community Initiatives Center for the Chief of Staff
DBGS00499 Director, Intergovernmental Affairs for the Assistant Secretary, Office of Communications and Outreach
DBGS00507 Confidential Assistant to the General Counsel
DBGS00511 Executive Assistant to the Deputy Chief of Staff for Strategy
DBGS00523 Director, White House Liaison to the Deputy Chief of Staff for Strategy
DBGS00533 Special Assistant to the Director, White House Liaison
DBGS00537 Special Assistant to the Deputy Chief of Staff for Strategy
DBGS00543 Confidential Assistant to the Assistant Secretary for Legislation and Congressional Affairs
DBGS00549 Special Assistant to the Executive Administrator
DBGS00551 Confidential Assistant to the Assistant Secretary for Planning, Evaluation, and Policy Development

DBGS00554 Confidential Assistant to the Director, Scheduling and Advance Staff
DBGS00560 Special Assistant to the Assistant Secretary for Planning, Evaluation, and Policy Development
DBGS00569 Special Assistant to the Director, Academic Improvement and Teacher Quality Programs
DBGS00570 Confidential Assistant to the Director, Intergovernmental Affairs
DBGS00576 Special Assistant to the Deputy Chief of Staff for Strategy
DBGS00586 Special Assistant to the Deputy Chief of Staff for Strategy
DBGS00589 Confidential Assistant to the Assistant Secretary, Office of Communications and Outreach
DBGS00612 Special Assistant to the General Counsel
DBGS00626 Special Assistant to the Chief of Staff
DBGS00649 Confidential Assistant to the Director, Scheduling and Advance Staff
DBGS00652 Special Assistant to the Director, Executive Management Staff
DBGS00655 Special Assistant to the Director, Scheduling and Advance Staff
DBGS00661 Confidential Assistant to the Director, White House Liaison
DBGS00663 Special Assistant to the Assistant Secretary, Office of Communications and Outreach
DBGS00672 Confidential Assistant to the Deputy Chief of Staff for Strategy
DBGS00673 Confidential Assistant to the Assistant Deputy Secretary for Innovation and Improvement
DBGS00675 Confidential Assistant to the General Counsel
DBGS00676 Confidential Assistant to the Executive Administrator
DBGS00678 Special Assistant to the Assistant Secretary for Planning, Evaluation, and Policy Development
DBGS00900 Special Assistant to the Director, Academic Improvement and Teacher Quality Programs
DBGS60164 Confidential Assistant to the Deputy Under Secretary

Environmental Protection Agency

EPGS03606 Press Secretary to the Associate Administrator for Public Affairs
EPGS05006 Speech Writer to the Associate Administrator for Public Affairs
EPGS05017 Deputy Associate Administrator for Congressional Affairs to the Associate Administrator for Congressional and Intergovernmental Relations
EPGS06028 Deputy Associate Administrator for Intergovernmental Relations to the Associate Administrator for Congressional and Intergovernmental Relations
EPGS07013 Deputy to the Director of Scheduling
EPGS07020 Confidential Assistant to the Deputy Administrator
EPGS07023 Advance Specialist to the Deputy Chief of Staff (Operations)
EPGS07029 Director of Advance to the Deputy Chief of Staff (Operations)
EPGS08002 Deputy Associate Administrator to the Associate Administrator for Public Affairs
EPGS08007 Director of Operations to the Deputy Chief of Staff (Operations)
EPGS08008 Program Manager (Scheduling) to the Deputy Chief of Staff (Operations)
EPGS09005 Special Assistant to the Associate Administrator for Policy, Economics and Innovation
EPGS09006 Deputy Press Secretary to the Associate Administrator for Public Affairs
EPGS09007 Confidential Assistant to the Administrator
EPGS09008 White House Liaison to the Administrator
EPGS09009 Deputy Press Secretary to the Associate Administrator for Public Affairs
EPGS60076 Senior Counsel to the Associate Administrator for Congressional and Intergovernmental Relations
EPGS60799 Special Assistant to the Senior Climate Policy Counsel to the Administrator

Council of Economic Advisers

CEGS60001 Confidential Assistant to the Chairman, Council of Economic Advisers
CEGS60004 Confidential Assistant to the Chairman, Council of Economic Advisers
CEGS60005 Administrative Operations Assistant to the Member (Council for Economic Advisers)

United States Tax Court

JCGS60040 00301 Chambers Administrator to the Chief Judge
JCGS60041 Chambers Administrator to the Chief Judge
JCGS60042 Chambers Administrator to the Chief Judge
JCGS60043 Chambers Administrator to the Chief Judge
JCGS60044 Chambers Administrator to the Chief Judge
JCGS60045 Chambers Administrator to the Chief Judge
JCGS60047 Chambers Administrator to the Chief Judge
JCGS60048 Chambers Administrator to the Chief Judge
JCGS60049 Chambers Administrator to the Chief Judge
JCGS60050 Chambers Administrator to the Chief Judge
JCGS60051 Chambers Administrator to the Chief Judge
JCGS60052 Chambers Administrator to the Chief Judge
JCGS60053 Chambers Administrator to the Chief Judge
JCGS60054 Chambers Administrator to the Chief Judge
JCGS60055 Chambers Administrator to the Chief Judge
JCGS60056 Chambers Administrator to the Chief Judge
JCGS60057 Chambers Administrator to the Chief Judge
JCGS60058 Chambers Administrator to the Chief Judge
JCGS60059 Chambers Administrator to the Chief Judge
JCGS60060 Chambers Administrator to the Chief Judge
JCGS60061 Chambers Administrator to the Chief Judge
JCGS60062 Chambers Administrator to the Chief Judge
JCGS60063 Chambers Administrator to the Chief Judge
JCGS60064 Chambers Administrator to the Chief Judge
JCGS60065 Chambers Administrator to the Chief Judge
JCGS60066 Trial Clerk to the Chief Judge
JCGS60067 Trial Clerk to the Chief Judge
JCGS60069 Trial Clerk to the Chief Judge
JCGS60071 Trial Clerk to the Chief Judge
JCGS60073 Trial Clerk to the Chief Judge
JCGS60075 Trial Clerk to the Chief Judge
JCGS60076 Trial Clerk to the Chief Judge
JCGS60078 Trial Clerk to the Chief Judge
JCGS60079 Trial Clerk to the Chief Judge
JCGS60080 Chambers Administrator to the Chief Judge
JCGS60081 Chambers Administrator to the Chief Judge
JCGS60083 Chambers Administrator to the Chief Judge
JCGS60084 Trial Clerk to the Chief Judge
JCGS60085 Trial Clerk to the Chief Judge
JCGS60086 Trial Clerk to the Chief Judge

Department of Veterans Affairs

DVGS00082 Special Assistant to the Assistant Secretary for Public and Intergovernmental Affairs
DVGS60001 Special Assistant to the Deputy Secretary of Veterans Affairs

DVGS60013 Special Assistant to the Secretary of Veterans Affairs
DVGS60017 Special Assistant to the Assistant Secretary for Public and Intergovernmental Affairs
DVGS60038 Special Assistant to the Deputy Secretary of Veterans Affairs
DVGS60048 Confidential Assistant to the Secretary of Veterans Affairs
DVGS60080 Special Assistant to the Secretary of Veterans Affairs

Broadcasting Board of Governors

IBGS00013 Chief of Staff to the Director, Office of Cuba Broadcasting

Securities and Exchange Commission

SEOT11011 Director of Communications to the Chairman
SEOT11012 Chief of Staff to the Chairman
SEOT60002 Confidential Assistant to a Commissioner
SEOT60007 Confidential Assistant to a Commissioner
SEOT60008 Secretary (Office Automation) to the Chief Accountant
SEOT60016 Secretary to the Director, Division of Enforcement
SEOT60052 Chief of Staff to the Chairman
SEOT60054 Secretary to the Director, Division of Market Regulation
SEOT60062 Confidential Assistant to a Commissioner
SEOT60090 Confidential Assistant to the Chairman
SEOT60103 Legislative and Intergovernmental Affairs Specialist to the Director of Legislative Affairs
SEOT60999 Confidential Assistant to the General Counsel
SEOT65001 Executive Staff Assistant to the Chief of Staff
SEOT90006 Confidential Assistant to a Commissioner
SEOT90007 Confidential Assistant to the Chairman

Department of Energy

DEGS00531 Senior Advisor to the Chief Operating Officer for Energy Efficiency and Renewable Energy
DEGS00548 Staff Assistant to the General Counsel
DEGS00556 Congressional Affairs Officer to the Director, Congressional Affairs
DEGS00570 Senior Policy Advisor to the Assistant Secretary of Energy (Environmental Management)
DEGS00593 Congressional Affairs Specialist to the Director, Congressional Affairs
DEGS00616 Special Assistant to the Assistant Secretary for Policy and International Affairs
DEGS00617 Special Assistant to the Director, Office of Scheduling and Advance
DEGS00628 Assistant Press Secretary to the Director, Public Affairs
DEGS00662 Deputy Assistant Secretary for Environmental Management and National Security to the Assistant Secretary for Congressional and Intergovernmental Affairs
DEGS00669 Senior Policy Advisor to the Under Secretary for Science
DEGS00702 Advisor to the Secretary, Department of Energy
DEGS00703 Special Assistant to the Secretary, Department of Energy
DEGS00704 Special Assistant to the Secretary, Department of Energy
DEGS00709 Special Assistant and Scheduler to the Secretary to the Director, Office of Public Affairs
DEGS00710 Deputy Press Secretary to the Director, Office of Public Affairs
DEGS00711 Deputy Director to the Director, Office of Public Affairs
DEGS00712 Press Secretary to the Director, Office of Public Affairs
DEGS00714 Special Assistant to the White House Liaison
DEGS00715 White House Liaison to the Secretary, Department of Energy
DEGS00716 Deputy Chief of Staff
DEGS00718 Economic Recovery Advisor to the Assistant Secretary (Electricity Delivery and Energy Reliability)
DEGS00719 Press Assistant to the Director, Office of Public Affairs
DEGS00720 Lead Advance Representative to the Secretary, Department of Energy
DEGS00721 Chief Speechwriter to the Director, Office of Public Affairs
DEGS00722 Special Assistant to the Secretary, Department of Energy
DEGS00724 Director, Office of Scheduling and Advance to the Secretary, Department of Energy
DEGS00725 Special Assistant to the Chief of Staff
DEGS00726 New Media Specialist to the Director, Office of Public Affairs
DEGS00727 Special Assistant to the Deputy Chief of Staff
DEGS00728 Special Assistant to the Chief of Staff
DEGS00729 Advisor for Policy and Communications to the Director, Office of Public Affairs
DEGS00730 Director, Public Affairs to the Under Secretary for Nuclear Security/Administrator for Nuclear Security
DEGS00731 Special Assistant to the Chief of Staff
DEGS00732 Deputy Scheduler to the Director, Office of Scheduling and Advance
DEGS00733 Trip Coordinator to the Director, Office of Scheduling and Advance
DEGS00734 Special Assistant to the Secretary to the Chief of Staff
DEGS00735 Special Assistant to the Chief of Staff
DEGS00739 Deputy Assistant Secretary for Intergovernmental and External Affairs to the Chief of Staff
DEGS00742 Senior Policy Advisor to the Chief of Staff
DEGS00743 Small Business Loan Guarantee Program Advisor to the Chief of Staff
DEGS00744 Deputy Director of Public Affairs to the Director, Public Affairs
DEGS00745 Special Assistant to the Chief of Staff
DEGS00749 Special Assistant to the Chief of Staff
DEGS00750 Special Assistant to the Chief of Staff
DEGS00751 New Media Specialist to the Chief of Staff
DEGS00752 Special Assistant to the Deputy Secretary of Energy
DEGS00754 Public Affairs Coordinator to the Director, Public Affairs
DEGS00756 Senior Counsel to the General Counsel
DEGS00757 Senior Advisor to the Under Secretary
DEGS00758 Special Assistant to the General Counsel
DEGS00759 Special Assistant to the Assistant Secretary for Policy and International Affairs

Federal Energy Regulatory Commission

DRGS60003 Confidential Assistant to the Member, Federal Energy Regulatory Commission
DRGS60007 Confidential Assistant to the Member, Federal Energy Regulatory Commission
DRGS60009 Confidential Assistant to the Chair, Federal Energy Regulatory Commission

Small Business Administration

SBGS00557 Deputy Associate Administrator for Communications and Public Liaison to the Assistant Administrator
SBGS00594 Press Secretary to the Assistant Administrator for Communications and Public Liaison
SBGS00601 Associate Administrator for Field Operations to the Administrator
SBGS00662 Deputy Assistant Administrator to the Assistant Administrator for Congressional and Legislative Affairs
SBGS00667 Speechwriter to the Assistant Administrator for Communications and Public Liaison
SBGS00675 Special Assistant to the Administrator
SBGS00677 Confidential Assistant to the Administrator

SBGS00678 Special Assistant to the Administrator
SBGS00680 Assistant Administrator for Communications and Public Liaison
SBGS00681 Special Assistant to the Associate Administrator for Capital Access
SBGS00682 National Director for Native American Affairs to the National Director for Native American Affairs
SBGS00683 Special Assistant to the Deputy Assistant Administrator for Congressional and Legislative Affairs
SBGS00694 Congressional Legislative Affairs Assistant to the Deputy Assistant Administrator for Congressional and Legislative Affairs
SBGS60173 Regional Administrator, Region VI, Dallas, Texas to the District Director
SBGS60174 Regional Administrator to the Associate Administrator for Field Operations
SBGS60175 Regional Administrator to the District Director
SBGS60188 Regional Administrator, Region IX, San Francisco to the Administrator
SBGS60189 Regional Administrator, Region 10, Seattle Washington to the Associate Administrator for the Office of Field Operations

Federal Deposit Insurance Corporation

FDOT00010 Chief of Staff to the Chairman of the Board of Directors (Director)
FDOT00012 Director for Public Affairs to the Chairman of the Board of Directors (Director)

Federal Trade Commission

FTGS60006 Congressional Liaison Specialist to the Chairman
FTGS60027 Confidential Assistant to the Chairman

General Services Administration

GSGS00090 Special Assistant to the White House Liaison
GSGS00095 Congressional Relations Specialist to the Associate Administrator for Congressional and Intergovernmental Affairs
GSGS00168 Special Assistant to the White House Liaison
GSGS00181 Public Affairs Specialist to the Deputy Associate Administrator for Communications and Marketing
GSGS00182 Special Assistant to the White House Liaison
GSGS00190 Congressional Relations Specialist to the Associate Administrator for Congressional and Intergovernmental Affairs
GSGS60095 White House Liaison to the Administrator
GSGS60103 Special Assistant to the Chief of Staff
GSGS60126 Deputy Associate Administrator for Communications and Marketing to the Associate Administrator for Citizen Services and Communications

United States International Trade Commission

TCGS00007 Staff Assistant (Legal) to a Commissioner
TCGS00010 Staff Assistant (Legal) to a Commissioner
TCGS00012 Staff Assistant (Legal) to a Commissioner
TCGS00013 Staff Assistant (Legal) to the Chairman
TCGS00025 Confidential Assistant to a Commissioner
TCGS00031 Executive Assistant to a Commissioner
TCGS00033 Staff Assistant to a Commissioner
TCGS00037 Staff Assistant (Legal) to the Chairman
TCGS60005 Staff Assistant (Legal) to a Commissioner
TCGS60006 Staff Assistant (Legal) to a Commissioner
TCGS60007 Staff Assistant (Economics) to a Commissioner
TCGS60015 Executive Assistant to the Vice Chairman
TCGS60018 Staff Assistant (Legal) to a Commissioner
TCGS60019 Staff Assistant (Economist) to a Commissioner
TCGS60022 Staff Assistant (Legal) to a Commissioner
TCGS60025 Staff Assistant (Legal) to a Commissioner
TCGS60030 Confidential Assistant to a Commissioner
TCGS60036 Staff Assistant (Economist) to the Chairman
TCGS60100 Staff Assistant (Legal) to a Commissioner
TCGS60101 Executive Assistant to a Commissioner

Export-Import Bank

EBGS04544 Executive Assistant to the Chairman
EBGS45409 Special Assistant to the Chief of Staff
EBSL42019 Senior Vice President for Congressional Affairs to the President and Chairman

Farm Credit Administration

FLOT00027 Director to the Chairman, Farm Credit Administration Board
FLOT00030 Associate Director of Congressional Affairs to the Chairman, Farm Credit Administration Board
FLOT00080 Executive Assistant to the Member, Farm Credit Administration Board

Occupational Safety and Health Review Commission

SHGS00007 Confidential Assistant to the Chairman
SHGS60008 Counsel to the Commission Member
SHGS60009 Confidential Assistant to the Commission Member

Selective Service System.

SSGS03389 Executive Officer/Chief of Staff to the Director Selective Service System
SSGS03464 Management Analyst to the Director Selective Service System

National Aeronautics and Space Administration

NNGS01121 Special Assistant to the Chief of Staff
NNGS01122 Special Assistant to the Chief of Staff

Federal Mine Safety and Health Review Commission

FRGS60024 Confidential Assistant to the Chairman
FRGS90504 Attorney Advisor (General) to a Member

Merit Systems Protection Board

MPGS00003 Confidential Assistant to a Board Member
MPGS60010 Confidential Assistant to the Chairman
MPGS60014 Counsel to the Chairman

Social Security Administration

SZGS00017 Associate Commissioner for External Affairs to the Deputy Commissioner for Communications
SZGS00019 Senior Advisor to the Deputy Commissioner for Legislation and Congressional Affairs

Commission on Civil Rights

CCGS00017 Special Assistant to the Commissioner
CCGS60012 Special Assistant to the Commissioner
CCGS60013 Special Assistant to the Vice Chairman
CCGS60020 Special Assistant to the Chairman
CCGS60029 Special Assistant to the Commissioner
CCGS60031 General Counsel to the Staff Director

National Credit Union Administration

CUOT00026 Staff Assistant to the Vice Chair
CUOT00025 Staff Assistant to a Board Member
CUOT00040 Senior Policy Advisor to the Chairman
CUOT01008 Senior Policy Advisor to a Board Member
CUOT01009 Senior Policy Advisor to a Board Member

CUOT01324 Staff Assistant to the Director of Public and Congressional Affairs

Consumer Product Safety Commission

PSGS00023 Special Assistant (Legal) to the Chairman, Consumer Product Safety Commission
PSGS07318 Special Assistant to a Commissioner
PSGS60001 Special Assistant (Legal) to a Commissioner
PSGS60061 Executive Assistant to a Commissioner
PSGS60062 Special Assistant (Legal) to a Commissioner
PSGS60063 Special Assistant (Legal) to a Commissioner
PSGS72150 Staff Assistant to a Commissioner

Federal Maritime Commission

MCGS60003 Counsel to the Commissioner
MCGS60042 Counsel to a Member

Trade and Development Agency

TDGS00003 Executive Assistant to the Director
TDGS00004 Public Affairs Specialist to the Director
TDGS60002 Congressional Liaison to the Director

Appalachian Regional Commission

APGS00005 Confidential Policy Advisor to the Federal Co-Chairman

Commodity Futures Trading Commission

CTOT00058 Special Assistant to the Commissioner
CTOT00082 Chief of Staff to the Chairperson
CTOT00089 Administrative Assistant to the Commissioner
CTOT00091 Chief Economist to the Chairperson
CTOT00097 Administrative Assistant to the Commissioner
CTOT09768 Director, Office of External Affairs

National Endowment for the Arts

NAGS00063 Deputy Congressional Liaison to the Director, Office of Government Affairs
NAGS00075 Director, Office of Government Affairs to the Chairman National Endowment for the Arts
NAGS60077 Director of Communications to the Chairman National Endowment for the Arts

National Endowment for the Humanities

NHGS60065 Special Assistant to the Chairman

Department of Housing and Urban Development

DUGS00053 Staff Assistant to the Chief of Staff
DUGS06632 General Deputy Assistant Secretary for Public Affairs to the Assistant Secretary for Public Affairs
DUGS60078 Staff Assistant to the Chief of Staff
DUGS60117 Staff Assistant to the Assistant Secretary for Administration/Chief Human Capital Officer
DUGS60121 Media Outreach Specialist to the Assistant Secretary for Public Affairs
DUGS60171 Congressional Relations Specialist to the Chief of Staff
DUGS60173 Staff Assistant to the Secretary, Housing and Urban Development
DUGS60174 Congressional Relations Officer to the Deputy Assistant Secretary for Congressional Relations
DUGS60178 Intergovernmental Relations Specialist to the Assistant Secretary for Congressional and Intergovernmental Relations
DUGS60180 Special Assistant to the Assistant Secretary for Housing, Federal Housing Commissioner
DUGS60182 Special Assistant to the Assistant Secretary for Public and Indian Housing
DUGS60184 Deputy Assistant Secretary for Congressional Relations to the Assistant Secretary for Congressional and Intergovernmental Relations
DUGS60186 Staff Assistant to the Chief of Staff
DUGS60193 Media Specialist to the Chief of Staff
DUGS60194 Staff Assistant to the Assistant Secretary for Public Affairs
DUGS60199 Staff Assistant to the Assistant Secretary for Public Affairs
DUGS60204 General Deputy Assistant Secretary to the Assistant Secretary for Congressional and Intergovernmental Relations
DUGS60211 Advance Coordinator to the Director, Office of Executive Scheduling and Operations
DUGS60240 Speechwriter to the Assistant Secretary for Public Affairs
DUGS60249 Congressional Relations Specialist to the Assistant Secretary for Congressional and Intergovernmental Relations
DUGS60270 White House Liaison Assistant to the Assistant to the Secretary and White House Liaison
DUGS60340 Special Assistant to the Chief of Staff
DUGS60341 Special Assistant for Program Initiatives to the Chief of Staff
DUGS60342 Special Assistant to the Chief of Staff
DUGS60354 Special Assistant to the Assistant Secretary for Housing, Federal Housing Commissioner
DUGS60388 Scheduling Coordinator to the Assistant Secretary for Administration/Chief Human Capital Officer
DUGS60389 Scheduling and Advance Coordinator to the Chief of Staff
DUGS60415 Senior Speechwriter to the Assistant Secretary for Public Affairs
DUGS60436 Staff Assistant to the Chief of Staff
DUGS60437 Special Assistant to the Secretary, Housing and Urban Development
DUGS60502 Special Policy Advisor to the Assistant Secretary for Public and Indian Housing
DUGS60519 Special Assistant to the Assistant Secretary for Public and Indian Housing
DUGS60520 Special Assistant to the Assistant Secretary for Public and Indian Housing
DUGS60597 Deputy Chief of Staff for Policy and Programs to the Chief of Staff
DUGS60599 Deputy Chief of Staff to the Chief of Staff
DUGS60603 Staff Assistant to the General Deputy Assistant Secretary for Policy Development Research
DUGS60621 Special Assistant to the Assistant Secretary for Policy Development and Research

National Mediation Board

NMGS60054 Confidential Assistant to a Board Member

Federal Labor Relations Authority

FAGS00001 Management Assistant to the Chairman
FAGS60022 Executive Assistant to the Chairman

Department of Transportation

DTGS60054 Associate Director for Governmental Affairs to the Assistant Secretary for Governmental Affairs
DTGS60199 Special Assistant to the Administrator
DTGS60202 Special Assistant to the Administrator
DTGS60237 Press Secretary to the Secretary and Director of Public Affairs
DTGS60257 Deputy Director of Public Affairs to the Secretary and Director of Public Affairs
DTGS60258 Associate Director for Governmental Affairs to the Assistant Secretary for Governmental Affairs
DTGS60274 Deputy Press Secretary to the Secretary and Director of Public Affairs

DTGS60295 Special Assistant to the Under Secretary of Transportation for Policy to the Associate Deputy Secretary
DTGS60311 Special Assistant for Scheduling and Advance to the Director of Scheduling and Advance
DTGS60317 Deputy Assistant Administrator for Government and Industry Affairs to the Assistant Administrator for Government and Industry Affairs
DTGS60324 Director of Scheduling and Advance to the Chief of Staff
DTGS60326 Special Assistant to the Administrator
DTGS60337 Director of Communications to the Administrator
DTGS60341 Associate Director for Governmental Affairs to the Deputy Assistant Secretary for Governmental Affairs
DTGS60342 Special Assistant to the Director of Scheduling and Advance
DTGS60358 Special Assistant to the Director of Scheduling and Advance
DTGS60360 Scheduler to the Director of Scheduling and Advance
DTGS60369 Deputy Assistant Secretary for Governmental Affairs to the Assistant Secretary for Governmental Affairs
DTGS60371 Deputy Assistant Secretary for Governmental Affairs to the Assistant Secretary for Governmental Affairs
DTGS60375 White House Liaison to the Chief of Staff
DTGS60451 Director of Communications to the Administrator
DTGS60462 Associate Director for Public Liaison to the Deputy Director of Public Affairs

National Transportation Safety Board

TBGS51532 Special Assistant to a Member
TBGS60025 Special Assistant to the Vice Chairman
TBGS81116 Confidential Assistant to the Chairman

Federal Housing Finance Board

FBOT00004 Counsel to the Chairman
FBOT00005 Staff Assistant to the Chairman
FBOT00010 Special Assistant to the Board Director
FBOT60009 Special Assistant to the Board Director

National Labor Relations Board

NLGS06872 Attorney Adviser (Labor) to the Chairman

Authority: 5 U.S.C. 3301 and 3302; E.O.10577, 3 CFR 1954–1958 Comp., p. 218.

Office of Personnel Management.

John Berry,

Director.

[FR Doc. E9–25310 Filed 10–20–09; 8:45 am]

BILLING CODE 6325–39–P

OFFICE OF PERSONNEL MANAGEMENT

Excepted Service

AGENCY: U.S. Office of Personnel Management (OPM).

ACTION: Notice.

SUMMARY: This gives notice of OPM decisions granting authority to make appointments under Schedules A, B, and C in the excepted service as required by 5 CFR 213.103.

FOR FURTHER INFORMATION CONTACT: Glenda Haendschke, Acting Group Manager, Executive Resources Services Group, Center for Performance Management System and Evaluation, Division for Human Capital Leadership and Merit System Accountability, 202–606–2246.

SUPPLEMENTARY INFORMATION: Appearing in the listing below are the individual authorities established under Schedules A, B, and C between August 1, 2009, and August 31, 2009.

These notices are published monthly in the **Federal Register** at *http://www.gpoaccess.gov/fr/*. A consolidated listing of all authorities as of June 30 is published each year. The following schedules are *not* codified in the code of Federal Regulations. These are agency specific exceptions.

Schedule A

No Schedule A authority to report.

Schedule B

No Schedule B authority to report.

Schedule C

The following Schedule C appointments were approved during August 2009.

Office of Management and Budget

BOGS90034 Special Assistant to the Director Office of Management and Budget. Effective August 5, 2009.

Office of National Drug Control Policy

QQGS90009 Associate Director for Intergovernmental Affairs. Effective August 19, 2009.

Office of Personnel Management

PMGS31418 Constituent Services Representative to the Director, Office of Congressional Relations. Effective August 14, 2009.

Department of State

DSGS69981 Senior Advisor to the Under Secretary for Public Diplomacy and Public Affairs. Effective August 4, 2009.
DSGS70004 Special Assistant to the Assistant Secretary for African Affairs. Effective August 4, 2009.
DSGS69974 Foreign Policy Analyst for the Assistant Secretary Oceans, International Environment and Science Affairs. Effective August 10, 2009.
DSGS70019 Staff Assistant to the Assistant Secretary for Public Affairs. Effective August 11, 2009.
DSGS69976 Special Assistant to the Under Secretary for Management. Effective August 12, 2009.
DSGS69921 Staff Assistant to the Director, Policy Planning Staff. Effective August 17, 2009.
DSGS69925 Congressional Inquiry Specialist for the Assistant Secretary for Legislative and Intergovernmental Affairs. Effective August 17, 2009.
DSGS69929 Chief of Staff to the Assistant Secretary for Legislative and Intergovernmental Affairs. Effective August 17, 2009.
DSGS69973 Staff Assistant to the Deputy Secretary. Effective August 17, 2009.
DSGS69977 Staff Assistant, Senior Gifts Officer to the Chief of Protocol. Effective August 17, 2009.
DSGS69944 Staff Assistant to the Senior Advisor to the Secretary and White House Liaison. Effective August 18, 2009.
DSGS69952 Supervisory Protocol Officer—Visits. Effective August 18, 2009.
DSGS69927 Staff Assistant to the Assistant Secretary for Consular Affairs. Effective August 19, 2009.
DSGS69983 Special Assistant to the Counselor. Effective August 21, 2009.

Department of the Treasury

DYGS00425 Special Assistant to the Under Secretary for International Affairs. Effective August 7, 2009.
DYGS00523 Senior Advisor to the Assistant Secretary for Financial Stability. Effective August 7, 2009.
DYGS00455 Special Assistant to the Financial Restructuring Specialist. Effective August 14, 2009.
DYGS00485 Special Assistant to the Deputy Executive Secretary. Effective August 14, 2009.
DYGS60351 Senior Advisor to the Assistant Secretary (Public Affairs). Effective August 14, 2009.

Department of Defense

DDGS17189 Speechwriter to the Special Assistant for Speechwriting. Effective August 3, 2009.

DDGS17241 Defense Fellow to the Special Assistant to the Secretary of Defense for White House Liaison. Effective August 3, 2009.
DDGS17242 Defense Fellow to the Special Assistant to the Secretary of Defense for White House Liaison. Effective August 3, 2009.
DDGS17251 Staff Assistant to the Special Assistant to the Secretary of Defense for White House Liaison. Effective August 11, 2009.
DDGS17252 Advance Officer to the Director, Advance Office. Effective August 19, 2009.
DDGS17253 Advance Officer to the Director, Advance Office. Effective August 19, 2009.

Department of the Navy

DNGS09147 Special Assistant to the Deputy Under Secretary of the Navy for Business Operations and Transformation. Effective August 5, 2009.
DNGS09148 Special Assistant to the Principal Deputy of the Navy for Plans, Policy, Oversight and Integration. Effective August 5, 2009.
DNGS09149 Special Assistant to the Deputy Under Secretary of the Navy for Business Operations and Transformation. Effective August 5, 2009.
DNGS09151 Special Assistant to the Deputy Under Secretary of the Navy for Business Operations and Transformation. Effective August 5, 2009.
DNGS09152 Attorney Advisor to the Deputy General Counsel. Effective August 5, 2009.
DNGS09153 Special Assistant to the Under Secretary of the Navy. Effective August 5, 2009.
DNGS09154 Special Assistant to the Deputy Under Secretary of the Navy for Business Operations and Transformation. Effective August 7, 2009.
DNGS09150 Special Assistant to the Under Secretary of the Navy. Effective August 10, 2009.
DNGS09157 Special Assistant to the Deputy Under Secretary of the Navy for Business Operations and Transformation. Effective August 11, 2009.

Department of Justice

DJGS00541 Counsel to the Deputy Attorney General. Effective August 12, 2009.
DJGS00540 Counsel to the Assistant Attorney General. Effective August 14, 2009.
DJGS00542 Staff Assistant to the Director. Effective August 21, 2009.
DJGS00544 Counselor to the Assistant Attorney General (Legal Policy). Effective August 26, 2009.

Department of Homeland Security

DMGS00692 Director of Congressional Relations. Effective August 5, 2009.
DMGS00835 Senior Advisor to the Chief of Staff. Effective August 18, 2009.
DMGS00807 Special Assistant to the Chief of Staff. Effective August 19, 2009.

Department of the Interior

DIGS01169 Special Assistant to the Assistant Secretary Policy Management and Budget. Effective August 14, 2009.
DIGS70007 Special Assistant to the Director of National Park Service. Effective August 24, 2009.

Department of Agriculture

DAGS00172 Staff Assistant to the Assistant Secretary for Congressional Relations. Effective August 13, 2009.
DAGS00174 Confidential Assistant to the Assistant Secretary for Congressional Relations. Effective August 27, 2009.

Department of Commerce

DCGS00012 Confidential Assistant to the Deputy Assistant Secretary for Administration. Effective August 6, 2009.
DCGS60006 Director of Scheduling and Advance for the Chief of Staff for International Trade Administration. Effective August 11, 2009.
DCGS60527 Executive Assistant to the Secretary. Effective August 11, 2009.
DCGS00643 Special Assistant to the Under Secretary of Commerce for Intellectual Property and Director of the US Patent and Trademark Office. Effective August 12, 2009.
DCGS00367 Special Assistant to the Director, Office of Legislative Affairs. Effective August 14, 2009.
DCGS00653 Director of Advisory Committees for the Assistant Secretary for Manufacturing and Services. Effective August 14, 2009.
DCGS00608 Confidential Assistant to the Chief of Staff for the Deputy Secretary. Effective August 17, 2009.
DCGS00465 Confidential Assistant to the Director Office of White House Liaison. Effective August 21, 2009.
DCGS00500 Senior Advisor and Director of Public Affairs for the Under Secretary for International Trade. Effective August 25, 2009.
DCGS00561 Special Assistant to the Under Secretary of Commerce for Intellectual Property and Director of the US Patent and Trademark Office. Effective August 27, 2009.
DCGS00696 Deputy Director of Legislative Affairs, International Trade Administration. Effective August 28, 2009.

Department of Labor

DLGS60163 Chief of Staff to the Assistant Secretary for Occupational Safety and Health. Effective August 11, 2009.
DLGS60209 Special Assistant to the Assistant Secretary for Veterans Employment and Training. Effective August 12, 2009.
DLGS60182 Special Assistant to the Deputy Secretary of Labor. Effective August 14, 2009.
DLGS60007 Special Assistant to the Director of Public Engagement. Effective August 17, 2009.
DLGS60130 Legislative Assistant to the Assistant Secretary for Congressional and Intergovernmental Affairs. Effective August 17, 2009.
DLGS60144 Special Assistant to the Director of Public Engagement. Effective August 17, 2009.
DLGS60190 Legislative Officer for the Assistant Secretary for Congressional and Intergovernmental Affairs. Effective August 20, 2009.
DLGS60262 Special Assistant to the Deputy Secretary of Labor. Effective August 26, 2009.
DLGS60045 Staff Assistant to the Deputy Assistant Secretary. Effective August 27, 2009.
DLGS60218 Special Assistant to the Deputy Assistant Secretary. Effective August 27, 2009.

Department of Health and Human Services

DHGS60268 Special Assistant to the Deputy Assistant Secretary for Legislation (Health Policy). Effective August 4, 2009.
DHGS60523 Executive Director, President's Council on Physical Fitness and Sports to the Assistant Secretary, Health. Effective August 4, 2009.
DHGS60571 Confidential Assistant (Scheduling) to the Director of Scheduling and Advance. Effective August 4, 2009.
DHGS60015 Deputy Director, Center for Faith Based and Community Initiatives. Effective August 5, 2009.
DHGS60679 Confidential Assistant to the Director, Office of External Affairs. Effective August 5, 2009.
DHGS60514 Confidential Assistant (Immediate Office) to the Assistant Secretary for Children and Families. Effective August 20, 2009.
DHGS60009 Confidential Assistant to the Assistant Secretary for Preparedness and Response for Public

Health Emergency Preparedness. Effective August 28, 2009.

DHGS60036 Confidential Assistant to the Director of Intergovernmental Affairs. Effective August 28, 2009.

DHGS60059 Deputy Director for Regional Outreach to the Director of Intergovernmental Affairs. Effective August 28, 2009.

DHGS60081 Special Assistant to the Director, Office of Global Health Affairs. Effective August 28, 2009.

DHGS60485 Director of Communications for the Assistant Secretary, Health. Effective August 28, 2009.

DHGS60030 Confidential Assistant to the General Counsel. Effective August 31, 2009.

DHGS60066 Confidential Assistant to the Deputy Chief of Staff. Effective August 31, 2009.

DHGS60462 Special Assistant (Office of Health Reform) to the Principal Deputy Assistant Secretary for Planning and Evaluation. Effective August 31, 2009.

DHGS60464 Confidential Assistant (Office of Health Reform) to the Principal Deputy Assistant Secretary for Planning and Evaluation. Effective August 31, 2009.

DHGS60465 Special Assistant (Office of Health Reform) to the Principal Deputy Assistant Secretary for Planning and Evaluation. Effective August 31, 2009.

DHGS60466 Director of Outreach (Office of Health Reform) to the Principal Deputy Assistant Secretary for Planning and Evaluation. Effective August 31, 2009.

Department of Education

DBGS00542 Special Assistant to the Deputy Secretary of Education. Effective August 10, 2009.

DBGS00223 Special Assistant to the Senior Advisor on Early Learning. Effective August 12, 2009.

DBGS00641 Chief of Staff to the Deputy Secretary of Education. Effective August 12, 2009.

DBGS00664 Chief of Staff to the Under Secretary. Effective August 12, 2009.

DBGS00299 Special Assistant to the Assistant Secretary for Elementary and Secondary Education. Effective August 14, 2009.

DBGS00355 Confidential Assistant to the Chief of Staff. Effective August 14, 2009.

DBGS00662 Special Assistant to the Deputy Assistant Secretary for External Affairs and Outreach Services. Effective August 14, 2009.

DBGS00657 Confidential Assistant to the Deputy Secretary of Education. Effective August 20, 2009.

DBGS00468 Special Assistant to the Chief of Staff. Effective August 25, 2009.

Department of Energy

DEGS00766 Special Assistant to the Assistant Secretary (Energy Efficiency and Renewable Energy). Effective August 11, 2009.

DEGS00767 Special Assistant to the Director, Office of Science. Effective August 11, 2009.

DEGS00768 Special Assistant to the Chief Financial Officer. Effective August 20, 2009.

Small Business Administration

SBGS00634 Regional Administrator (Region I) to the Associate Administrator for Field Operations. Effective August 27, 2009.

SBGS60173 Regional Administrator, Region VI, to the Associate Administrator for Field Operations. Effective August 27, 2009.

SBGS60174 Regional Administrator to the Associate Administrator for Field Operations. Effective August 27, 2009.

SBGS00668 Senior Advisor to the Associate Administrator for Field Operations. Effective August 31, 2009.

SBGS60170 Regional Administrator, Region VIII, to the Associate Administrator for Field Operations. Effective August 31, 2009.

Export-Import Bank

EBSL94047 Senior Vice President, Communications to the President and Chairman. Effective August 24, 2009.

Commission on Civil Rights

CCGS60011 Special Assistant to the Vice Chairman. Effective August 25, 2009.

Commodity Futures Trading Commission

CTOT00065 Director, Division of Market Oversight to the Chairperson. Effective August 7, 2009.

Department of Housing and Urban Development

DUGS60326 Staff Assistant to the Chief of Staff. Effective August 11, 2009.

DUGS60036 Special Assistant to the Chief of Staff. Effective August 26, 2009.

Department of Transportation

DTGS60129 Counselor to the General Counsel. Effective August 5, 2009.

DTGS60460 Director of Public Affairs for the Administrator. Effective August 14, 2009.

DTGS60400 Associate Administrator for Policy and Governmental Affairs to the Administrator. Effective August 25, 2009.

Authority: 5 U.S.C. 3301 and 3302; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218.

Office of Personnel Management.

John Berry,

Director.

[FR Doc. E9–25293 Filed 10–20–09; 8:45 am]

BILLING CODE 6325–39–P

POSTAL REGULATORY COMMISSION

Docket Nos. MC2010–1 and CP2010–1; Order No. 313

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request to add Priority Mail Contract 19 to the Competitive Product List. The Postal Service has also filed a related contract. This notice addresses procedural steps associated with these filings.

DATES: Comments are due October 22, 2009.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.*

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820 and *stephen.sharfman@prc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction
II. Notice of Filings
III. Ordering Paragraphs

I. Introduction

On October 13, 2009, the Postal Service filed a formal request pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.* to add Priority Mail Contract 19 to the Competitive Product List.[1] The Postal Service asserts that Priority Mail Contract 19 is a competitive product ''not of general applicability'' within the meaning of 39 U.S.C. 3632(b)(3). The Postal Service states that prices and classification underlying this contract are supported by Governors' Decision No. 09–6 in Docket No. MC2009–25. *Id.* at 1. The Request has been assigned Docket No. MC2010–1.

The Postal Service contemporaneously filed a contract related to the proposed new product pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. The contract has been assigned Docket No. CP2010–1.

[1] Request of the United States Postal Service to Add Priority Mail Contract 19 to Competitive Product List and Notice of Filing (Under Seal) of Contract and Supporting Data, October 13, 2009 (Request).

Request. In support of its Request, the Postal Service filed the following materials: (1) A redacted version of the Governors' Decision, originally filed in Docket No. MC2009–25, authorizing certain Priority Mail contracts; [2] (2) a redacted version of the contract; [3] (3) a requested change in the Competitive Product List; [4] (4) a Statement of Supporting Justification as required by 39 CFR 3020.32; [5] (5) a certification of compliance with 39 U.S.C. 3633(a); [6] and (6) an application for nonpublic treatment of the materials filed under seal.[7]

In the Statement of Supporting Justification, Mary Prince Anderson, Acting Manager, Sales and Communications, Expedited Shipping, asserts that the service to be provided under the contract will cover its attributable costs, make a positive contribution to institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id.,* Attachment D. Thus, Ms. Anderson contends there will be no issue of subsidization of competitive products by market dominant products as a result of this contract. *Id.*

Related contract. A redacted version of the specific Priority Mail Contract 19 is included with the Request. The contract will become effective on the day that the Commission provides all necessary regulatory approvals. It is terminable upon 30 days notice by a party, but could continue for 3 years with annual adjustments. The Postal Service represents that the contract is consistent with 39 U.S.C. 3633(a)(1). *See id.,* Attachment D. The Postal Service will not provide the shipper with customized pricing for eligible Priority Mail items mailed by the shipper.

The Postal Service filed much of the supporting materials, including the specific Priority Mail Contract 19, under seal. In its Request, the Postal Service maintains that the contract and related financial information, including the customer's name and the accompanying analyses that provide prices, terms, conditions, cost data, and financial projections should remain under seal. *Id.* at 2. It also requests that the Commission order that the duration of such treatment of all customer identifying information be extended indefinitely, instead of ending after 10 years. *Id.,* Attachment F at 1 and 7.

II. Notice of Filings

The Commission establishes Docket Nos. MC2010–1 and CP2010–1 for consideration of the Request pertaining to the proposed Priority Mail Contract 19 product and the related contract, respectively. In keeping with practice, these dockets are addressed on a consolidated basis for purposes of this order; however, future filings should be made in the specific docket in which issues being addressed pertain.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642 and 39 CFR part 3015 and 39 CFR 3020 subpart B. Comments are due no later than October 22, 2009. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Paul L. Harrington to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2010–1 and CP2010–1 for consideration of the matter raised in each docket.

2. Pursuant to 39 U.S.C. 505, Paul L. Harrington is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than October 22, 2009.

4. The Secretary shall arrange for publication of this order in the **Federal Register.**

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. E9–25346 Filed 10–20–09; 8:45 am]

BILLING CODE 7710–FW–P

[2] Attachment A to the Request, reflecting Governors' Decision No. 09–6, April 27, 2009.

[3] Attachment B to the Request.

[4] Attachment C to the Request.

[5] Attachment D to the Request.

[6] Attachment E to the Request.

[7] Attachment F to the Request.

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intentions to request approval on a new and/or currently approved information collection.

DATES: Submit comments on or before December 21, 2009.

ADDRESSES: Send all comments regarding whether this information collection is necessary for the proper performance of the function of the agency, whether the burden estimates are accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collection, to Cynthia Pitts, Director, Disaster Administrative Services, Small Business Administration, 409 3rd Street, 6th Floor, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Cynthia Pitts, Director, Disaster Administrative Services 202–205–7570 *cynthia.pitts@sba.gov* Curtis B. Rich, Management Analyst, 202–205–7030 *curtis.rich@sba.gov.*

SUPPLEMENTARY INFORMATION: Disaster loans are authorized upon terms and conditions to (1) assure proper use of proceeds, (2) comply with established record keeping requirements, and (3) assure sound credit positions. Record-keeping requirements provide a basis to assure proper use of proceeds and satisfy loan conditions.

Title: ''Borrower's Progress Certification.''

Description of Respondents: Recipients of Disaster Loans.

Form Number: 1366.

Annual Responses: 12,078.

Annual Burden: 11,312.

Jacqueline White,

Chief, Administrative Information Branch.

[FR Doc. E9–25226 Filed 10–20–09; 8:45 am]

BILLING CODE P

SECURITIES AND EXCHANGE COMMISSION

[Form N–8A; File No. 270–135; OMB Control No. 3235–0175]

Proposed Collection; Comment Request

Upon written request, copy available from: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

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 (the ''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.

The Investment Company Act of 1940, as amended (''1940 Act'') (15 U.S.C.

80a–1 *et seq.*), requires investment companies to register with the Commission before they conduct any business in interstate commerce. Section 8(a) of the 1940 Act provides that an investment company shall be deemed to be registered upon receipt by the Commission of a notification of registration in such form as the Commission prescribes. Form N–8A (17 CFR 274.10) is the form for notification of registration that the Commission has adopted under section 8(a). The purpose of such notification of registration provided on Form N–8A is to notify the Commission of the existence of investment companies required to be registered under the 1940 Act and to enable the Commission to administer the provisions of the 1940 Act with respect to those companies. After an investment company has filed its notification of registration under section 8(a), the company is then subject to the provisions of the 1940 Act which govern certain aspects of its organization and activities, such as the composition of its board of directors and the issuance of senior securities. Form N–8A requires an investment company to provide its name, state of organization, form of organization, classification, the name and address of each investment adviser of the investment company, the current value of its total assets and certain other information readily available to the investment company. If the investment company is filing a registration statement as required by Section 8(b) of the 1940 Act concurrently with its notification of registration, Form N–8A requires only that the registrant file the cover page (giving its name, address and agent for service of process) and sign the form in order to effect registration.

Each year approximately 105 investment companies file a notification on Form N–8A, which is required to be filed only once by an investment company. The Commission estimates that preparing Form N–8A requires an investment company to spend approximately 1 hour so that the total burden of preparing Form N–8A for all affected investment companies is 105 hours. Estimates of average burden hours are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.

The collection of information on Form N–8A is mandatory. The information provided on Form N–8A 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 OMB control number.

Written 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 collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through 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.

Please direct your written comments to Charles Boucher, 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.*

Dated: October 14, 2009.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–25206 Filed 10–20–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Rule 38a–1; SEC File No. 270–522; OMB Control No. 3235–0586]

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.

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 (the ''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Rule 38a–1 (17 CFR 270.38a–1) under the Investment Company Act of 1940 (15 U.S.C. 80a) (''Investment Company Act'') is intended to protect investors by fostering better fund compliance with securities laws. The rule requires every registered investment company and business development company (''fund'') to: (i) Adopt and implement written policies and procedures reasonably designed to prevent violations of the Federal securities laws by the fund, including procedures for oversight of compliance by each investment adviser, principal underwriter, administrator, and transfer agent of the fund; (ii) obtain the fund board of director's approval of those policies and procedures; (iii) annually review the adequacy of those policies and procedures and the policies and procedures of each investment adviser, principal underwriter, administrator, and transfer agent of the fund, and the effectiveness of their implementation; (iv) designate a chief compliance officer to administer the fund's policies and procedures and prepare an annual report to the board that addresses certain specified items relating to the policies and procedures; and (v) maintain for five years the compliance policies and procedures and the chief compliance officer's annual report to the board.

The rule contains certain information collection requirements that are designed to ensure that funds establish and maintain comprehensive, written internal compliance programs. The information collections also assist the Commission's examination staff in assessing the adequacy of funds' compliance programs.

While Rule 38a–1 requires each fund to maintain written policies and procedures, most funds are located within a fund complex. The experience of the Commission's examination and oversight staff suggests that each fund in a complex is able to draw extensively from the fund complex's ''master'' compliance program to assemble appropriate compliance policies and procedures. Many fund complexes already have written policies and procedures documenting their compliance programs. Further, a fund needing to develop or revise policies and procedures on one or more topics in order to achieve a comprehensive compliance program can draw on a number or outlines and model programs available from a variety of industry representatives, commentators, and organizations.

There are approximately 4638 funds subject to Rule 38a–1. Among these funds, 105 were newly registered in the past year. These 105 funds, therefore, were required to adopt and document the policies and procedures that make up their compliance programs. Commission staff estimates that the average annual hour burden for a fund to adopt and document these policies and procedures is 80 hours. Thus, we estimate that the aggregate annual burden hours associated with the

adoption and documentation requirement is 8,400 hours.

All funds are required to conduct an annual review of the adequacy of their existing policies and procedures and the policies and procedures of each investment adviser, principal underwriter, administrator, and transfer agent of the fund, and the effectiveness of their implementation. In addition, each fund chief compliance officer is required to prepare an annual report that addresses the operation of the policies and procedures of the fund and the policies and procedures of each investment adviser, principal underwriter, administrator, and transfer agent of the fund, any material changes made to those policies and procedures since the date of the last report, any material changes to the policies and procedures recommended as a result of the annual review, and certain compliance matters that occurred since the date of the last report. The staff estimates that each fund spends 42 hours per year, on average, conducting the annual review and preparing the annual report to the board of directors. Thus, we estimate that the annual aggregate burden hours associated with the annual review and annual report requirement is 194,796 hours.

Finally, the staff estimates that each fund spends 11 hours annually, on average, maintaining the records required by proposed Rule 38a–1. Thus, the annual aggregate burden hours associated with the recordkeeping requirement is 51,018 hours.

In total, the staff estimates that the aggregate annual information collection burden of Rule 38a–1 is 254,214 hours. The estimate of burden hours is made solely for the purposes of the Paperwork Reduction Act. The estimate is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. Complying with this collection of information requirement is mandatory. Responses will not be 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 send an e-mail to Shagufta Ahmed at *Shagufta_Ahmed@omb.eop.gov;* and (ii) Charles Boucher, 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: October 14, 2009.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–25208 Filed 10–20–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Rule 17f–2(a); OMB Control No. 3235–0034; SEC File No. 270–34]

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.

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 existing collection of information provided for in Rule 17f–2(a) (17 CFR 240.17f–2(a)) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Exchange Act'').

Rule 17f–2 (17 CFR 240.17f–2) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) requires that securities professionals be fingerprinted. This requirement serves to identify security risk personnel, to allow an employer to make fully informed employment decisions, and to deter possible wrongdoers from seeking employment in the securities industry. Partners, directors, officers, and employees of exchanges, broker, dealers, transfer agents, and clearing agencies are included. Fingerprint cards submitted under Rule 17f–2(a) must be retained for a period of not less than three years after termination of the person's employment relationship with the organization. Fingerprint cards submitted according to Rule 17f–2(a) will not be kept confidential. It is estimated that approximately 10,000 respondents will submit fingerprint cards. It is also estimated that each respondent will submit 55 fingerprint cards. The staff estimates that the average number of hours necessary to comply with the Rule 17f–2(a) is one-half hour. The total burden is 275,000 hours for respondents. The average cost per hour is approximately $50. Therefore, the total cost of compliance for respondents is $13,750,000.

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: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Charles Boucher, 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 to OMB within 30 days of this notice.

Dated: October 14, 2009.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–25207 Filed 10–20–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60817; File No. SR–ISE–2009–76]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt a Fee for ISE Market Maker Orders Sent to the Exchange by Electronic Access Members

October 13, 2009.

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 October 1, 2009, International Securities Exchange, LLC (''ISE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE proposes to adopt a fee for ISE market maker orders sent to the Exchange by Electronic Access Members (''EAMs''). The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.com*), at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to adopt a fee for ISE market maker orders sent to the Exchange by EAMs. Specifically, the Exchange proposes to adopt a fee of $0.20 per contract for such orders. Market maker orders sent to the Exchange by EAMs are currently charged per the Exchange's market maker sliding scale. Market maker orders sent by EAMs, however, are essentially broker-dealer orders and thus should be billed at the rate the Exchange currently charges for broker-dealer orders. The Exchange treats broker-dealer orders as Firm Proprietary orders for the purpose of the Exchange's fee schedule and charges a fee of $0.20 per contract. ISE proposes to implement this fee change on October 1, 2009.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the ''Exchange Act'') for this proposed rule change is the requirement under Section 6(b)(4) that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. In particular, the proposed fee change will align fees charged by the Exchange for market maker orders sent by EAMs with the fees charged by the Exchange for broker-dealer orders.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3) of the Act [3] and Rule 19b–4(f)(2) [4] thereunder. 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–ISE–2009–76 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2009–76. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro/shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–ISE–2009–76 and should be submitted on or before November 12, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[5]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–25201 Filed 10–20–09; 8:45 am]

BILLING CODE 8010–01–P

[3] 15 U.S.C. 78s(b)(3)(A) [sic].

[4] 17 CFR 19b–4(f)(2).

[5] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60823; File No. SR–NYSEAmex–2009–59]

Self-Regulatory Organizations; NYSE Amex LLC; Order Granting Approval of Proposed Rule Change Amending NYSE Amex Options Rule 915

October 14, 2009.

On August 19, 2009, NYSE Amex, Inc. (''NYSE Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 [2] thereunder to amend the definition of Futures Reference Asset in Commentary .11(5) to NYSE Amex Rule 915 to permit options on Futures-Linked Securities to be based on products

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

linked to CBOE Volatility Index Futures (''VIX Futures''). The proposed rule change was published for comment in the **Federal Register** on September 11, 2009 for a 21-day comment period.[3] The Commission received no comment letters regarding the proposal. This order approves the proposed rule change.

Commentary .11 to NYSE Amex Rule 915 designates the listing and trading of options on Equity Index-Linked Securities, Commodity-Linked Securities, Currency-Linked Securities, Fixed Income Index-Linked Securities, Futures-Linked Securities, and Multifactor Index-Linked Securities, collectively known as Index-Linked Securities (as defined in NYSE Amex Company Guide Section 107(H)) that are principally traded on a national securities exchange and an ''NMS Stock'' (as defined in Rule 600 of Regulation NMS under the Act). Futures-Linked Securities pay at maturity an amount of cash based on the performance of a ''Futures Reference Asset,'' currently defined as an index of futures on Treasury Securities, GSE Securities, supranational debt and debt of a foreign country or a subdivision thereof, or interest rate futures, or options or derivatives on any of the foregoing. The Exchange proposes to include VIX Futures in this definition.

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange[4] and, in particular, the requirements of Section 6 of the Act.[5] Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[6] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Currently, the Exchange will consider listing and trading options on Index-Linked Securities, including options on Futures-Linked Securities, provided the Index-Linked Securities meet the criteria for underlying securities set forth in Commentary .01 to NYSE Amex Rule 915. Underlying Index-Linked Securities must meet the criteria and guidelines for underlying securities set forth in Commentary .01 to NYSE Amex Rule 915; or the Index-Linked Securities must be redeemable at the option of the holder at least on a weekly basis through the issuer at a price related to the applicable underlying Reference Asset.[7] After the addition of VIX Futures to the definition of a Futures Reference Asset in Commentary .11(5) to NYSE Amex Rule 915, options on Index-Linked Securities, including options on Futures Linked Securities, would continue to be subject to all Exchange rules governing the trading of equity options[8] and the current continuing or maintenance listing standards applicable to the trading of options on Index-Linked Securities on NYSE Amex. The Commission also notes that it has previously approved an amendment to Section 107H of the Amex Company Guide to add the VIX Futures to the definition of ''Futures Reference Asset'' for the listing and trading of Futures-Linked Securities.[9]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change (SR–NYSEAmex–2009–59) is hereby approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–25205 Filed 10–20–09; 8:45 am]

BILLING CODE 8010–01–P

[3] *See* Securities Exchange Act Release No. 60622 (September 3, 2009), 74 FR 46826.

[4] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(5).

[7] For purposes of Commentary .11 to NYSE Amex Rule 915, Reference Assets collectively refers to Equity Reference Assets, Commodity Reference Assets, Currency Reference Assets, Fixed Income Reference Assets, Futures Reference Assets, and Multifactor Reference Assets.

[8] Despite the fact that Index-Linked Securities are linked to an underlying index, each trade as a single, exchange-listed security. Accordingly, rules pertaining to the listing and trading of standard equity options apply to options on Index-Linked Securities.

[9] *See* Securities Exchange Act Release No. 60535 (August 19, 2009), 74 FR 46826 (August 26, 2009) (NYSEAmex–2009–55); *see also* Securities Exchange Act Release No. 58968 (November 17, 2008), 73 FR 71082 (November 24, 2008) (SR–NYSEArca–2008–111).

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60818; File No. SR–BX–2009–048]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Order Approving a Proposed Rule Change To Amend the Grandfathered Rules of the Exchange

October 13, 2009.

On August 17, 2009, NASDAQ OMX BX, Inc. (''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the Grandfathered Rules of the Exchange.[3] The proposed rule change was published for comment in the **Federal Register** on September 8, 2009.[4] The Commission received no comments on the proposal.

The proposed rule change would incorporate certain provisions of the former Constitution of the Boston Stock Exchange, Incorporated (''BSE'')[5] into the Grandfathered Rules. The provisions to be added to the Grandfathered Rules relate to the following: (1) Participation (formerly Membership) rules, to supplement the By-Laws and the Grandfathered Rules to direct the BOX Options Participants (''Participants'') and prospective participants to Section 6(c) of the Act,[6] as cited in the proposed rule text regarding the investigation and acceptance of an applicant; (2) Non-liability of the Exchange provision, to reinforce to Participants the ''non-liability'' of the Exchange for damages sustained from use of the facilities of the Exchange;
(3) Insolvent Participants, to provide guidance for Insolvent Participants to notify the Exchange, of such insolvency and to state that the Exchange will notify the Commission of such insolvency; and (4) Exchange Inquiries to remind Participants that they may be subject to expulsion or suspension for failure to respond to an Exchange Inquiry.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Grandfathered Rules are operative to the extent that they apply to the Boston Options Exchange Group, LLC (''BOX'') and to Options Participants on the Exchange, and are to be read in conjunction with the Rules of the BOX.

[4] *See* Securities Exchange Act Release No. 60591 (August 31, 2009), 74 FR 46288.

[5] Securities Exchange Act Release No. 58324 (August 7, 2008), 73 FR 46936 (August 12, 2008) (SR–BSE–2008–02, –23, –25; SR–BSECC–2008–01) (''Release No. 34–58324'').

[6] 15 U.S.C. 78f(c).

The Exchange proposes to apply these provisions retroactively to the date on which proposals set forth in Release No. 34–58324 were approved by the Commission.[7]

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange[8] and, in particular, the requirements of Section 6 of the Act[9] and the rules and regulations thereunder. The Commission finds specifically that the proposed rule change is consistent with Section 6(b)(5) of the Act,[10] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, 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 because it clarifies the provisions of the former BSE Constitution that will continue to apply to Participants.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[11] that the proposed rule change (SR–BX–2009–048) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–25202 Filed 10–20–09; 8:45 am]

BILLING CODE 8011–01–P

[7] *See supra* note 5.

[8] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[9] 15 U.S.C. 78f.

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(2).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60822; File No. SR–NYSEArca–2009–77]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change Amending NYSE Arca Options Rule 5.3(j)

October 14, 2009.

On August 19, 2009, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4[2] thereunder to amend the definition of Futures Reference Asset in NYSE Arca Rule 5.3(j)(1)(E) to permit options on Futures-Linked Securities to be based on products linked to CBOE Volatility Index Futures (''VIX Futures''). The proposed rule change was published for comment in the **Federal Register** on September 11, 2009 for a 21-day comment period.[3] The Commission received no comment letters regarding the proposal. This order approves the proposed rule change.

NYSE Arca Rule 5.3(j) designates the listing and trading of options on Equity Index-Linked Securities, Commodity-Linked Securities, Currency-Linked Securities, Fixed Income Index-Linked Securities, Futures-Linked Securities, and Multifactor Index-Linked securities, collectively known as Index-Linked Securities (as defined in NYSE Arca Equities Rule 5.2(j)(6)) that are principally traded on a national securities exchange and an ''NMS Stock'' (as defined in Rule 600 of Regulation NMS under the Act). Futures-Linked Securities pay at maturity an amount of cash based on the performance of a ''Futures Reference Asset,'' currently defined as an index of futures on Treasury Securities, GSE Securities, supranational debt and debt of a foreign country or a subdivision thereof, or interest rate futures, or options or derivatives on any of the foregoing. The Exchange proposes to include VIX Futures in this definition.

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange[4] and, in particular, the requirements of Section 6 of the Act.[5] Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[6] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Currently, the Exchange will consider listing and trading options on Index-Linked Securities, including options on Futures-Linked Securities, provided the Index-Linked Securities meet the criteria for underlying securities set forth in NYSE Arca Rule 5.3(a)–(b). Underlying Index-Linked Securities must meet the criteria and guidelines for underlying securities set forth in Rule 5.3(a); or the Index-Linked Securities must be redeemable at the option of the holder at least on a weekly basis through the issuer at a price related to the applicable underlying Reference Asset.[7] After the addition of VIX Futures to the definition of a Futures Reference Asset in NYSE Arca Rule 5.3(j)(1)(E), options on Index-Linked Securities, including options on Futures Linked Securities, would continue to be subject to all Exchange rules governing the trading of equity options[8] and the current continuing or maintenance listing standards applicable to the trading of options on Index-Linked Securities on NYSE Arca. The Commission also notes that it has previously approved an amendment to NYSE Arca Equities Rule 5.2(j)(6)(v) to add the VIX Futures to the definition of ''Futures Reference Asset'' for the listing and trading of Futures-Linked Securities.[9]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change (SR–NYSEArca–2009–77) is hereby approved.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 60621 (September 3, 2009), 74 FR 46818.

[4] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(5).

[7] For purposes of NYSE Arca Rule 5.3(j), Reference Assets collectively refers to Equity Reference Assets, Commodity Reference Assets, Currency Reference Assets, Fixed Income Reference Assets, Futures Reference Assets, and Multifactor Reference Assets.

[8] Despite the fact that Index-Linked Securities are linked to an underlying index, each trade as a single, exchange-listed security. Accordingly, rules pertaining to the listing and trading of standard equity options apply to options on Index-Linked Securities.

[9] *See* Securities Exchange Act Release No. 58968 (November 17, 2008), 73 FR 71082 (November 24, 2008) (SR–NYSEArca–2008–111); *see also* Securities Exchange Act Release No. 60535 (August 19, 2009), 74 FR 46826 (August 26, 2009) (NYSEAmex–2009–55).

[10] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–25203 Filed 10–20–09; 8:45 am]

BILLING CODE 8011–01–P

[11] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 6710]

Notice of Meeting of the Cultural Property Advisory Committee

There will be a meeting of the Cultural Property Advisory Committee on Thursday, November 12, 2009, from approximately 9 a.m. to 5 p.m., and on Friday, November 13, from approximately 9 a.m. to 5 p.m. at the Department of State, Annex 5, 2200 C Street, NW., Washington, DC. During its meeting on November 12 the Committee will review a proposal to extend the Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of El Salvador Concerning the Imposition of Import Restrictions on Certain Categories of Archaeological Material from the Pre-Hispanic Cultures of the Republic of El Salvador (''MOU''). The Government of the Republic of El Salvador has notified the Government of the United States of America of its interest in extending the MOU.

The Committee's responsibilities are carried out in accordance with provisions of the Convention on Cultural Property Implementation Act (19 U.S.C. 2601, *et seq.*). The text of the Act and subject MOU, as well as related information, may be found at *http://exchanges.state.gov/culprop*. Portions of the meeting on November 12 will be closed pursuant to 5 U.S.C. 552b(c)(9)(B) and 19 U.S.C. 2605(h), the latter of which stipulates that ''The provisions of the Federal Advisory Committee Act shall apply to the Cultural Property Advisory Committee except that the requirements of subsections (a) and (b) of section 10 and 11 of such Act (relating to open meetings, public notice, public participation, and public availability of documents) shall not apply to the Committee, whenever and to the extent it is determined by the President or his designee that the disclosure of matters involved in the Committee's proceedings would compromise the Government's negotiation objectives or bargaining positions on the negotiations of any agreement authorized by this title.'' On November 12, the Committee will have an open session from approximately 10:30 a.m. to 12 noon, to receive oral public comment on the proposal to extend the MOU with El Salvador.

On November 13, the Committee will continue its interim review of the MOU with Italy and will have an open session from approximately 9:30 a.m. to 12 noon to receive oral public comment. An open session is not a statutory requirement, nor is the invitation for public oral or written comment. These steps are taken at the initiative of the Department of State. Persons wishing to attend either of these open sessions should notify the Cultural Heritage Center of the Department of State at (202) 632–6301 no later than November 4, 2009, 5 p.m. (EST) to arrange for admission. Seating is extremely limited. Requests for reasonable accommodation should also be made at that time; last minute requests will be difficult to fulfill.

Anyone wishing to make an oral presentation at either public session must request to be scheduled and must submit a written text of the oral comments by November 2, 2009, to allow time for distribution to Committee members prior to the meeting. Oral comments will be limited to allow time for questions from members of the Committee, and with respect to the proposed extension of the El Salvador MOU must specifically relate to the determinations under Section 303(a)(1) of the Convention on Cultural Property Implementation Act, 19 U.S.C. 2602, pursuant to which the Committee must make findings. This statute can be found at the Web site noted above.

With respect to comments on the interim review of the Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy, concluded on January 19, 2001, and extended in 2006, oral comments must be limited to Article II of this MOU.

The Committee also invites written comments and asks that they be submitted no later than November 2, 2009, to allow time for distribution to Committee members prior to the meeting.

All written materials, including the written texts of oral statements, may be faxed to (202) 632–6300. If more than three (3) pages, 20 duplicates of written materials must be sent by express mail to: Cultural Heritage Center, SA–5, Fifth Floor, Department of State, Washington, DC 20522–0505.

Dated: October 8, 2009.

Maura M. Pally,

Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. E9–25324 Filed 10–20–09; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed the Week Ending October 3, 2009

The following Agreements were filed with the Department of Transportation under the Sections 412 and 414 of the Federal Aviation Act, as amended (49 U.S.C. 1382 and 1384) and procedures governing proceedings to enforce these provisions. Answers may be filed within 21 days after the filing of the application.

Docket Number: DOT–OST–2009–0232.
Date Filed: September 28, 2009.
Parties: Members of the International Air Transport Association.
Subject:
TC31 North & Central Pacific TC3 (except Japan)—North America, Caribbean (except between Korea (Rep. of), Malaysia and USA).
Expedited Resolution 002bi (Memo 0496).
Intended Effective Date: November 1, 2009.

Docket Number: DOT–OST–2009–0233.
Date Filed: September 28, 2009.
Parties: Members of the International Air Transport Association.
Subject:
Meeting date/time: CSC Mail Vote (S065) dated 21 August 2009.
Agreement/Minutes: CSC Mil Vote (S065).
Resolution 601.
Intended Effective Date: December 1, 2009.

Docket Number: DOT–OST–2009–0234.
Date Filed: September 29, 2009.
Parties: Members of the International Air Transport Association.
Subject:
TC123 South Atlantic.
Expedited Resolution 002bh (Memo 0454).
Intended Effective Date: November 1, 2009.

Docket Number: DOT–OST–2009–0235.

Date Filed: September 28, 2009.
Parties: Members of the International Air Transport Association.
Subject:
TC31 North & Central Pacific.
TC3—Central America, South America.
Expedited Resolution 002bj.
(Memo 0495).
Intended Effective Date: November 1, 2009.

Docket Number: DOT–OST–2009–0236.
Date Filed: September 29, 2009.
Parties: Members of the International Air Transport Association.
Subject:
TC123 Mid Atlantic.
Expedited Resolution 002bk (Memo 0453).
Intended Effective Date: November 1, 2009.

Docket Number: DOT–OST–2009–0237.
Date Filed: September 29, 2009.
Parties: Members of the International Air Transport Association.
Subject:
TC123 North Atlantic (except between USA and Korea, Rep. of, Malaysia).
Expedited Resolution 002bg.
(Memo 0452).
Intended Effective Date: November 1, 2009.

Docket Number: DOT–OST–2009–0238.
Date Filed: September 29, 2009.
Parties: Members of the International Air Transport Association.
Subject:
TC123 North Atlantic between USA and Korea, Rep. of Malaysia.
Expedited Resolution 002bg.
(Memo 0451).
Intended Effective Date: November 1, 2009.

Barbara J. Hairston,
Supervisory Dockets Officer, Docket Operations, Alternate Federal Register Liaison.

[FR Doc. E9–25317 Filed 10–20–09; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Research and Innovative Technology Administration

[Docket Number RITA–2008–0002]

Notice of Request for Approval To Continue To Collect New Information: Confidential Close Call Reporting System

AGENCY: Bureau of Transportation Statistics (BTS), Research and Innovative Technology Administration (RITA), U.S. Department of Transportation.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the requirements of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, this notice announces that the Bureau of Transportation Statistics (BTS) intends to request the Office of Management and Budget (OMB) renew the information collection request for the Close Calls project. This data collection effort is in support of a five-year research study aiming at improving rail safety by analyzing information on close calls and other unsafe occurrences in the rail industry. The ongoing research study is conducted by the Office of Human Factors in the Federal Railroad Administration and is designed to identify safety issues and propose corrective actions based on voluntary reports of close calls submitted to BTS. This collection is necessary because data on close calls are not normally reported to the railroad carriers or the Federal Railroad Administration. Continuous data collection for this research project is necessary to develop trends about rail safety and to improve railroad safety on an ongoing basis.

DATES: Comments must be received by December 21, 2009.

ADDRESSES: You can mail or hand-deliver comments to the U.S. Department of Transportation (DOT), Docket Management Facility (DMF). You may submit your comments by mail to the Docket Clerk, Docket No. RITA–2008–0002, U.S. Department of Transportation, 1200 New Jersey Ave., SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. Comments should identify the docket number; paper comments should be submitted in duplicate. The DMF is open for examination and copying, at the above address, from 9 a.m. to 5 p.m., Monday through Friday except Federal holidays. If you wish to receive confirmation of receipt of your written comments, please include a self-addressed, stamped postcard with the following statement, ''Comments on Docket: RITA–2008–0002.'' The Docket Clerk will date stamp the postcard prior to returning it to you via the U.S. mail. Please note that due to delays in the delivery of U.S. mail to Federal offices in Washington, DC, we recommend that persons consider an alternative method (the Internet, fax, or professional delivery service) to submit comments to the docket and ensure their timely receipt at U.S. DOT. You may fax your comments to the DMF at (202) 493–2251.

If you wish to file comments using the Internet, you may use the Web site *http://www.regulations.gov.* Please follow the instructions for submitting an electronic comment. You can also review comments on-line at the same Web site *http://www.regulations,gov.*

Please note that anyone is able to electronically search all comments received into our docket management system 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 review the Department's Privacy Policy at *http://www.dot.gov/Privacy.*

FOR FURTHER INFORMATION CONTACT: Demetra V. Collia, E–36, Room 314, Bureau of Transportation Statistics, Research and Innovative Technology Administration, 1200 New Jersey Ave., SE., Washington, DC 20590; (202) 366–1610; FAX No. (202) 366–3676; *e-mail:demetra.collia@dot.gov.*

Data Confidentiality Provisions: The confidentiality of Close Calls data is protected under the BTS confidentiality statute (49 U.S.C. 111 (k)) and the Confidential Information Protection and Statistical Efficiency Act (CIPSEA) of 2002 (Pub. L. 107–347, Title V). In accordance with these confidentiality statutes, only statistical and non-identifying data will be made publicly available through reports. Further, BTS will not release to FRA or any other public or private entity any information that might reveal the identity of individuals or organizations mentioned in close call reports.

SUPPLEMENTARY INFORMATION:

I. The Data Collection

The Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35; as amended) and 5 CFR Part 1320 require each Federal agency to obtain OMB approval to continue an information collection activity. BTS is seeking OMB approval for the following BTS information collection activity:

Title: Confidential Close Call Reporting System.
OMB Control Number: 2139– 0010.
Type of Review: Approval to continue to collect new information: Confidential Close Call Reporting System (C^3RS).
Respondents: Employees of selected (pilot) railroad sites.
Number of Respondents: 4,000 (per annum).

Estimated Time per Response: 0.50 hours.

Frequency: Intermittent for approximately three (3) years. (Reports are submitted when there is a qualifying event, *i.e.,* a close call occurs within a pilot site. The frequency of such an event is estimated to be two per day.)

Total Annual Burden: 365.00 hours.

II. Background

Continuing to collect data on the Nation's transportation system is an important component of the BTS responsibility to the transportation community and is authorized in BTS statutory authority (49 USC 111(c)(1) and (2) and 49 USC 111(c)(5) (j)). BTS and FRA share a common interest in promoting rail safety based on better data. To that end, FRA's Office of Research and Development is sponsoring the Confidential Close Call Reporting System (C^3RS) Demonstration Project to investigate the effectiveness of such a data collection system in improving rail safety. The data collection phase of this study was initiated in February, 2009 and is scheduled to continue for approximately 3 more years.

A close call represents a situation in which an ongoing sequence of events was stopped from developing further, preventing the occurrence of potentially serious safety-related consequences. This might include the following: (1) Events that happen frequently, but have low safety consequences; (2) events that happen infrequently but have the potential for high consequences (*e.g.,* a train in dark territory proceeds beyond its authority); (3) events that are below the FRA reporting threshold (*e.g.,* an event that causes a minor injury); and (4) events that are reportable to FRA but have the potential for a far greater accident than the one reported (*e.g.,* a slow speed collision with minor damage to the equipment and no injuries.)

Employees involved in a close call are asked to fill out a questionnaire and mail it to BTS. Blank forms of the questionnaire will be made available on the Web for download and at the employees work site. The respondent is asked to provide information such as: (1) Name and contact information; (2) time and location of the close call event; (3) a short description of the event; (4) contributing factors to the close call; and (5) any other information that might be useful in determining a root cause of such event.

BTS collects close call reports submitted by railroad employees and protects the confidentiality of these data through its own statute (49 U.S.C. 111(i)) and the Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA). In addition, BTS is developing an analytical database containing the reported data and other pertinent information to determine root causes of frequently reported close calls. The database is a valuable tool to railroad carriers and the FRA in their effort to identify safety issues and provide corrective measures before an accident occurs.

Voluntary reporting of close calls to a confidential system can provide a tool to identify and correct weaknesses in railroad safety systems before an accident actually occurs. The C^3RS demonstration project offers a voluntary, cooperative, non-punitive environment to communicate safety concerns. Through the analysis of close calls the FRA and the railroad community receive information about factors that may contribute to unsafe events and the error recovery mechanisms that prevented an adverse consequence from occurring. Such information is used to develop new training programs, identify root causes of potentially adverse events, assess risk and allocate resources to address those risks more efficiently. In addition, the database provides rail safety researchers with valuable information regarding precursors to safety risks and contributes to research and development of intervention programs aimed at preventing accidents and fatalities.

III. Request for Comments

BTS requests comments on any aspects of these information collections, including: (1) The accuracy of the estimated burden; (2) ways to enhance the quality, usefulness, and clarity of the collected information; and (3) ways to minimize the collection burden without reducing the quality of the information collected, including additional use of automated collection techniques or other forms of information technology.

Issued in Washington, DC, on October 15, 2009.

Steven D. Dillingham,

Director, Bureau of Transportation Statistics, Research and Innovative Technology Administration.

[FR Doc. E9–25316 Filed 10–20–09; 8:45 am]

BILLING CODE 4910–HY–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Request To Release Airport Property at the Punxsutawney Municipal Airport, Punxsutawney, PA

AGENCY: Federal Aviation Administration (FAA) DOT.

ACTION: Notice of request to release airport property.

SUMMARY: The FAA proposes to rule and invite public comment on the release of land at the Punxsutawney Municipal Airport, Punxsutawney, Pennsylvania under the provisions of Section 47125(a) of Title 49 United States Code (U.S.C.).

DATES: Comments must be received on or before November 20, 2009.

ADDRESSES: Comments on this application may be mailed or delivered to the following address: Ricky Young, Manager, Punxsutawney Municipal Airport Authority, 500 Chestnut Street, Punxsutawney, PA 15767, and at the FAA Harrisburg Airports District Office: Lori K. Pagnanelli, Manager, Harrisburg Airports District Office, 3905 Hartzdale Dr., Suite 508, Camp Hill, PA 17011.

FOR FURTHER INFORMATION CONTACT: Lori B.R. Ledebohm, Planner, Harrisburg Airports District Office location listed above.

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 the Punxsutawney Municipal Airport under the provisions of Section 47125(a) of Title 49 U.S.C.

On July 28, 2009, the FAA and the Pennsylvania Department of Transportation Bureau of Aviation determined that the request to release property at the Punxsutawney Municipal Airport submitted by the Punxsutawney Municipal Airport Authority (Authority) met the procedural requirements.

The following is a brief overview of the request:

The Punxsutawney Municipal Airport Authority requests the release of 30.4248 acres of non-aeronautical airport property to Frank M. Amundson and Mary Ann Amundson. The property was acquired without Federal participation and is currently vacant. The property is located on the Easterly corner of Ridgmont Road and Clawson Street. The purpose of this release is to allow the Punxsutawney Municipal Airport Authority (Authority) to exchange the subject land that does not

serve any aeronautical purpose at the airport. In exchange for the subject land, Amundson will transfer the terminal building and hangar to the Authority, which facilities are presently located at the Airport. The exchange will allow the Authority to gain greater control of the facilities located on dedicated airport property. There are no impacts to the Airport and the land is not needed for airport development as shown on the Airport Layout Plan. There are no proceeds expected in connection with the Transfer. Any proceeds from the sale of property are to be used for the capital and operating costs of the airport.

Any person may inspect the request by appointment at the FAA office address listed above. Interested persons are invited to comment on the proposed release from obligations. All comments will be considered by the FAA to the extent practicable.

Issued in Camp Hill, Pennsylvania, October 13, 2009.

Lori K. Pagnanelli,

Manager, Harrisburg Airports District Office.

[FR Doc. E9–25361 Filed 10–20–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35300]

Central Railroad Company of Indianapolis—Lease and Operation Exemption—Norfolk Southern Railway Company

Central Railroad Company of Indianapolis (CERA), a Class III carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to lease and to operate, pursuant to a lease agreement (Agreement) entered into on September 14, 2009, with Norfolk Southern Railway Company (NSR), approximately 15.9 miles of NSR's rail line between milepost RK–154.5, a point just east of the grade crossing at 38th Street, in Gas City, Grant County, IN, and milepost RK–138.6 at the end of the line, at Hartford City, Blackford County, IN (the line).[1] The Agreement also includes operating rights into Goodman Yard, and any sidings or sidetracks owned by NSR that are accessed via the line.

CERA states that there is no provision or agreement that will limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means. *See* 49 CFR 1150.43(h).

CERA certifies that its projected annual revenues as a result of this transaction would not exceed those that would qualify it as a Class III rail carrier. However, because its projected annual revenues will exceed $5 million, CERA also certifies that it has complied with notice requirements of 49 CFR 1150.42(e).

The transaction is scheduled to be consummated on December 1, 2009, at least 60 days after CERA's certification of the notice requirements of section 49 CFR 1150.42(e).

Pursuant to the Consolidated Appropriations Act, 2008, Public Law No. 110–161, § 193, 121 Stat. 1844 (2007), nothing in this decision authorizes the following activities at any solid waste rail transfer facility: collecting, storing or transferring solid waste outside of its original shipping container; or separating or processing solid waste (including baling, crushing, compacting and shredding). The term ''solid waste'' is defined in section 1004 of the Solid Waste Disposal Act, 42 U.S.C. 6903.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than November 24, 2009 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35300, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Louis E. Gitomer, Law Offices of Louis E. Gitomer, LLC, 600 Baltimore Avenue, Suite 301, Towson, MD 21204.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: October 16, 2009.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. E9–25312 Filed 10–20–09; 8:45 am]

BILLING CODE 4915–01–P

[1] The line does not include a parcel of land on and adjacent to the right-of-way at milepost 145.20.

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2009–0168]

Technical Report on Fatalities in Frontal Crashes Despite Seat Belts and Air Bags

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Request for comments on technical report.

SUMMARY: This notice announces NHTSA's publication of a Technical Report reviewing and evaluating the performance in frontal crashes of air-bag-equipped, late-model passenger cars, pickup trucks, SUVs and vans and the protection they offer to drivers and front-seat passengers who wear seat belts. The report's title is: *Fatalities in Frontal Crashes Despite Seat Belts and Air Bags.*

DATES: Comments must be received no later than February 18, 2010.

ADDRESSES: *Report:* The technical report is available on the Internet for viewing on line in PDF format at *http://www-nrd.nhtsa.dot.gov/Pubs/811102.PDF.* You may obtain a copy of the report free of charge by sending a self-addressed mailing label to Charles J. Kahane (NVS–431), National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590.

Comments: You may submit comments [identified by Docket Number NHTSA–2009–0168] by any of the following methods:

- *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, M–30, U.S. Department of Transportation, West Building, Ground Floor, Rm. W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., between 9 am and 5 pm Eastern Time, Monday through Friday, except Federal holidays.

You may call Docket Management at 202–366–9826.

Instructions: For detailed instructions on submitting comments, see the Procedural Matters section of this document. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Charles J. Kahane, Chief, Evaluation

Division, NVS–431, National Center for Statistics and Analysis, National Highway Traffic Safety Administration, Room W53–312, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone: 202–366–2560. E-mail: *chuck.kahane@dot.gov*.

For information about NHTSA's evaluations of the effectiveness of existing regulations and programs: You may see a list of published evaluation reports at *http://www-nrd.nhtsa.dot.gov/cats/listpublications.aspx?Id=226&ShowBy=Category* and if you click on any report you will be able to view it in PDF format.

SUPPLEMENTARY INFORMATION: Why are people still dying in frontal crashes despite seat belt use, air bags, and the crashworthy structures of late-model vehicles? Statistical analyses show the combination of seat belt use and air bags is highly effective, reducing fatality risk by 61 percent compared to an unbelted occupant of a vehicle not equipped with air bags—but 61 percent is not 100 percent. To address the question, an interdisciplinary NHTSA team reviewed every case of a frontal fatality to a belted driver or right-front passenger in a model year 2000 or newer vehicle in the Crashworthiness Data System (CDS) of the National Automotive Sampling System through calendar year 2007. Aside from a substantial proportion of these 122 crashes that are just exceedingly severe, the main reason people are still dying is because so many crashes involve poor structural engagement between the vehicle and its collision partner: corner impacts, oblique crashes, impacts with narrow objects, and underrides. By contrast, few if any of these 122 fatal crashes were full-frontal or offset-frontal impacts with good structural engagement, unless the crashes were of extreme severity or the occupants exceptionally vulnerable.

Procedural Matters

How Can I Influence NHTSA's Thinking on This Subject?

NHTSA welcomes public review of the evaluation plan and invites the reviewers to comment about the selection, priority, and schedule of the regulations to be evaluated. The agency is interested in learning of any additional data that may be useful in the evaluations. NHTSA will submit to the Docket a response to the comments and, if appropriate, will supplement or revise the evaluation plan.

How Do I Prepare and Submit Comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the Docket number of this document (NHTSA–2009–0168) in your comments.

Your primary comments must not be more than 15 pages long (49 CFR 553.21). However, you may attach additional documents to your primary comments. There is no limit on the length of the attachments.

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 (65 FR 19477) or you may visit *http://regulations.gov.*

Please send two paper copies of your comments to Docket Management, fax them, or use the Federal eRulemaking Portal. The mailing address is U.S. Department of Transportation, Docket Management Facility, M–30, West Building, Ground Floor, Rm. W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. The fax number is 1–202–493–2251. To use the Federal eRulemaking Portal, go to *http://www.regulations.gov* and follow the online instructions for submitting comments.

We also request, but do not require you to send a copy to Charles J. Kahane, Chief, Evaluation Division, NVS–431, National Highway Traffic Safety Administration, Room W53–312, 1200 New Jersey Avenue, SE., Washington, DC 20590 (or e-mail them to *chuck.kahane@dot.gov).* He can check if your comments have been received at the Docket and he can expedite their review by NHTSA.

How Can I Be Sure that My Comments Were Received?

If you wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

How Do I Submit Confidential Business Information?

If you wish to submit any information under a claim of confidentiality, send three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Include a cover letter supplying the information specified in our confidential business information regulation (49 CFR Part 512).

In addition, send two copies from which you have deleted the claimed confidential business information to U. S. Department of Transportation, Docket Management Facility, M–30, West Building, Ground Floor, Rm. W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or submit them via the Federal eRulemaking Portal.

Will the Agency Consider Late Comments?

In our response, we will consider all comments that Docket Management receives before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments that Docket Management receives after that date.

Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the Docket for new material.

How Can I Read the Comments Submitted by Other People?

You may read the materials placed in the docket for this document (*e.g.,* the comments submitted in response to this document by other interested persons) at any time by going to *http://www.regulations.gov.* Follow the online instructions for accessing the dockets. You may also read the materials at the Docket Management Facility by going to the street address given above under **ADDRESSES**. The Docket Management Facility is open between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.

Authority: 49 U.S.C. 30111, 30168; delegation of authority at 49 CFR 1.50 and 501.8.

James F. Simons,

Director, Office of Regulatory Analysis and Evaluation.

[FR Doc. E9–25271 Filed 10–20–09; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designations, Foreign Narcotics Kingpin Designation Act

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the names of three individuals whose property and interests in property have been blocked pursuant to the Foreign Narcotics Kingpin Designation Act (''Kingpin Act'') (21 U.S.C. 1901–1908, 8 U.S.C. 1182).

DATES: The designation by the Director of OFAC of the three individuals identified in this notice pursuant to section 805(b) of the Kingpin Act is effective on October 14, 2009.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel: (202) 622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available on OFAC's Web site (*http://www.treas.gov/ofac*) or via facsimile through a 24-hour fax-on demand service, tel.: (202) 622–0077.

Background

The Kingpin Act became law on December 3, 1999. The Kingpin Act establishes a program targeting the activities of significant foreign narcotics traffickers and their organizations on a worldwide basis. It provides a statutory framework for the President to impose sanctions against significant foreign narcotics traffickers and their organizations on a worldwide basis, with the objective of denying their businesses and agents access to the U.S. financial system and to the benefits of trade and transactions involving U.S. companies and individuals.

The Kingpin Act blocks all property and interests in property, subject to U.S. jurisdiction, owned or controlled by significant foreign narcotics traffickers as identified by the President. In addition, the Secretary of the Treasury consults with the Attorney General, the Director of the Central Intelligence Agency, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, the Secretary of State, and the Secretary of Homeland Security when designating and blocking the property and interests in property, subject to U.S. jurisdiction, of persons who are found to be: (1) Materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a person designated pursuant to the Kingpin Act; (2) owned, controlled, or directed by, or acting for or on behalf of, a person designated pursuant to the Kingpin Act; or (3) playing a significant role in international narcotics trafficking.

On October 14, 2009, OFAC designated three individuals whose property and interests in property are blocked pursuant to section 805(b) of the Kingpin Act.

The list of additional designees is as follows:

Individual

1. KARAYILAN, Murat; DOB 5 June 1954; alt. DOB 1950; POB Konak, Turkey; nationality Turkey; (individual) [SDNTK].

2. ALTUN, Ali Riza; (a.k.a. ALTUG, Risa; a.k.a. KIVIRCIK, Ali; a.k.a. RIZA, Ebubekir); DOB 1 January 1956; POB Kucuk Sobecimen, Turkey; nationality Turkey; (individual) [SDNTK].

3. AYDAR, Zubayir (a.k.a. AYDAR, Zubayin); DOB 1 Jan 1961; POB Yanikses, Turkey; nationality Turkey; (individual) [SDNTK].

Dated: October 14, 2009.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. E9–25289 Filed 10–20–09; 8:45 am]

BILLING CODE 4811–45–P

DEPARTMENT OF VETERANS AFFAIRS

Genomic Medicine Program Advisory Committee; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Genomic Medicine Program Advisory Committee will meet on November 10, 2009, at the Hamilton Crowne Plaza, 1001 14th Street NW., Washington, DC, from 8:30 a.m. to 5 p.m. The meeting is open to the public.

The purpose of the Committee is to provide advice and make recommendations to the Secretary of Veterans Affairs on using genetic information to optimize medical care of Veterans and to enhance development of tests and treatments for diseases particularly relevant to Veterans.

The Committee will receive program updates including planned responses to recommendations, and will be asked to continue to provide insight into optimal ways for VA to incorporate genomic information into its health care program while applying appropriate ethical oversight and protecting the privacy of Veterans. The meeting focus will include program updates, including a genetics education tool for health care providers and upcoming genomics research initiatives, as well as presentations on the Veterans' survey results and clinical application of pharmacogenetics.

Time will be allocated for receiving public comments at 3:30 p.m. Public comments will be limited to five minutes each. Individuals wishing to make oral statements before the Committee will be accommodated on a first-come, first-served basis. Individuals who speak are invited to submit 1–2 page summaries of their comments at the time of the meeting for inclusion in the official meeting record.

The public may submit written statements for the Committee's review to Dr. Sumitra Muralidhar, Designated Federal Officer, at Department of Veterans Affairs, Veterans Health Administration (121E), 810 Vermont Avenue, NW., Washington, DC 20420, or at *sumitra.muralidhar@va.gov.* Any member of the public wishing to attend the meeting or seeking additional information should contact Dr. Muralidhar at (202) 461–1669.

Dated: October 15, 2009.

By Direction of the Secretary.

Vivian Drake,

Acting Committee Management Officer.

[FR Doc. E9–25367 Filed 10–20–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

Veterans' Advisory Committee on Environmental Hazards; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a meeting of the Veterans' Advisory Committee on Environmental Hazards will be held on November 9–10, 2009, at VA Central Office, 810 Vermont Avenue, NW., Washington, DC, from 8 a.m. to 4:30 p.m. each day. The sessions will be held in Room 630 on November 9 and Room C–7 on November 10. The meeting is open to the public.

The purpose of the Committee is to provide advice to the Secretary of Veterans Affairs on adverse health effects that may be associated with exposure to ionizing radiation, and to make recommendations on proposed standards and guidelines regarding VA benefit claims based upon exposure to ionizing radiation.

The major items on the agenda for both days will be discussions of medical and scientific papers concerning the health effects of exposure to ionizing radiation. On the basis of the discussions, the Committee may make recommendations to the Secretary concerning the relationship of certain diseases to exposure to ionizing radiation.

An open forum for verbal statements from the public will be available for 30 minutes in the afternoon each day. People wishing to make oral statements before the Committee will be accommodated on a first-come, first-served basis and will be provided three minutes per statement.

Members of the public wishing to attend should contact Ms. Bernice Green at the Department of Veterans Affairs, Compensation and Pension Service, 810 Vermont Avenue, NW., Washington, DC 20420, or by phone at (202) 461–9723, or by fax at (202) 275–1728 or by e-mail at *bernice.green@va.gov.* Individuals should submit written questions or prepared statements for the Committee's review to Ms. Green prior to the meeting. The Committee may ask those who submit material for clarification prior to its consideration.

Dated: October 14, 2009.

By Direction of the Secretary.

Vivian Drake,

Acting Committee Management Officer.

[FR Doc. E9–25272 Filed 10–20–09; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Former Prisoners of War; Notice of Meeting

The Department of Veterans Affairs gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Advisory Committee on Former Prisoners of War has scheduled a meeting on November 2–4, 2009, at the Department of Veterans Affairs Regional Office, 5460 Reno Corporate Drive, Reno, Nevada, from 9 a.m. to 4 p.m. each day. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the administration of benefits under title 38, United States Code, for Veterans who are former prisoners of war, and to make recommendations on the needs of such Veterans for compensation, health care, and rehabilitation.

On November 2, the Committee will receive remarks from VA officials and tour the VA Regional office. In the afternoon, a town hall meeting will be held at the VA Regional Office to hear from former prisoners of war. On November 3, the Committee will receive updates on the report from the Robert E. Mitchell Center for Prisoners of War Studies, educational programs, Veterans Health Administration and discuss the Committee's recommendations and VA responses. In the afternoon, the Committee will continue a tour of the VA Regional Office. On November 4, the Committee's Medical and Administrative Working Groups will complete their interim report for the Committee's final report. In the afternoon, the Committee will work on its first draft of its final report.

Members of the public may attend the town hall meeting and may also submit written statements for review by the Committee in advance of the meeting to Mr. Bradley G. Mayes, Director, Compensation and Pension Service, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, or to Ms. Carolyn Bryant at *Carolyn.bryant@va.gov.*

Dated: October 14, 2009.

By Direction of the Secretary.

Vivian Drake,

Acting Committee Management Officer.

[FR Doc. E9–25273 Filed 10–20–09; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Disability Compensation; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Advisory Committee on Disability Compensation will meet on November 16–17, 2009, in the Carlton Ballroom at the St. Regis, 923 16th and K Streets, NW., Washington, DC, from 8:30 a.m. to 5 p.m. each day. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the maintenance and periodic readjustment of the VA Schedule for Rating Disabilities. The Committee is to assemble and review relevant information relating to the nature and character of disabilities arising from service in the Armed Forces, provide an ongoing assessment of the effectiveness of the rating schedule and give advice on the most appropriate means of responding to the needs of veterans relating to disability compensation.

On November 16, the Committee will receive briefings on transition policy and care coordination and the cost of providing medical and disability care to veterans from Iraq and Afghanistan. On November 17, the Committee will receive updates on Veterans Benefits Administration automation of records initiatives and an overview of organization and involvement with psychological health and traumatic brain injury.

On the afternoon of November 17, time will be allocated for receiving public comments. Public comments will be limited to three minutes each. Individuals wishing to make oral statements before the Committee will be accommodated on a first-come, first-served basis. Individuals who speak are invited to submit 1–2 page summaries of their comments at the time of the meeting for inclusion in the official meeting record.

The public may submit written statements for the Committee's review to Ms. Ersie Farber, Designated Federal Officer, Department of Veterans Affairs, Veterans Benefits Administration (211A), 810 Vermont Avenue, NW., Washington, DC 20420 or to *Ersie.farber@va.gov.* Any member of the public wishing to attend the meeting or seeking additional information should contact Ms. Farber at (202) 461–9728.

Dated: October 14, 2009.

By Direction of the Secretary.

Vivian Drake,

Acting Committee Management Officer.

[FR Doc. E9–25270 Filed 10–20–09; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Minority Veterans; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Public Law 92–463 (Federal Advisory Committee Act) that the Advisory Committee on Minority Veterans will meet on November 2–5, 2009, in the Pan American Room at the Capital Hilton, 1001 16th Street, NW., Washington, DC, from 8 a.m. to 5 p.m., each day. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary on the administration of VA benefits and services to minority Veterans, to assess the needs of minority Veterans and to evaluate whether VA compensation, medical and rehabilitation services, outreach, and other programs are meeting those needs. The Committee makes recommendations to the Secretary regarding such activities.

On November 2, the agenda will include briefings and updates on the role of the advisory committee, ethics,

Center for Minority Veterans, Office of Policy and Planning, Veterans Health Administration, and a round table discussion with ex-officio members. On November 3, the agenda will include briefings and updates on the Veterans Employment Coordination Service, Center for Veterans Enterprise, National Cemetery Administration, Veterans Benefits Administration, and a round table discussion with VA's Advisory Committee on Homeless Veterans and the Advisory Committee on Women Veterans. On November 4, the agenda will include briefings and updates on the Office of Public and Intergovernmental Affairs, Office of Diversity and Inclusion, and the Committee will be meeting with the Chief of Staff. On November 5, the agenda will include briefings and updates from Congressional Staff members. In the afternoon, the Committee will work on their after action report.

Any member of the public wishing to attend should contact Juanita J. Mullen or Ron Sagudan, Department of Veterans Affairs, Center for Minority Veterans (00M), 810 Vermont Avenue, NW., Washington, DC 20420. They may be contacted either by phone at (202) 461–6191, fax at (202) 273–7092, or e-mail at *Juanita.mullen@va.gov* or *Ronald.sagudan@va.gov.* Interested persons may attend, appear before, or file statements with the Committee. Written statements must be filed before the meeting, or within 10 days after the meeting.

Dated: October 15, 2009.

By Direction of the Secretary.

Vivian Drake,

Acting Committee Management Officer.

[FR Doc. E9–25369 Filed 10–20–09; 8:45 am]

BILLING CODE P

Federal Register

Wednesday,
October 21, 2009

Part II

Federal Reserve System

12 CFR Part 226
Truth in Lending; Proposed Rule

FEDERAL RESERVE SYSTEM

12 CFR Part 226

[Regulation Z; Docket No. R–1370]

Truth in Lending

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule; request for public comment.

SUMMARY: The Board proposes to amend Regulation Z, which implements the Truth in Lending Act, and the staff commentary to the regulation in order to implement provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009 that are effective on February 22, 2010. This proposal would establish a number of new substantive and disclosure requirements to establish fair and transparent practices pertaining to open-end consumer credit plans, including credit card accounts. In particular, the proposed rule would limit the application of increased rates to existing credit card balances, require credit card issuers to consider a consumer's ability to make the required payments, establish special requirements for extensions of credit to consumers who are under the age of 21, and limit the assessment of fees for exceeding the credit limit on a credit card account.

DATES: Comments must be received on or before November 20, 2009.

ADDRESSES: You may submit comments, identified by Docket No. R–1370, by any of the following methods:

- *Agency Web Site: http://www.federalreserve.gov*. Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *E-mail: regs.comments@federalreserve.gov*. Include the docket number in the subject line of the message.
- *Facsimile:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Jennifer S. Benson or Stephen Shin, Attorneys, Amy Burke, Benjamin K. Olson, or Vivian Wong, Senior Attorneys, or Krista Ayoub or Ky Tran-Trong, Counsels, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, at (202) 452–3667 or 452–2412; for users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

SUPPLEMENTARY INFORMATION:

I. Background and Implementation of the Credit Card Act

January 2009 Regulation Z and FTC Act Rules

On December 18, 2008, the Board adopted two final rules pertaining to open-end (not home-secured) credit. These rules were published in the **Federal Register** on January 29, 2009. The first rule makes comprehensive changes to Regulation Z's provisions applicable to open-end (not home-secured) credit, including amendments that affect all of the five major types of required disclosures: credit card applications and solicitations, account-opening disclosures, periodic statements, notices of changes in terms, and advertisements. *See* 74 FR 5244 (January 2009 Regulation Z Rule). The second is a joint rule published with the Office of Thrift Supervision (OTS) and the National Credit Union Administration (NCUA) under the Federal Trade Commission Act (FTC Act) to protect consumers from unfair acts or practices with respect to consumer credit card accounts. *See* 74 FR 5498 (January 2009 FTC Act Rule). The effective date for both rules is July 1, 2010.

On May 5, 2009, the Board published proposed clarifications and technical amendments to the January 2009 Regulation Z Rule (May 2009 Regulation Z Proposed Clarifications) in the **Federal Register**. *See* 74 FR 20784. The Board, the OTS, and the NCUA (collectively, the Agencies) concurrently published proposed clarifications and technical amendments to the January 2009 FTC Act Rule. *See* 74 FR 20804 (May 2009 FTC Act Rule Proposed Clarifications). In both cases, as stated in the **Federal Register,** these proposals were intended to clarify and facilitate compliance with the consumer protections contained in the January 2009 final rules and not to reconsider the need for—or the extent of—those protections. The comment period on both of these proposed sets of amendments ended on June 4, 2009. Where relevant, the Board has considered the comments submitted in preparing this proposed rule and is republishing the proposed amendments with several revisions as discussed in V. Section-by-Section Analysis. The Board intends to finalize the amendments, with revisions as appropriate, in connection with this rulemaking.

The Credit Card Act

On May 22, 2009, the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit Card Act) was signed into law. Public Law 111–24, 123 Stat. 1734 (2009). The Credit Card Act primarily amends the Truth in Lending Act (TILA) and establishes a number of new substantive and disclosure requirements to establish fair and transparent practices pertaining to open-end consumer credit plans. Several of the provisions of the Credit Card Act are similar to provisions in the Board's January 2009 Regulation Z and FTC Act Rules, while other portions of the Credit Card Act address practices or mandate disclosures that were not addressed in the Board's rules.

The requirements of the Credit Card Act that pertain to credit cards or other open-end credit for which the Board has rulemaking authority become effective in three stages. First, provisions generally requiring that consumers receive 45 days' advance notice of interest rate increases and significant changes in terms (new TILA Section 127(i)) and provisions regarding the amount of time that consumers have to make payments (revised TILA Section 163) became effective on August 20, 2009 (90 days after enactment of the Credit Card Act). A majority of the requirements under the Credit Card Act for which the Board has rulemaking authority, including, among other things, provisions regarding interest rate increases (revised TILA Section 171), over-the-limit transactions (new TILA Section 127(k)), and student cards (new TILA Sections 127(c)(8), 127(p), and 140(f)) become effective on February 22, 2010 (9 months after enactment). Finally, two provisions of the Credit Card Act addressing the reasonableness and proportionality of penalty fees and charges (new TILA Section 149) and re-evaluation by creditors of rate increases (new TILA Section 148) are effective on August 22, 2010 (15 months after enactment). The Credit Card Act also requires the Board to conduct several studies and to make several reports to Congress, and sets forth differing time

periods in which these studies and reports must be completed.

Implementation Plan

On July 22, 2009, the Board published an interim final rule to implement those provisions of the Credit Card Act that became effective on August 20, 2009 (July 2009 Regulation Z Interim Final Rule). *See* 74 FR 36077. As discussed in the supplementary information to the July 2009 Regulation Z Interim Final Rule, the Board is implementing the provisions of the Credit Card Act in stages, consistent with the statutory timeline established by Congress. Accordingly, the interim final rule implemented those provisions of the statute that became effective August 20, 2009, primarily addressing change-in-terms notice requirements and the amount of time that consumers have to make payments. The Board issued rules in interim final form based on its determination that, given the short implementation period established by the Credit Card Act and the fact that similar rules were already the subject of notice-and-comment rulemaking, it would be impracticable and unnecessary to issue a proposal for public comment followed by a final rule. The Board solicited comment on the interim final rule; the comment period ended on September 21, 2009. The Board intends to consider comments on the interim final rule when finalizing this rulemaking implementing those provisions of the Credit Card Act that become effective February 22, 2010.[1]

The Board intends to separately consider the two remaining provisions under the Credit Card Act regarding reasonable and proportional penalty fees and charges and the re-evaluation of rate increases, and to finalize implementing regulations in accordance with the timeline established by Congress, upon notice and after giving the public an opportunity to comment.

To the extent appropriate, the Board has used its January 2009 rules and the underlying rationale as the basis for its rulemakings under the Credit Card Act. The Board also intends to retain those portions of its January 2009 Regulation Z Rule that are unaffected by the Credit Card Act. The Board is not withdrawing any provisions of the January 2009 Regulation Z Rule or its January 2009 FTC Act Rule at this time. The Board anticipates that in connection with finalizing this proposed rule for those provisions of the Credit Card Act that are effective February 22, 2010, it will amend or withdraw those portions of the January 2009 Regulation Z Rule that are inconsistent with the requirements of the Credit Card Act. In addition, as discussed further in V. Section-by-Section Analysis, the Board is proposing to move the requirements in its January 2009 FTC Act Rule into Regulation Z and intends to withdraw the requirements adopted under Regulation AA, consistent with Congress's approach of amending the Truth in Lending Act.[2] Finally, except as otherwise noted, the Board is considering comments received on the May 2009 Regulation Z Proposed Clarifications and plans to incorporate those final clarifications, to the extent appropriate, when it promulgates final rules pursuant to this proposal.

Republication of Provisions of January 2009 Regulation Z Rule

The Board has published four proposed or final rules in 2009 that amend or propose to amend Regulation Z's provisions applicable to open-end (not home-secured) credit: the January 2009 Regulation Z Rule, the May 2009 Regulation Z Proposed Clarifications, the July 2009 Regulation Z Interim Final Rule, and the present proposal. The Board is aware that the existence of multiple concurrent Regulation Z rulemakings pertaining to open-end (not home-secured) credit has the potential to cause confusion. In particular, the Board understands that it may be difficult for interested parties to ascertain how the four proposed or final rules will read as an integrated whole once all final rules are adopted and effective.

In order to more clearly illustrate the cumulative changes in the four proposed or final rules, the Board is republishing in this proposal all sections of Regulation Z from the four proposed or final rules that pertain to open-end (not home-secured) credit. As discussed further in this supplementary information, the requirements of the Board's January 2009 FTC Act Rule are also being incorporated into this proposal under Regulation Z, with proposed amendments as necessary to conform to the requirements of the Credit Card Act. The Board believes that this is the clearest way to present the proposed and final revisions to Regulation Z in an integrated format. The Board thinks that it is important that commenters be able to consider the changes included in this proposal in light of the complete package of changes effected by the Board's recent rulemakings pertaining to open-end (not home-secured) credit.

The Board is not reconsidering the need for or the extent of the January 2009 Regulation Z Rule, except to the extent that it is inconsistent with the requirements of the Credit Card Act. Accordingly, although the Board is republishing the provisions of Regulation Z that pertain to open-end (not home-secured) credit in their entirety, the Board is requesting that interested parties limit the scope of their comments to the proposed changes, which are discussed in the supplementary information. As necessary, the Board has made technical and conforming changes to the regulatory text from the January 2009 Regulation Z Rule in order to conform with the proposed regulations implementing the Credit Card Act. These changes are not substantive in nature and are therefore not discussed in detail in V. Section-by-Section Analysis.

The Board is not republishing in connection with this proposal several sections of the January 2009 Regulation Z Rule that are applicable only to home-equity lines of credit subject to the requirements of § 226.5b (HELOCs). In particular, the Board is not republishing §§ 226.6(a), 226.7(a) and 226.9(c)(1). These sections, as discussed in the supplementary information to the January 2009 Regulation Z Rule, are intended to preserve the existing requirements of Regulation Z for home-equity lines of credit until the Board's ongoing review of the rules that apply to HELOCs is completed. On August 26, 2009, the Board published proposed revisions to those portions of Regulation Z affecting HELOCs in the **Federal Register**. *See* 74 FR 43428 (August 2009 Regulation Z HELOC Proposal). In order to clarify that this proposed rule is not intended to amend or otherwise affect the August 2009 Regulation Z HELOC Proposal, the Board is not republishing several sections of the January 2009 Regulation Z Rule that apply only to HELOCs in this **Federal Register** notice.

The Board anticipates, however, that a final rule will be issued with regard to this proposal prior to completion of

[1] The Board has already begun consideration of the comment letters received on the July 2009 Regulation Z Interim Final Rule. However, the review of the comment letters is ongoing, and accordingly the supplementary information to this proposal does not discuss the comments received. The Board anticipates addressing the comments in their entirety when it issues a final rule based on this proposal.

[2] *See also* OTS Memorandum for Chief Executive Officers: Credit CARD Act: Interest Rate Increases and Rules on Unfair Practices (issued July 13, 2009) (available at *http://files.ots.treas.gov/25312.pdf*); NCUA *Press Release:* Working with Other Regulators on Credit CARD Act and UDAP Rule (issued July 1, 2009) (available at *http://www.ncua.gov/news/press_releases/2009/MR09–0701.htm*).

final rules regarding HELOCs. Therefore, the Board anticipates that it will include §§ 226.6(a), 226.7(a), and 226.9(c)(1), as adopted in the January 2009 Regulation Z Rule, in its final rulemaking based on this proposal, to give HELOC creditors clear guidance as to the applicable Regulation Z requirements between the effective date of this rule and the effective date of the forthcoming HELOC final rules.

The Board is, however, republishing several provisions of general applicability to all credit subject to Regulation Z that were included in the January 2009 Regulation Z Rule, such as the definitions in § 226.2 and the rules regarding finance charges in § 226.4. The Board notes that these provisions, and any other provisions applicable to HELOCs, could be subject to revision in connection with finalizing the August 2009 Regulation Z HELOC Proposal. In addition, on August 26, 2009, the Board also published in the **Federal Register** proposed revisions to Regulation Z's provisions addressing closed-end credit secured by real property or a consumer's dwelling. 74 FR 43232 (August 2009 Regulation Z Closed-End Credit Proposal). Among other things, the August 2009 Regulation Z Closed-End Credit Proposal includes several proposed revisions to § 226.4, which addresses finance charges. This proposal is not intended to affect or withdraw any proposed changes to such provisions of general applicability included in either the August 2009 Regulation Z HELOC Proposal or the August 2009 Regulation Z Closed-End Credit Proposal.

Finally, the Board has incorporated in the regulatory text and commentary for §§ 226.1, 226.2, and 226.3 several changes that were adopted in the Board's recent rulemaking pertaining to private education loans. *See* 74 FR 41194 (August 14, 2009) for further discussion of these changes. The Board is not soliciting comment on these amendments.

When publishing a proposed rule for comment under Regulation Z, the Board generally denotes regulatory and commentary text proposed to be deleted by use of bolded brackets. Similarly, the Board generally denotes the proposed insertion of text with bolded arrows. For this proposal, the Board is not displaying proposed insertions and deletions of text using brackets and arrows. As noted above, the Board has published four proposed or final rules pertaining to open-end (not home-secured) credit under Regulation Z in 2009, many of which impact the same provisions, and therefore the Board believes that the use of brackets and arrows for just those changes introduced in this proposal could cause confusion.

Effective Date

As noted above, the effective date of the Board's January 2009 Regulation Z Rule is July 1, 2010. However, the effective date of the provisions of the Credit Card Act implemented by this proposal is February 22, 2010. Many of the provisions of the Credit Card Act as implemented by this proposal are closely related to provisions of the January 2009 Regulation Z Rule. For example, proposed § 226.9(c)(2)(ii), which describes ''significant changes in terms'' for which 45 days' advance notice is required, cross-references § 226.6(b)(1) and (b)(2) as adopted in the January 2009 Regulation Z Rule. In order to implement the Credit Card Act in a manner consistent with the January 2009 Regulation Z Rule, the Board intends to make the effective date for the final rule pursuant to this proposal February 22, 2010. The Board is considering whether this effective date should apply to both the provisions of the January 2009 Regulation Z Rule that are not directly affected by the Credit Card Act that are included in the proposed rule as well as new and amended requirements proposed pursuant to the Credit Card Act.

The Board recognizes that there are certain provisions of the January 2009 Regulation Z Rule that impose substantial operational burdens on creditors that are not directly required by the Credit Card Act. For such provisions, the Board is considering retaining the original mandatory compliance date of July 1, 2010, consistent with the effective date it adopted when the January 2009 Regulation Z Rule was issued. In particular, the Board is considering whether the original mandatory compliance date of July 1, 2010 would be appropriate for certain tabular or other formatting requirements applicable to account-opening disclosures under § 226.6(b), portions of the periodic statement under § 226.7(b),[3] disclosures provided with checks that access a credit card account under § 226.9(b)(3), change-in-terms notices provided pursuant to § 226.9(c)(2), and notices of a rate increase due to a consumer's default, delinquency, or as a penalty pursuant to § 226.9(g). The Board understands that creditors are already in the process of updating their systems in order to provide these disclosures in the appropriate tabular format by the July 1, 2010 effective date of the January 2009 Regulation Z Rule, and that retaining a July 1, 2010 effective date for the formatting requirements associated with such disclosures may be appropriate. The Board solicits comment on this approach, as well as whether there are other provisions of this proposed rule that are not directly required by the Credit Card Act for which a mandatory compliance date of July 1, 2010 would also be appropriate. The Board also seeks comment on appropriate transition rules for the proposed amendments to Regulation Z.

[3] The Board notes that the Credit Card Act does, however, require a tabular format for the repayment disclosures under proposed § 226.7(b)(12), and accordingly does not intend to provide a July 1, 2010 mandatory compliance date for such formatting requirements.

II. Summary of Major Proposed Revisions

A. Increases in Annual Percentage Rates

Existing balances. Consistent with the Credit Card Act, the proposed rule would prohibit creditors from applying increased annual percentage rates and certain fees and charges to existing credit card balances, except in the following circumstances: (1) When a temporary rate lasting at least six months expires; (2) when the rate is increased due to the operation of an index (*i.e.,* when the rate is a variable rate); (3) when the minimum payment has not been received within 60 days after the due date; and (4) when the consumer successfully completes or fails to comply with the terms of a workout arrangement. In addition, when the annual percentage rate on an existing balance has been reduced pursuant to the Servicemembers Civil Relief Act (SCRA), the proposed rule would permit the creditor to increase that rate once the SCRA ceases to apply.

New transactions. The proposed rule would implement the Credit Card Act's prohibition on increasing an annual percentage rate during the first year after an account is opened. After the first year, the proposed rule would provide that creditors are permitted to increase the annual percentage rates that apply to new transactions so long as the creditor complies with the Credit Card Act's 45-day advance notice requirement, which was implemented in the July 2009 Regulation Z Interim Final Rule.

B. Evaluation of Consumer's Ability To Pay

General requirements. The Credit Card Act prohibits creditors from opening a new credit card account or increasing the credit limit for an existing credit card account unless the creditor considers the consumer's ability to make the required payments

under the terms of the account. Because credit card accounts typically require consumers to make a minimum monthly payment that is a percentage of the total balance (plus, in some cases, accrued interest and fees), the proposed rule would require creditors to consider the consumer's ability to make the required minimum payments.

However, because a creditor will not know the exact amount of a consumer's minimum payments at the time it is evaluating the consumer's ability to make those payments, the proposal would require creditors to use a reasonable method for estimating a consumer's minimum payments and would provide a safe harbor that creditors could use to satisfy this requirement. For example, with respect to the opening of a new credit card account, the safe harbor would provide that it would be reasonable for a creditor to estimate minimum payments based on a consumer's utilization of the full credit line using the minimum payment formula employed by the creditor with respect to the credit card product for which the consumer is being considered.

The proposed rule would also clarify the types of factors creditors should review in considering a consumer's ability to make the required minimum payments. Specifically, an evaluation of a consumer's ability to pay must include a review of the consumer's income or assets as well as the consumer's current obligations, and a creditor must establish reasonable policies and procedures for considering that information. When considering a consumer's income or assets and current obligations, a creditor would be permitted to rely on information provided by the consumer or information in a consumer's credit report.

Specific requirements for underage consumers. Consistent with the Credit Card Act, the proposed rule prohibits a creditor from issuing a credit card to a consumer who has not attained the age of 21 unless the consumer has submitted a written application that meets certain requirements. Specifically, the application must include either: (1) The signature of a cosigner who has attained the age of 21, who has the means to repay debts incurred by the underage consumer in connection with the account, and who assumes joint liability for such debts; or (2) information indicating that the underage consumer has the ability to make the required payments for the account.

C. Marketing to Students

Prohibited inducements. The Credit Card Act limits a creditor's ability to offer a student at an institution of higher education any tangible item to induce the student to apply for or open an open-end consumer credit plan offered by the creditor. Specifically, the Credit Card Act prohibits such offers: (1) On the campus of an institution of higher education; (2) near the campus of an institution of higher education; or (3) at an event sponsored by or related to an institution of higher education.

The proposed commentary would provide guidance to assist creditors in complying with the rule. For example, the proposed commentary would clarify that ''tangible item'' means a physical item (such as a gift card, t-shirt, or magazine subscription) and does not include non-physical items (such as discounts, rewards points, or promotional credit terms). The proposed commentary would also clarify that a location that is within 1,000 feet of the border of the campus of an institution of higher education (as defined by the institution) is considered near the campus of that institution. Finally, consistent with guidance recently adopted by the Board with respect to certain private education loans, the proposed commentary would state that an event is related to an institution of higher education if the marketing of such event uses words, pictures, or symbols identified with the institution in a way that implies that the institution endorses or otherwise sponsors the event.

Disclosure and reporting requirements. The proposed rule would also implement the provisions of the Credit Card Act requiring institutions of higher education to publicly disclose agreements with credit card issuers regarding the marketing of credit cards. The proposal would state that an institution may comply with this requirement by, for example, posting the agreement on its Web site or by making the agreement available upon request.

D. Fees or Charges for Transactions That Exceed the Credit Limit

Consumer consent requirement. Consistent with the Credit Card Act, the proposed rule would require that a creditor obtain a consumer's express consent (or opt-in) before imposing any fees on a consumer's credit card account for making an extension of credit that exceeds the account's credit limit. Prior to obtaining this consent, the creditor must disclose, among other things, the dollar amount of any fees or charges that will be assessed for an over-the-limit transaction as well as any increased rate that may apply if the consumer exceeds the credit limit. In addition, if the consumer consents, the creditor is also required to provide a notice of the consumer's right to revoke that consent on any periodic statement that reflects the imposition of an over-the-limit fee or charge.

The proposed rule would apply these requirements to all consumers (including existing account holders) if the creditor imposes a fee or charge for paying an over-the-limit transaction. Thus, after the February 22, 2010 effective date, creditors would be prohibited from assessing any over-the-limit fees or charges on an account until the consumer consents to the payment of transactions that exceed the credit limit.

Prohibited practices. Even if the consumer has affirmatively consented to the creditor's payment of over-the-limit transactions, the Credit Card Act prohibits certain practices in connection with the assessment of over-the-limit fees or charges. Consistent with these statutory prohibitions, the proposed rule would prohibit a creditor from imposing more than one over-the-limit fee or charge per billing cycle. In addition, a creditor could not impose an over-the-limit fee or charge on the account for the same over-the-limit transaction in more than three billing cycles.

The Credit Card Act also directs the Board to prescribe regulations that prevent unfair or deceptive acts or practices in connection with the manipulation of credit limits designed to increase over-the-limit fees or other penalty fees. Pursuant to this authority, the proposed rule would prohibit a creditor from assessing an over-the-limit fee or charge that is caused by the creditor's failure to promptly replenish the consumer's available credit. The proposed rule would also prohibit creditors from conditioning the amount of available credit on the consumer's consent to the payment of over-the-limit transactions. Finally, the proposed rule would prohibit the imposition of any over-the-limit fees or charges if the credit limit is exceeded solely because of the creditor's assessment of fees or charges (including accrued interest charges) on the consumer's account.

E. Timely Settlement of Estates

The Credit Card Act directs the Board to prescribe regulations requiring creditors to establish procedures ensuring that any administrator of an estate can resolve the outstanding credit card balance of a deceased accountholder in a timely manner. The proposed rule would impose two

specific requirements designed to enable administrators to determine the amount of and pay a deceased consumer's balance in a timely manner. First, upon request by the administrator, the creditor would be required to disclose the amount of the balance in a timely manner. Second, once an administrator has made such a request, the creditor would be required to cease the imposition of fees and charges on the account (including the accrual of interest) so that the amount of the balance does not increase while the administrator is arranging for payment.

F. On-line Disclosure of Credit Card Agreements

The Credit Card Act requires creditors to post credit card agreements on their Web sites and to submit those agreements to the Board for posting on its Web site. The Credit Card Act further provides that the Board may establish exceptions to these requirements in any case where the administrative burden outweighs the benefit of increased transparency, such as where a credit card plan has a *de minimis* number of accountholders.

The proposed rule would require a creditor to post on its Web site or otherwise make available its credit card agreements with its current cardholders. However, the proposed rule would establish two limitations with respect to the submission of agreements to the Board. First, the proposed rule would establish a *de minimis* exception for creditors with fewer than 10,000 open credit card accounts. Because the overwhelming majority of credit card accounts are held by creditors that have more than 10,000 open accounts, the information provided through the Board's Web site would still reflect virtually all of the terms available to consumers.

Second, creditors would not be required to submit agreements that are not currently offered to the public. The Board believes that the primary purpose of the information provided through the Board's Web site is to assist consumers in comparing credit card agreements offered by different issuers when shopping for a new credit card. Including agreements that are no longer offered to the public would not facilitate comparison shopping by consumers. In addition, including such agreements could create confusion regarding which terms are currently available.

G. Additional Provisions

The proposed rule also implements the following provisions of the Credit Card Act, all of which go into effect on February 22, 2010.

Limitations on fees. The Board's January 2009 FTC Act Rule prohibited banks from charging to a credit card account during the first year after account opening certain account-opening and other fees that, in total, constituted the majority of the initial credit limit. The Credit Card Act contains a similar provision, except that it applies to all fees (other than fees for late payments, returned payments, and exceeding the credit limit) and limits the total fees to 25% of the initial credit limit.

Payment allocation. When different rates apply to different balances on a credit card account, the Board's January 2009 FTC Act Rule required banks to allocate payments in excess of the minimum first to the balance with the highest rate or pro rata among the balances. The Credit Card Act contains a similar provision, except that excess payments must always be allocated first to the balance with the highest rate.

Double-cycle billing. The Board's January 2009 FTC Act Rule prohibited banks from imposing finance charges on balances for days in previous billing cycles as a result of the loss of a grace period (a practice sometimes referred to as ''double-cycle billing''). The Credit Card Act contains a similar prohibition. In addition, when a consumer pays some but not all of a balance prior to expiration of a grace period, the Credit Card Act prohibits the creditor from imposing finance charges on the portion of the balance that has been repaid.

Fees for making payment. The Credit Card Act prohibits creditors from charging a fee for making a payment, except for payments involving an expedited service by a service representative of the creditor.

Minimum payments. The Board's January 2009 Regulation Z Rule implemented provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 requiring creditors to provide a toll-free telephone number where consumers could receive an estimate of the time to repay their account balances if they made only the required minimum payment each month. The Credit Card Act substantially revised the statutory requirements for these disclosures. In particular, the Credit Card Act requires the following new disclosures on the periodic statement: (1) The amount of time and the total cost (interest and principal) involved in paying the balance in full making only minimum payments; and (2) the monthly payment amount required to pay off the balance in 36 months and the total cost (interest and principal) of repaying the balance in 36 months.

III. Statutory Authority

Section 2 of the Credit Card Act states that the Board ''may issue such rules and publish such model forms as it considers necessary to carry out this Act and the amendments made by this Act.'' This proposed rule implements several sections of the Credit Card Act, which amend TILA. TILA mandates that the Board prescribe regulations to carry out its purposes and specifically authorizes the Board, among other things, to do the following:

- Issue regulations that contain such classifications, differentiations, or other provisions, or that provide for such adjustments and exceptions for any class of transactions, that in the Board's judgment are necessary or proper to effectuate the purposes of TILA, facilitate compliance with the act, or prevent circumvention or evasion. 15 U.S.C. 1604(a).
- Exempt from all or part of TILA any class of transactions if the Board determines that TILA coverage does not provide a meaningful benefit to consumers in the form of useful information or protection. The Board must consider factors identified in the act and publish its rationale at the time it proposes an exemption for comment. 15 U.S.C. 1604(f).
- Add or modify information required to be disclosed with credit and charge card applications or solicitations if the Board determines the action is necessary to carry out the purposes of, or prevent evasions of, the application and solicitation disclosure rules. 15 U.S.C. 1637(c)(5).
- Require disclosures in advertisements of open-end plans. 15 U.S.C. 1663.

For the reasons discussed in this notice, the Board is using its specific authority under TILA and the Credit Card Act, in concurrence with other TILA provisions, to effectuate the purposes of TILA, to prevent the circumvention or evasion of TILA, and to facilitate compliance with the act.

IV. Applicability of Proposed Provisions

While several provisions under the Credit Card Act apply to all open-end credit, others apply only to certain types of open-end credit, such as credit card accounts under open-end consumer credit plans. As a result, the Board understands that some additional clarification may be helpful as to which provisions of the Credit Card Act as proposed to be implemented in Regulation Z are applicable to which types of open-end credit products. In order to clarify the scope of the

proposed revisions to Regulation Z, the Board is providing the below table, which summarizes the applicability of each of the major revisions to Regulation Z.[4]

Provision	Applicability
§ 226.5(a)(2)(iii)	All open-end (not home-secured) consumer credit plans.
§ 226.5(b)(2)(ii)	All open-end consumer credit plans.
§ 226.7(b)(11)	Credit card accounts under an open-end (not home-secured) consumer credit plan.
§ 226.7(b)(12)	Credit card accounts under an open-end (not home-secured) consumer credit plan.
§ 226.7(b)(14)	All open-end (not home-secured) consumer credit plans.
§ 226.9(c)(2)	All open-end (not home-secured) consumer credit plans.
§ 226.9(e)	Credit or charge card accounts subject to § 226.5a.
§ 226.9(g)	All open-end (not home-secured) consumer credit plans.
§ 226.9(h)	Credit card accounts under an open-end (not home-secured) consumer credit plan.
§ 226.10(b)(2)(ii)	All open-end consumer credit plans.
§ 226.10(b)(3)	Credit card accounts under an open-end (not home-secured) consumer credit plan.
§ 226.10(d)	All open-end consumer credit plans.
§ 226.10(e)	Credit card accounts under an open-end (not home-secured) consumer credit plan.
§ 226.10(f)	Credit card accounts under an open-end (not home-secured) consumer credit plan.
§ 226.11(c)	Credit card accounts under an open-end (not home-secured) consumer credit plan.
§ 226.16(f)	All open-end consumer credit plans.
§ 226.16(h)	All open-end (not home-secured) consumer credit plans.
§ 226.51	Credit card accounts under an open-end (not home-secured) consumer credit plan.
§ 226.52	Credit card accounts under an open-end (not home-secured) consumer credit plan.
§ 226.53	Credit card accounts under an open-end (not home-secured) consumer credit plan.
§ 226.54	Credit card accounts under an open-end (not home-secured) consumer credit plan.
§ 226.55	Credit card accounts under an open-end (not home-secured) consumer credit plan.
§ 226.56	Credit card accounts under an open-end (not home-secured) consumer credit plan.
§ 226.57	Credit card accounts under an open-end (not home-secured) consumer credit plan, except that § 226.57(c) applies to all open-end consumer credit plans.
§ 226.58	Credit card accounts under an open-end (not home-secured) consumer credit plan.

V. Section-by-Section Analysis

Section 226.2 Definitions and Rules of Construction

2(a) Definitions

2(a)(15) Credit Card

In the January 2009 Regulation Z Rule, the Board revised § 226.2(a)(15) to read as follows: ''*Credit card* means any card, plate, or other single credit device that may be used from time to time to obtain credit. *Charge card* means a credit card on an account for which no periodic rate is used to compute a finance charge.'' 74 FR 5257. In order to clarify the application of certain provisions of the Credit Card Act that apply to ''credit card account[s] under an open end consumer credit plan,'' the Board proposes to further revise § 226.2(a)(15) by adding a definition of ''credit card account under an open-end (not home-secured) consumer credit plan.'' Specifically, proposed § 226.2(a)(15)(ii) would define this term to mean any credit account accessed by a credit card except a credit card that accesses a home-equity plan subject to the requirements of § 226.5b or an overdraft line of credit accessed by a debit card. The definitions of ''credit card'' and ''charge card'' in the January 2009 Regulation Z Rule would be moved to proposed § 226.2(a)(15)(i) and (iii), respectively.

The exclusion of credit cards that access a home-equity plan subject to § 226.5b is consistent with the approach adopted by the Board in the July 2009 Regulation Z Interim Final Rule. *See* 74 FR 36083. Specifically, the Board used its authority under TILA Section 105(a) and § 2 of the Credit Card Act to interpret the term ''credit card account under an open-end consumer credit plan'' in new TILA Section 127(i) to exclude home-equity lines of credit subject to § 226.5b, even if those lines could be accessed by a credit card. Instead, the Board applied the disclosure requirements in current § 226.9(c)(2)(i) and (g)(1) to ''credit card accounts under an open-end (not home-secured) consumer credit plan.'' *See* 74 FR 36094–36095. For consistency with the interim final rule, the Board would generally use its authority under TILA Section 105(a) and § 2 of the Credit Card Act to apply the same interpretation to other provisions of the Credit Card Act that apply to a ''credit card account under an open end consumer credit plan.'' *See, e.g.,* revised TILA § 127(j), (k), (l), (n); revised TILA § 171; new TILA §§ 140A, 148, 149, 172.[5] This interpretation is also consistent with the Board's historical treatment of HELOC accounts accessible by a credit card under TILA; for example, the credit and charge card application and solicitation disclosure requirements under § 226.5a expressly do not apply to home-equity plans accessible by a credit card that are subject to § 226.5b. *See* current § 226.5a(a)(3); revised § 226.5a(a)(5)(i), 74 FR 5403. The Board has issued the August 2009 Regulation Z HELOC Proposal to address changes to Regulation Z that it believes are necessary and appropriate for HELOCs and will consider any appropriate revisions to the requirements for HELOCs in connection with that review.

The Board also proposes to interpret the term ''credit card account under an open end consumer credit plan'' to exclude a debit card that accesses an overdraft line of credit. Although such cards are ''credit cards'' under current

[4] This table summarizes the applicability only of those new paragraphs or provisions added to Regulation Z in order to implement the Credit Card Act, as well as the applicability of proposed provisions addressing deferred interest or similar offers. The Board notes that it is not proposing to change the applicability of provisions of Regulation Z amended by the January 2009 Regulation Z Rule or May 2009 Regulation Z Proposed Clarifications.

[5] In certain cases, the Board has applied a statutory provision that refers to ''credit card accounts under an open end consumer credit plan'' to a wider range of products. Specifically, *see* the discussion below regarding the implementation of new TILA Section 127(i) in proposed § 226.9(c)(2), the implementation of new TILA Section 127(m) in proposed §§ 226.5(a)(2)(iii) and 226.16(f), and the implementation of new TILA Section 127(o) in proposed § 226.10(d).

§ 226.2(a)(15), the Board has generally excluded them from the provisions of Regulation Z that specifically apply to credit cards. For example, as with credit cards that access HELOCs, the provisions in § 226.5a regarding credit and charge card applications and solicitations do not apply to overdraft lines of credit tied to asset accounts accessed by debit cards. *See* current § 226.5a(a)(3); revised § 226.5a(a)(5)(ii), 74 FR 5403.

Instead, Regulation E (Electronic Fund Transfers) generally governs debit cards that access overdraft lines of credit. *See* 12 CFR part 205. For example, Regulation E generally governs the issuance of debit cards that access an overdraft line of credit, although Regulation Z's issuance provisions apply to the addition of a credit feature (such as an overdraft line) to a debit card. *See* 12 CFR 205.12(a)(1)(ii) and (a)(2)(i). Similarly, when a transaction that debits a checking or other asset account also draws on an overdraft line of credit, Regulation Z treats the extension of credit as incident to an electronic fund transfer and the error resolution provisions in Regulation E generally govern the transaction. *See* 12 CFR 205.12 comment 12(a)–1.i.[6]

Consistent with this approach, the Board believes that debit cards that access overdraft lines of credit should not be subject to the regulations implementing the provisions of the Credit Card Act that apply to ''credit card accounts under an open end consumer credit plan.'' As discussed in the January 2009 Regulation Z Rule, the Board understands that overdraft lines of credit are not in wide use.[7] Furthermore, as a general matter, the Board understands that creditors do not generally engage in the practices addressed in the relevant provisions of the Credit Card Act with respect to overdraft lines of credit. For example, as discussed in the January 2009 Regulation Z Rule, overdraft lines of credit are not typically promoted as—or used for—long-term extensions of credit. *See* 74 FR 5331. Therefore, because proposed § 226.9(c)(2) would require a creditor to provide 45 days' notice before increasing an annual percentage rate for an overdraft line of credit, a creditor is unlikely to engage in the practices prohibited by revised TILA Section 171 with respect to the application of increased rates to existing balances. Similarly, because creditors generally do not apply different rates to different balances or provide grace periods with respect to overdraft lines of credit, the provisions in proposed §§ 226.53 and 226.54 would not provide any meaningful protection. Accordingly, the Board proposes to use its authority under TILA Section 105(a) and § 2 of the Credit Card Act to create an exception for debit cards that access an overdraft line of credit. The Board notes this proposed definition is not intended to alter the scope or coverage of provisions of Regulation Z that refer generally to credit cards or open-end credit rather than the new defined term ''credit card account under an open-end (not home-secured consumer credit plan.''

Section 226.5 General Disclosure Requirements

5(a) Form of Disclosures

5(a)(2) Terminology

Section 103 of the Credit Card Act creates a new TILA Section 127(m) (15 U.S.C. 1637(m)), which states that with respect to the terms of any credit card account under an open-end consumer credit plan, the term ''fixed,'' when appearing in conjunction with a reference to the APR or interest rate applicable to such account, may only be used to refer to an APR or interest rate that will not change or vary for any reason over the period specified clearly and conspicuously in the terms of the account. 15 U.S.C. 1637(m). In the January 2009 Regulation Z Rule, the Board had adopted §§ 226.5(a)(2)(iii) and 226.16(f) to restrict the use of the term ''fixed,'' or any similar term, to describe a rate disclosed in certain required disclosures and in advertisements only to instances when that rate would not increase until the expiration of a specified time period. If no time period is specified, then the term ''fixed,'' or any similar term, may not be used to describe the rate unless the rate will not increase while the plan is open.

The Board believes that §§ 226.5(a)(2)(iii) and 226.16(f), as adopted in the January 2009 Regulation Z Rule, would be consistent with new TILA Section 127(m). Therefore, the Board is not proposing any changes to these rules.

While TILA Section 127(m) applies only to credit card accounts under an open-end consumer credit plan, § 226.5(a)(2)(iii) applies to all open-end (not home-secured) plans and § 226.16(f) applies to all open-end plans. The Board continues to believe this scope is appropriate, so consumers of non-credit card products that are open-end (not home-secured) plans will still benefit from the protections of this requirement. The Board accordingly proposes to use its TILA Section 105(a) authority to apply the requirements of § 226.5(a)(2)(iii) to all open-end (not home-secured) plans and § 226.16(f) to all open-end plans. Furthermore, although TILA Section 127(m) only references the term ''fixed,'' §§ 226.5(a)(2)(iii) and 226.16(f) restrict use of the word ''fixed'' as well as other similar terms. The Board believes this interpretation is necessary to prevent creditors from circumventing the rule by using different terminology that would essentially have the same meaning as ''fixed'' in the minds of consumers. As a result, the Board proposes to use its authority under TILA Section 105(a) to apply the provision to other terms similar to the term ''fixed.''

Also, TILA Section 127(m) implies that a time period for which the rate is fixed must be specified in the account terms. While most creditors will likely state a term for the which the rate is fixed, the Board believes the rule should address instances when a rate is described as ''fixed'' but no time period is provided. The Board, therefore, proposes to use its authority under TILA Section 105(a) to provide that if a creditor describes a rate as ''fixed,'' but does not disclose a time period for which the rate will be fixed, the rate must not increase while the plan is open. Finally, TILA Section 127(m) states that a rate described as ''fixed'' may not change or vary for any reason. The Board believes, however, that it would be beneficial to consumers to permit a creditor to decrease a rate described as ''fixed.'' Accordingly, the Board proposes to use its authority under TILA Section 105(a) to provide that a rate described as ''fixed'' may not be increased.

5(b) Time of Disclosures

5(b)(1) Account-Opening Disclosures

5(b)(1)(i) General Rule

In certain circumstances, a creditor may substitute or replace one credit card account with another credit card account. For example, if an existing

[6] However, the error resolution provisions in § 226.13(d) and (g) do apply to such transactions. *See* 12 CFR 205.12 comment 12(a)–1.ii.D; *see also* current §§ 226.12(g) and 13(i); current comments 12(c)(1)–1 and 13(i)–3; new comment 12(c)–3, 74 FR 5488; revised comment 12(c)(1)–1.iv., 74 FR 5488. In addition, if the transaction solely involves an extension of credit and does not include a debit to a checking or other asset account, the liability limitations and error resolution requirements in Regulation Z apply. *See* 12 CFR 205.12(a)–1.i.

[7] The 2007 Survey of Consumer Finances data indicates that few families (1.7 percent) had a balance on lines of credit other than a home-equity line or credit card at the time of the interview. In comparison, 73 percent of families had a credit card, and 60.3 percent of these families had a credit card balance at the time of the interview. *See* Brian Bucks, *et al.,* Changes in U.S. Family Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances, Federal Reserve Bulletin (February 2009).

cardholder requests additional features or benefits (such as rewards on purchases), the creditor may substitute or replace the existing credit card account with a new credit card account that provides those features or benefits. The Board also understands that creditors often charge higher annual percentage rates or annual fees to compensate for additional features and benefits. As discussed below, proposed § 226.55 and its commentary address the application of the general prohibitions on increasing annual percentage rates, fees, and charges during the first year after account opening and on applying increased rates to existing balances in these circumstances. *See* proposed § 226.55(d); proposed comments 55(b)(3)–3 and 55(d)–1 through –3.

In order to clarify the application of the disclosure requirements in §§ 226.6(b) and 226.9(c)(2) when one credit card account is substituted or replaced with another, the Board proposes to adopt comment 5(b)(1)(i)–6, which states that, when a card issuer substitutes or replaces an existing credit card account with another credit card account, the card issuer must either provide notice of the terms of the new account consistent with § 226.6(b) or provide notice of the changes in the terms of the existing account consistent with § 226.9(c)(2). The Board understands that, when an existing cardholder requests new features or benefits, disclosure of the new terms pursuant to § 226.6(b) may be preferable because the cardholder generally will not want to wait 45 days for the new terms to take effect (as would be the case if notice were provided pursuant to § 226.9(c)(2)). Thus, this comment is intended to provide card issuers with some flexibility regarding whether to treat the substitution or replacement as the opening of a new account (subject to § 226.6(b)) or a change in the terms of an existing account (subject to § 226.9(c)(2)).

However, the Board does not intend to permit card issuers to circumvent the disclosure requirements in § 226.9(c)(2) by treating a change in terms as the opening of a new account. Accordingly, the comment would further state that whether a substitution or replacement results in the opening of a new account or a change in the terms of an existing account for purposes of the disclosure requirements in §§ 226.6(b) and 226.9(c)(2) is determined in light of all the relevant facts and circumstances.

The comment provides the following list of relevant facts and circumstances: (1) Whether the card issuer provides the consumer with a new credit card; (2) whether the card issuer provides the consumer with a new account number; (3) whether the account provides new features or benefits after the substitution or replacement (such as rewards on purchases); (4) whether the account can be used to conduct transactions at a greater or lesser number of merchants after the substitution or replacement; (5) whether the card issuer implemented the substitution or replacement on an individualized basis; and (6) whether the account becomes a different type of open-end plan after the substitution or replacement (such as when a charge card is replaced by a credit card). The comment states that, when most of these facts and circumstances are present, the substitution or replacement likely constitutes the opening of a new account for which § 226.6(b) disclosures are appropriate. However, the comment also states that, when few of these facts and circumstances are present, the substitution or replacement likely constitutes a change in the terms of an existing account for which § 226.9(c)(2) disclosures are appropriate.[8]

The Board solicits comment on whether additional facts and circumstances are relevant. The Board also solicits comment on alternative approaches to determining whether a substitution or replacement results in the opening of a new account or a change in the terms of an existing account for purposes of the disclosure requirements in §§ 226.6(b) and 226.9(c)(2).

5(b)(2) Periodic Statements

The Board is proposing to amend comment 5(b)(2)(ii)–2 in several respects in order to clarify the consequences of a failure to comply with the requirement in § 226.5(b)(2)(ii) that creditors adopt reasonable procedures designed to ensure that periodic statements for open-end credit plans are mailed or delivered at least 21 days before the payment due date and the date on which any grace period expires. First, the title of the comment would be amended to cover both treating a payment as late for any purpose and collecting any finance or other charge. Second, because § 226.5(b)(2)(ii) only prohibits the creditor from treating a payment as late for any purpose or collecting any finance or other charge *as a result of* a failure to comply with the general 21-day requirement, the comment would be amended to clarify that the prohibition in § 226.5(b)(2)(ii) on treating a payment as late for any purpose or collecting finance or other charges applies only during the 21-day period following mailing or delivery of the periodic statement. Thus, if a creditor does not receive a payment within 21 days of mailing or delivery of the periodic statement, the prohibition does not apply and the creditor may, for example, impose a late payment fee.

Third, for similar reasons, the amended comment would clarify that, when an account is not eligible for a grace period, a creditor may impose a finance charge due to a periodic interest rate without treating a payment as late or collecting finance or other charges as a result of a failure to comply with § 226.5(b)(2)(ii).

The Board is also proposing to amend the cross-reference in comment 5(b)(2)(ii)–6 to reflect the restructuring of the commentary to § 226.7.

Section 226.5a Credit and Charge Card Applications and Solicitations

5a(b) Required Disclosures

5a(b)(1) Annual Percentage Rate

To complement the proposed disclosure requirements for deferred interest or similar plans proposed in §§ 226.7(b) and 226.16(h) in the May 2009 Regulation Z Proposed Clarifications, the Board also proposed a new comment 5a(b)(1)–9 to clarify that an issuer offering a deferred interest or similar plan may not disclose a rate as 0% due to the possibility that the consumer may not be obligated for interest regarding the deferred interest or similar transaction. 74 FR 20797. The Board is republishing proposed comment 5a(b)(1)–9 in this **Federal Register** notice.

Section 226.7 Periodic Statement

7(b) Rules Affecting Open-End (Not Home-Secured) Plans

7(b)(11) Due Date; Late Payment Costs

In 2005, the Bankruptcy Act amended TILA to add Section 127(b)(12), which required creditors that charge a late payment fee to disclose on the periodic statement (1) the payment due date or, if the due date differs from when a late payment fee would be charged, the earliest date on which the late payment fee may be charged, and (2) the amount of the late payment fee. *See* 15 U.S.C. 1637(b)(12). In the January 2009 Regulation Z Rule, the Board implemented this section of TILA for open-end (not home-secured) credit plans. Specifically, the final rule added § 226.7(b)(11) to require creditors offering open-end (not home-secured) credit plans that charge a fee or impose

[8] The comment also provides cross-references to other provisions in Regulation Z and its commentary that address the substitution or replacement of credit card accounts.

a penalty rate for paying late to disclose on the periodic statement: the payment due date, and the amount of any late payment fee and any penalty APR that could be triggered by a late payment. For ease of reference, this supplementary information will refer to the disclosure of any late payment fee and any penalty APR that could be triggered by a late payment as ''the late payment disclosures.''

Section 226.7(b)(13), as adopted in the January 2009 Regulation Z Rule, sets forth formatting requirements for the due date and the late payment disclosures. Specifically, § 226.7(b)(13) requires that the due date be disclosed on the front side of the first page of the periodic statement. Further, the amount of any late payment fee and any penalty APR that could be triggered by a late payment must be disclosed in close proximity to the due date.

Section 202 of the Credit Card Act amends TILA Section 127(b)(12) to provide that for a ''credit card account under an open-end consumer credit plan,'' a creditor that charges a late payment fee must disclose in a conspicuous location on the periodic statement (1) the payment due date, or, if the due date differs from when a late payment fee would be charged, the earliest date on which the late payment fee may be charged, and (2) the amount of the late payment fee. In addition, if a late payment may result in an increase in the APR applicable to the credit card account, a creditor also must provide on the periodic statement a disclosure of this fact, along with the applicable penalty APR. The disclosure related to the penalty APR must be placed in close proximity to the due-date disclosure discussed above.

In addition, Section 106 of the Credit Card Act adds new TILA Section 127(o), which requires that the payment due date for a credit card account under an open-end (not home-secured) consumer credit plan be the same day each month. 15 U.S.C. 1637(o).

As discussed in more detail below, the Board proposes to retain the due date and the late payment disclosure provisions adopted in § 226.7(b)(11) as part of the January 2009 Regulation Z Rule, with several revisions. Format requirements relating to the due date and the late payment disclosure provisions are discussed in more detail in the section-by-section analysis to proposed § 226.7(b)(13).

Applicability of the due date and the late payment disclosure requirements. The due date and the late payment disclosures added to TILA Section 127(b)(12) by the Bankruptcy Act applied to all open-end credit plans. Consistent with TILA Section 127(b)(12), as added by the Bankruptcy Act, the due date and the late payment disclosures in § 226.7(b)(11) (as adopted in the January 2009 Regulation Z Rule) apply to all open-end (not home-secured) credit plans, including credit card accounts, overdraft lines of credit and other general purpose lines of credit that are not home secured.

The Credit Card Act amended TILA Section 127(b)(12) to apply the due date and the late payment disclosures only to creditors offering a credit card account under an open-end consumer credit plan. Consistent with newly-revised TILA Section 127(b)(12), the Board proposes to amend § 226.7(b)(11) to require the due date and the late payment disclosures only for a ''credit card account under an open-end (not home-secured) consumer credit plan,'' as that term is defined under proposed § 226.2(a)(15)(ii). As discussed in more detail in the section-by-section analysis to proposed § 226.2(a)(15)(ii), the term ''credit card account under an open-end (not home-secured) consumer credit plan'' means any account accessed by a credit card, except this term does not include HELOC accounts subject to § 226.5b that are accessed by a credit card device or overdraft lines of credit that are accessed by a debit card. Thus, based on the proposed definition of ''credit card account under an open-end (not home-secured) consumer credit plan,'' the due date and the late payment disclosures would not apply to (1) open-end credit plans that are not credit card accounts such as general purpose lines of credit that are not accessed by a credit card; (2) HELOC accounts subject to § 226.5b even if they are accessed by a credit card device; and (3) overdraft lines of credit even if they are accessed by a debit card. In addition, as discussed in more detail below, under proposed § 226.7(b)(11)(ii), the Board also proposes to exempt charge card accounts from the late payment disclosure requirements.

Charge card accounts. As discussed above, the late payment disclosures in TILA Section 127(b)(12), as amended by the Credit Card Act, apply to ''creditors'' offering credit card accounts under an open-end consumer credit plan. Issuers of ''charge cards'' (which are typically products where outstanding balances cannot be carried over from one billing period to the next and are payable when a periodic statement is received) are ''creditors'' for purposes of specifically enumerated TILA disclosure requirements. 15 U.S.C. 1602(f); § 226.2(a)(17). The late payment disclosure requirement in TILA Section 127(b)(12), as amended by the Credit Card Act, is not among those specifically enumerated.

For the reasons discussed in more detail below, a charge card issuer would be required to disclose the due date on the periodic statement, and this payment due date must be the same day each month. Nonetheless, under proposed § 226.7(b)(11)(ii), a charge card issuer would not be required to disclose on the periodic statement the late payment disclosures, namely any late payment fee or penalty APR that could be triggered by a late payment. As discussed above, the late payment disclosure requirements are not specifically enumerated in TILA Section 103(f) to apply to charge card issuers. In addition, the Board notes that for some charge card issuers, payments are not considered ''late'' for purposes of imposing a fee until a consumer fails to make payments in two consecutive billing cycles. It would be undesirable to encourage consumers who in January receive a statement with the balance due upon receipt, for example, to avoid paying the balance when due because a late payment fee may not be assessed until mid-February; if consumers routinely avoided paying a charge card balance by the due date, it could cause issuers to change their practice with respect to charge cards.

Section 226.7(b)(11)(ii) makes clear the exemption is for periodic statements provided solely for charge card accounts; periodic statements provided for card accounts with a charge card feature and revolving feature must comply with the late payment disclosure provisions as to the revolving feature. The Board also proposes to retain comment app. G–9 (which was adopted in the January 2009 Regulation Z Rule). Comment app. G–9 explains that creditors offering card accounts with a charge card feature and a revolving feature may revise disclosures, such as the late payment disclosures and the repayment disclosures discussed in the section-by-section analysis to proposed § 226.7(b)(12) below, to make clear the feature to which the disclosures apply.

Payment due date. As adopted in the January 2009 Regulation Z Rule, § 226.7(b)(11) requires creditors offering open-end (not home-secured) credit to disclose the due date for a payment if a late payment fee or penalty rate could be imposed under the credit agreement, as discussed in more detail as follows. As adopted in the January 2009 Regulation Z Rule, § 226.7(b)(11) applies to all open-end (not home-secured) credit plans, even those plans that are not accessed by a credit card device. The Board proposes generally to retain

the due date disclosure, except that this disclosure would be required only for a card issuer offering a ''credit card account under an open-end (not home-secured) consumer credit plan,'' as that term is defined in proposed § 226.2(a)(15)(ii).

In addition, as discussed below, the Board is proposing several other revisions to § 226.7(b)(11) in order to implement new TILA Section 127(o), which requires that the payment due date for a credit card account under an open-end (not home-secured) consumer credit plan be the same day each month. In addition to requiring that the due date disclosed be the same day each month, in order to implement new TILA Section 127(o), the Board proposes to require that the due date disclosure be provided regardless of whether a late payment fee or penalty rate could be imposed. Second, the Board proposes to amend § 226.7(b)(11)(ii) to require that the due date be disclosed for charge card accounts, although charge card issuers would not be required to provide the late payment disclosures set forth in proposed § 226.7(b)(11)(i)(B).

1. *Courtesy periods*. In the January 2009 Regulation Z Rule, § 226.7(b)(11) interpreted the due date to be a date that is required by the legal obligation. Comment 7(b)(11)–1 clarified that creditors need not disclose informal ''courtesy periods'' not part of the legal obligation that creditors may observe for a short period after the stated due date before a late payment fee is imposed, to account for minor delays in payments such as mail delays. The Board proposes to retain comment 7(b)(11)–1 with technical revisions to refer to card issuers, rather than creditors, consistent with the proposal to limit the due date and late payment disclosures to a ''credit card account under an open-end (not home-secured) consumer credit plan,'' as that term is defined in proposed § 226.2(a)(15)(ii).

2. *Assessment of late fees*. Under TILA Section 127(b)(12), as revised by the Credit Card Act, a card issuer must disclose on periodic statements the payment due date or, if different, the earliest date on which the late payment fee may be charged. Some State laws require that a certain number of days must elapse following a due date before a late payment fee may be imposed. Under such a State law, the later date arguably would be required to be disclosed on periodic statements.

In the January 2009 Regulation Z Rule, the Board required creditors to disclose the due date under the terms of the legal obligation, and not a later date, such as when creditors are restricted by State or other law from imposing a late payment fee unless a payment is late for a certain number of days following the due date. Specifically, comment 7(b)(12)–2 (as adopted as part of the January 2009 Regulation Z Rule) notes that some State or other laws require that a certain number of days must elapse following a due date before a late payment fee may be imposed. For example, assume a payment is due on March 10 and State law provides that a late payment fee cannot be assessed before March 21. Comment 7(b)(11)–2 clarifies that creditors must disclose the due date under the terms of the legal obligation (March 10 in this example), and not a date different than the due date, such as when creditors are restricted by State or other law to delay from imposing a late payment fee unless a payment is late for a certain number of days following the due date (March 21 in this example). Consumers' rights under State law to avoid the imposition of late payment fees during a specified period following a due date are unaffected by the disclosure requirement. In this example, the creditor would disclose March 10 as the due date for purposes of § 226.7(b)(11), even if under State law the creditor could not assess a late payment fee before March 21.

The Board was concerned that disclosure of the later date would not provide a meaningful benefit to consumers in the form of useful information or protection and would result in consumer confusion. In the example above, highlighting March 20 as the last date to avoid a late payment fee may mislead consumers into thinking that a payment made any time on or before March 20 would have no adverse financial consequences. However, failure to make a payment when due is considered an act of default under most credit contracts, and can trigger higher costs due to loss of a grace period, interest accrual, and perhaps penalty APRs. The Board considered additional disclosures on the periodic statement that would more fully explain the consequences of paying after the due date and before the date triggering the late payment fee, but such an approach appeared cumbersome and overly complicated.

For these reasons, notwithstanding TILA Section 127(b)(12), as revised by the Credit Card Act, the Board proposes to continue to require card issuers to disclose the due date under the terms of the legal obligation, and not a later date, such as when creditors are restricted by State or other law from imposing a late payment fee unless a payment is late for a certain number of days following the due date. The Board proposes this exception to the TILA requirement to disclose the later date pursuant to the Board's authority under TILA Section 105(a) to make adjustments that are necessary to effectuate the purposes of TILA. 15 U.S.C. 1604(a).

The Board proposes to retain comment 7(b)(11)–2 with several revisions. First, the comment would be revised to refer to card issuers, rather than creditors, consistent with the proposal to limit the due date and late payment disclosures to a ''credit card account under an open-end (not home-secured) consumer credit plan,'' as that term is defined in proposed § 226.2(a)(15)(ii). Second, the comment would be revised to address the situation where the terms of the account agreement (rather than State law) limit a card issuer from imposing a late payment fee unless a payment is late a certain number of days following a due date. The Board proposes to revise comment 7(b)(11)–2 to provide that in this situation a card issuer must disclose the date the payment is due under the terms of the legal obligation, and not the later date when a late payment fee may be imposed under the contract.

3. *Same due date each month*. The Credit Card Act created a new TILA Section 127(o), which states in part that the payment due date for a credit card account under an open end consumer credit plan shall be the same day each month. The Board is proposing to implement this requirement by revising § 226.7(b)(11)(i). The text the Board is proposing to insert into amended § 226.7(b)(11)(i) would generally track the statutory language in new TILA Section 127(o) and would state that for credit card accounts under open-end (not home-secured) consumer credit plans, the due date disclosed pursuant to § 226.7(b)(11)(i) must be the same day of the month for each billing cycle.

The Board is proposing several new comments to clarify the requirement that the due date be the same day of the month for each billing cycle. Proposed comment 7(b)(11)(i)–6 would clarify that the same day of the month means the same numerical day of the month. The comment notes that one example of a compliant practice would be to have a due date that is the 25th of every month. In contrast, it would not be permissible for the payment due date to be the same relative date, but not numerical date, of each month, such as the third Tuesday of the month. The Board believes that the intent of new TILA Section 127(o) is to promote predictability and to enhance consumer awareness of due dates each month to make it easier to make timely payments. The Board believes that requiring the

due date to be the same numerical day each month effectuates the statute, and that permitting the due date to be the same relative day each month would not as effectively promote predictability for consumers.

The Board notes that in practice the requirement that the due date be the same numerical date each month would preclude creditors from setting due dates that are the 29th, 30th, or 31st of the month. The Board is aware that some credit card issuers currently set due dates for a portion of their accounts on every day of the month, in order to distribute the burden associated with processing payments more evenly throughout the month. The Board solicits comment on any operational burden associated with processing additional payments received on the 1st through 28th of the month in those months with more than 28 days.

Proposed comment 7(b)(11)(i)–7 would clarify that a creditor may adjust a consumer's due date from time to time, for example in response to a consumer-initiated request, provided that the new due date will be the same numerical date each month on an ongoing basis. The proposed comment would cross-reference existing comment 2(a)(4)–3 for guidance on transitional billing cycles that might result when the consumer's due date is changed. The Board believes that it is appropriate to permit creditors to change the consumer's due date from time to time, for example, if the creditor wishes to honor a consumer request for a new due date that better coincides with the time of the month when the consumer is paid by his or her employer. The Board notes that while the proposed comment refers to consumer-initiated requests as one example of when a change in due date might occur, proposed § 226.7(b)(11)(i) and comment 7(b)(11)(i)–7 would not prohibit changes in the consumer's due date from time to time that are not consumer-initiated, for example, if a creditor acquires a portfolio and changes the consumer's due date as it migrates acquired accounts onto its own systems.

Regulation Z's definition of ''billing cycle'' in § 226.2(a)(4) contemplates that the interval between the days or dates of regular periodic statements must be equal and no longer than a quarter of a year. Therefore, some creditors may have billing cycles that are two or three months in duration. The Board is proposing comment 7(b)(11)(i)–8 to clarify that new § 226.7(b)(11)(i) does not prohibit billing cycles that are two or three months, provided that the due date for each billing cycle is on the same numerical date of each month. The Board believes that it was not the intent of new TILA Section 127(o) to require that each billing cycle be exactly one month, so long as the due date is always the same day of the month for each billing cycle. For example, the comment notes that a creditor that establishes two-month billing cycles could send a consumer periodic statements disclosing due dates of January 25, March 25, and May 25.

Finally, the Board is proposing comment 7(b)(11)(i)–9 to clarify the relationship between §§ 226.7(b)(11)(i) and 226.10(d). As discussed elsewhere in this supplementary information, proposed § 226.10(d) provides that if the payment due date is a day on which the creditor does not receive or accept payments by mail, the creditor is generally required to treat a payment received the next business day as timely. It is likely that, from time to time, a due date that is the same numerical date each month as required by § 226.7(b)(11)(i) may fall on a date on which the creditor does not accept or receive mailed payments, such as a holiday or weekend. However, proposed comment 7(b)(11)(i)–9 clarifies that in such circumstances the creditor must disclose the due date according to the legal obligation between the parties, not the date as of which the creditor is permitted to treat the payment as late. For example, assume that the consumer's due date is the 4th of every month and the creditor does not accept or receive payments by mail on Thursday, July 4. Pursuant to § 226.10(d), the creditor may not treat a mailed payment received on the following business day, Friday, July 5, as late for any purpose. The creditor must nonetheless, however, disclose July 4 as the due date on the periodic statement and may not disclose a July 5 due date. This is consistent with the approach that the Board has taken with regard to payment due dates in comment 5(b)(2)(ii)–3 of the July 2009 Regulation Z Interim Final Rule, where the due date disclosed is required to reflect the legal obligation between the parties, not any courtesy period offered by the creditor or required by State or other law.

Late payment fee and penalty APR. In the January 2009 Regulation Z Rule, the Board adopted § 226.7(b)(11) to require creditors offering open-end (not home-secured) credit plans that charge a fee or impose a penalty rate for paying late to disclose on the periodic statement the amount of any late payment fee and any penalty APR that could be triggered by a late payment (in addition to the payment due date discussed above). Consistent with TILA Section 127(b)(12), as revised by the Credit Card Act, proposed § 226.7(b)(11) would continue to require that a card issuer disclose any late payment fee and any penalty APR that may be imposed on the account as a result of a late payment, in addition to the payment due date discussed above.

Fee or rate triggered by multiple events. In the January 2009 Regulation Z Rule, the Board added comment 7(b)(11)–3 to provide guidance on complying with the late payment disclosure if a late fee or penalty APR is triggered after multiple events, such as two late payments in six months. Comment 7(b)(11)–3 provides that in such cases, the creditor may, but is not required to, disclose the late payment and penalty APR disclosure each month. The disclosures must be included on any periodic statement for which a late payment could trigger the late payment fee or penalty APR, such as after the consumer made one late payment in this example. The Board proposes to retain this comment with technical revisions to refer to card issuers, rather than creditors, consistent with the proposal to limit the late payment disclosures to a ''credit card account under an open-end (not home-secured) consumer credit plan,'' as that term is defined in proposed § 226.2(a)(15)(ii).

Range of fees and rates. In the January 2009 Regulation Z Rule, § 226.7(b)(11)(i)(B) provides that if a range of late payment fees or penalty APRs could be imposed on the consumer's account, creditors may disclose the highest late payment fee and rate and at creditors' option, an indication (such as using the phrase ''up to'') that lower fees or rates may be imposed. Comment 7(b)(11)–4 was added to illustrate the requirement. The final rule also permits creditors to disclose a range of fees or rates. The Board proposes to retain § 226.7(b)(11)(i)(B) and comment 7(b)(11)–4 with technical revisions to refer to card issuers, rather than creditors, consistent with the proposal to limit the late payment disclosures to a ''credit card account under an open-end (not home-secured) consumer credit plan,'' as that term is defined in proposed § 226.2(a)(15)(ii). This approach recognizes the space constraints on periodic statements and provides card issuers flexibility in disclosing possible late payment fees and penalty rates.

Penalty APR in effect. In the January 2009 Regulation Z Rule, comment 7(b)(11)–5 was added to provide that if the highest penalty APR has previously been triggered on an account, the

creditor may, but is not required to, delete as part of the late payment disclosure the amount of the penalty APR and the warning that the rate may be imposed for an untimely payment, as not applicable. Alternatively, the creditor may, but is not required to, modify the language to indicate that the penalty APR has been increased due to previous late payments, if applicable. The Board proposes to retain this comment with technical revisions to refer to card issuers, rather than creditors, consistent with the proposal to limit the late payment disclosures to a ''credit card account under an open-end (not home-secured) consumer credit plan,'' as that term is defined in proposed § 226.2(a)(15)(ii).

7(b)(12) Repayment Disclosures

The Bankruptcy Act added TILA Section 127(b)(11) to require creditors that extend open-end credit to provide a disclosure on the front of each periodic statement in a prominent location about the effects of making only minimum payments. 15 U.S.C. 1637(b)(11). This disclosure included: (1) a ''warning'' statement indicating that making only the minimum payment will increase the interest the consumer pays and the time it takes to repay the consumer's balance; (2) a hypothetical example of how long it would take to pay off a specified balance if only minimum payments are made; and (3) a toll-free telephone number that the consumer may call to obtain an estimate of the time it would take to repay his or her actual account balance (''generic repayment estimate''). In order to standardize the information provided to consumers through the toll-free telephone numbers, the Bankruptcy Act directed the Board to prepare a ''table'' illustrating the approximate number of months it would take to repay an outstanding balance if the consumer pays only the required minimum monthly payments and if no other advances are made. The Board was directed to create the table by assuming a significant number of different APRs, account balances, and minimum payment amounts; the Board was required to provide instructional guidance on how the information contained in the table should be used to respond to consumers' requests.

Alternatively, the Bankruptcy Act provided that a creditor may use a toll-free telephone number to provide the actual number of months that it will take consumers to repay their outstanding balances (''actual repayment disclosure'') instead of providing an estimate based on the Board-created table. A creditor that does so would not need to include a hypothetical example on its periodic statements, but must disclose the warning statement and the toll-free telephone number on its periodic statements. 15 U.S.C. 1637(b)(11)(J)–(K).

For ease of reference, this supplementary information will refer to the above disclosures in the Bankruptcy Act about the effects of making only the minimum payment as ''the minimum payment disclosures.''

In the January 2009 Regulation Z Rule, the Board implemented this section of TILA. In that rulemaking, the Board limited the minimum payment disclosures required by the Bankruptcy Act to credit card accounts, pursuant to the Board's authority under TILA Section 105(a) to make adjustments that are necessary to effectuate the purposes of TILA. 15 U.S.C. 1604(a). In addition, the final rule in § 226.7(b)(12) provided that credit card issuers could choose one of three ways to comply with the minimum payment disclosure requirements set forth in the Bankruptcy Act: (1) Provide on the periodic statement a warning about making only minimum payments, a hypothetical example, and a toll-free telephone number where consumers may obtain generic repayment estimates; (2) provide on the periodic statement a warning about making only minimum payments, and a toll-free telephone number where consumers may obtain actual repayment disclosures; or (3) provide on the periodic statement the actual repayment disclosure. The Board issued guidance in Appendix M1 to part 226 for how to calculate the generic repayment estimates, and guidance in Appendix M2 to part 226 for how to calculate the actual repayment disclosures. Appendix M3 to part 226 provided sample calculations for the generic repayment estimates and the actual repayment disclosures discussed in Appendices M1 and M2 to part 226.

The Credit Card Act substantially revised Section 127(b)(11) of TILA. Specifically, Section 201 of the Credit Card Act amends TILA Section 127(b)(11) to provide that creditors that extend open-end credit must provide the following disclosures on each periodic statement: (1) A ''warning'' statement indicating that making only the minimum payment will increase the interest the consumer pays and the time it takes to repay the consumer's balance; (2) the number of months that it would take to repay the outstanding balance if the consumer pays only the required minimum monthly payments and if no further advances are made; (3) the total cost to the consumer, including interest and principal payments, of paying that balance in full, if the consumer pays only the required minimum monthly payments and if no further advances are made; (4) the monthly payment amount that would be required for the consumer to pay off the outstanding balance in 36 months, if no further advances are made, and the total cost to the consumer, including interest and principal payments, of paying that balance in full if the consumer pays the balance over 36 months; and (5) a toll-free telephone number at which the consumer may receive information about credit counseling and debt management services. For ease of reference, this supplementary information will refer to the above disclosures in the Credit Card Act as ''the repayment disclosures.''

The Credit Card Act provides that the repayment disclosures discussed above (except for the warning statement) must be disclosed in the form and manner which the Board prescribes by regulation and in a manner that avoids duplication; and be placed in a conspicuous and prominent location on the billing statement. By regulation, the Board must require that the disclosure of the repayment information (except for the warning statement) be in the form of a table that contains clear and concise headings for each item of information and provides a clear and concise form stating each item of information required to be disclosed under each such heading. In prescribing the table, the Board must require that all the information in the table, and not just a reference to the table, be placed on the billing statement and the items required to be included in the table must be listed in the order in which such items are set forth above. In prescribing the table, the statute states that the Board shall use terminology different from that used in the statute, if such terminology is more easily understood and conveys substantially the same meaning. With respect to the toll-free telephone number for providing information about credit counseling and debt management services, the Credit Card Act provides that the Board must issue guidelines by rule, in consultation with the Secretary of the Treasury, for the establishment and maintenance by creditors of a toll-free telephone number for purposes of providing information about a accessing credit counseling and debt management services. These guidelines must ensure that referrals provided by the toll-free telephone number include only those nonprofit budget and credit counseling agencies approved by a U.S. bankruptcy trustee pursuant to 11 U.S.C. 111(a).

As discussed in more detail below, the Board proposes to revise

§ 226.7(b)(12) to implement Section 201 of the Credit Card Act.

Proposal to limit the repayment disclosure requirements to credit card accounts. Under the Credit Card Act, the repayment disclosure requirements apply to all open-end accounts (such as credit card accounts, HELOCs, and general purpose credit lines). As discussed above, in the January 2009 Regulation Z Rule, the Board limited the minimum payment disclosures required by the Bankruptcy Act to credit card accounts. For similar reasons, the Board proposes to limit the repayment disclosures in the Credit Card Act to credit card accounts under open-end (not home-secured) consumer credit plans, as that term is defined in proposed § 226.2(a)(15)(ii).

As discussed in more detail in the section-by-section analysis to proposed § 226.2(a)(15)(ii), the term ''credit card account under an open-end (not home-secured) consumer credit plan'' means any account accessed by a credit card, except this term does not include HELOC accounts subject to § 226.5b that are accessed by a credit card device or overdraft lines of credit that are accessed by a debit card. Thus, based on the proposed exemption to limit the repayment disclosures to credit card accounts under open-end (not home-secured) consumer credit plans, the following products would be exempt from the repayment disclosures in TILA Section 127(b)(11), as set forth in the Credit Card Act: (1) HELOC accounts subject to § 226.5b even if they are accessed by a credit card device; (2) overdraft lines of credit even if they are accessed by a debit card; and (3) open-end credit plans that are not credit card accounts, such as general purpose lines of credit that are not accessed by a credit card.

The Board proposes this rule pursuant to its exception and exemption authorities under TILA Section 105. Section 105(a) authorizes the Board to make exceptions to TILA to effectuate the statute's purposes, which include facilitating consumers' ability to compare credit terms and helping consumers avoid the uninformed use of credit. *See* 15 U.S.C. 1601(a), 1604(a). Section 105(f) authorizes the Board to exempt any class of transactions from coverage under any part of TILA if the Board determines that coverage under that part does not provide a meaningful benefit to consumers in the form of useful information or protection. *See* 15 U.S.C. 1604(f)(1). The Board must make this determination in light of specific factors. *See* 15 U.S.C. 1604(f)(2). These factors are (1) the amount of the loan and whether the disclosure provides a benefit to consumers who are parties to the transaction involving a loan of such amount; (2) the extent to which the requirement complicates, hinders, or makes more expensive the credit process; (3) the status of the borrower, including any related financial arrangements of the borrower, the financial sophistication of the borrower relative to the type of transaction, and the importance to the borrower of the credit, related supporting property, and coverage under TILA; (4) whether the loan is secured by the principal residence of the borrower; and (5) whether the exemption would undermine the goal of consumer protection.

As discussed in more detail below, the Board has considered each of these factors carefully, and based on that review, believes that the proposed exemption is appropriate.

1. *HELOC accounts.* In the August 2009 Regulation Z HELOC Proposal, the Board proposed that the repayment disclosures required by TILA Section 127(b)(11), as amended by the Credit Card Act, not apply to HELOC accounts, including HELOC accounts that can be accessed by a credit card device. *See* 74 FR 43428. The Board proposed this rule pursuant to its exception and exemption authorities under TILA Section 105(a) and 105(f), as discussed above. In the supplementary information to the August 2009 Regulation Z HELOC Proposal, the Board stated its belief that the minimum payment disclosures in the Credit Card Act would be of limited benefit to consumers for HELOC accounts and are not necessary to effectuate the purposes of TILA. First, the Board understands that most HELOCs have a fixed repayment period. Under the August 2009 Regulation Z HELOC Proposal, in proposed § 226.5b(c)(9)(i), creditors offering HELOCs subject to § 226.5b would be required to disclose the length of the plan, the length of the draw period and the length of any repayment period in the disclosures that must be given within three business days after application (but not later than account opening). In addition, this information also must be disclosed at account opening under proposed § 226.6(a)(2)(v)(A), as set forth in the August 2009 Regulation Z HELOC Proposal. Thus, for a HELOC account with a fixed repayment period, a consumer could learn from those disclosures the amount of time it would take to repay the HELOC account if the consumer only makes required minimum payments. The cost to creditors of providing this information a second time, including the costs to reprogram periodic statement systems, appears not to be justified by the limited benefit to consumers.

In addition, in the supplementary information to the August 2009 Regulation Z HELOC Proposal, the Board stated its belief that the disclosure about total cost to the consumer of paying the outstanding balance in full (if the consumer pays only the required minimum monthly payments and if no further advances are made) would not be useful to consumers for HELOC accounts because of the nature of consumers' use of HELOC accounts. The Board understands that HELOC consumers tend to use HELOC accounts for larger transactions that they can finance at a lower interest rate than is offered on unsecured credit cards, and intend to repay these transactions over the life of the HELOC account. By contrast, consumers tend to use unsecured credit cards to engage in a significant number of small dollar transactions per billing cycle, and may not intend to finance these transactions for many years. The Board also understands that HELOC consumers often will not have the ability to repay the balances on the HELOC account at the end of each billing cycle, or even within a few years. To illustrate, the Board's 2007 Survey of Consumer Finances data indicates that the median balance on HELOCs (for families that had a balance at the time of the interview) was $24,000, while the median balance on credit cards (for families that had a balance at the time of the interview) was $3,000.[9]

As discussed in the supplementary information to the August 2009 Regulation Z HELOC Proposal, the nature of consumers' use of HELOCs also underlies the Board's belief that periodic disclosure of the monthly payment amount required for the consumer to pay off the outstanding balance in 36 months, and the total cost to the consumer of paying that balance in full if the consumer pays the balance over 36 months, would not provide useful information to consumers for HELOC accounts.

For all these reasons, in the August 2009 Regulation Z HELOC Proposal, the Board proposed to exempt HELOC accounts (even when they are accessed by a credit card account) from the repayment disclosure requirements set forth in TILA Section 127(b)(11), as revised by the Credit Card Act.

[9] Brian Bucks, *et al.*, Changes in U.S. Family Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances, Federal Reserve Bulletin (February 2009).

2. *Overdraft lines of credit and other general purpose credit lines*. The Board also proposes to exempt overdraft lines of credit (even if they are accessed by a debit card) and general purpose credit lines that are not accessed by a credit card from the repayment disclosure requirements set forth in TILA Section 127(b)(11), as revised by the Credit Card Act, for several reasons. 15 U.S.C. 1637(b)(11). First, these lines of credit are not in wide use. The 2007 Survey of Consumer Finances data indicates that few families—1.7 percent—had a balance on lines of credit other than a home-equity line or credit card at the time of the interview. (By comparison, 73 percent of families had a credit card, and 60.3 percent of these families had a credit card balance at the time of the interview.) [10] Second, these lines of credit typically are neither promoted, nor used, as long-term credit options of the kind for which the repayment disclosures are intended. Third, the Board is concerned that the operational costs of requiring creditors to comply with the repayment disclosure requirements for overdraft lines of credit and other general purpose lines of credit may cause some institutions to no longer provide these products as accommodations to consumers, to the detriment of consumers who currently use these products. For these reasons, the Board proposes to use its TILA Section 105(a) and 105(f) authority (as discussed above) to exempt overdraft lines of credit and other general purpose credit lines from the repayment disclosure requirements, because in this context the Board believes the repayment disclosures are not necessary to effectuate the purposes of TILA. 15 U.S.C. 1604(a) and (f).

7(b)(12)(i) In General

TILA Section 127(b)(11)(A), as amended by the Credit Card Act, requires that a creditor that extends open-end credit must provide the following disclosures on each periodic statement: (1) A ''warning'' statement indicating that making only the minimum payment will increase the interest the consumer pays and the time it takes to repay the consumer's balance; (2) the number of months that it would take to repay the outstanding balance if the consumer pays only the required minimum monthly payments and if no further advances are made; (3) the total cost to the consumer, including interest and principal payments, of paying that balance in full, if the consumer pays only the required minimum monthly payments and if no further advances are made; (4) the monthly payment amount that would be required for the consumer to pay off the outstanding balance in 36 months, if no further advances are made, and the total cost to the consumer, including interest and principal payments, of paying that balance in full if the consumer pays the balance over 36 months; and (5) a toll-free telephone number at which the consumer may receive information about accessing credit counseling and debt management services.

In implementing these statutory disclosures, proposed § 226.7(b)(12)(i) sets forth the repayment disclosures that a credit card issuer generally must provide on the periodic statement. As discussed in more detail below, proposed § 226.7(b)(12)(ii) sets forth the repayment disclosures that a credit card issuer must provide on the periodic statement when negative or no amortization occurs on the account.

Warning statement. TILA Section 127(b)(11)(A), as amended by the Credit Card Act, requires that a creditor include the following statement on each periodic statement: ''Minimum Payment Warning: Making only the minimum payment will increase the amount of interest you pay and the time it takes to repay your balance,'' or a similar statement that is required by the Board pursuant to consumer testing. 15 U.S.C. 1637(b)(11)(A). Under proposed § 226.7(b)(12)(i)(A), if amortization occurs on the account, a credit card issuer generally would be required to disclose the following statement with a bold heading on each periodic statement: ''Minimum Payment Warning: If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance.'' The proposed warning statement contains several stylistic revisions to the statutory language, based on plain language principles, in an attempt to make the language of the warning more understandable to consumers. The Board tested the proposed warning statement as part of the consumer testing conducted by the Board on credit card disclosures in relation to the January 2009 Regulation Z Rule. Participants in that consumer testing reviewed periodic statement disclosures with the proposed warning statement, and they indicated they understood from this statement that paying only the minimum payment would increase both interest charges and the length of time it would take to pay off a balance.

Minimum payment disclosures. TILA Section 127(b)(11)(B)(i) and (ii), as amended by the Credit Card Act, requires that a creditor provide on each periodic statement: (1) The number of months that it would take to pay the entire amount of the outstanding balance, if the consumer pays only the required minimum monthly payments and if no further advances are made; and (2) the total cost to the consumer, including interest and principal payments, of paying that balance in full, if the consumer pays only the required minimum monthly payments and if no further advances are made. 15 U.S.C. 1637(b)(11)(B)(i) and (ii). The Board proposes new § 226.7(b)(12)(i)(B) and (C) to implement these statutory provisions.

1. *Minimum payment repayment estimate*. Under proposed § 226.7(b)(12)(i)(B), if amortization occurs on the account, a credit card issuer generally would be required to disclose on each periodic statement the minimum payment repayment estimate, as described in proposed Appendix M1 to part 226. As described in more detail in the section-by-section analysis to proposed Appendix M1 to part 226, the minimum payment repayment estimate would be an estimate of the number of months that it would take to pay the entire amount of the outstanding balance shown on the periodic statement, if the consumer pays only the required minimum monthly payments and if no further advances are made. Under proposed Appendix M1 to part 226, a credit card issuer generally would calculate the minimum payment repayment estimate based on the minimum payment formula(s), the APRs and the outstanding balance currently applicable to a consumer's account. For other terms that may impact the calculation of the minimum payment repayment estimate, the Board proposes to allow issuers to make certain assumption about these terms.

Proposed § 226.7(b)(12)(i)(B) provides that if the minimum payment repayment estimate is less than 2 years, a credit card issuer must disclose the estimate in months. Otherwise, the estimate would be disclosed in years. If the estimate is 2 years or more, the estimate would be rounded to the nearest whole year, meaning that if the estimate contains a fractional year less than 0.5, the estimate would be rounded down to the nearest whole year. The estimate would be rounded up to the nearest whole year if the estimate contains a fractional year equal to or greater than 0.5. The Board proposes that the minimum payment repayment estimate be disclosed in years (if the

[10] Brian Bucks, *et al.*, Changes in U.S. Family Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances, Federal Reserve Bulletin (February 2009).

estimated payoff period is 2 years or more), pursuant to the Board's authority to make adjustments to TILA's requirements to effectuate the statute's purposes, which include facilitating consumers' ability to compare credit terms and helping consumers avoid the uninformed use of credit. *See* 15 U.S.C. 1601(a), 1604(a).

The Board believes that disclosing the estimated minimum payment repayment period in years (if the estimated payoff period is 2 years or more) allows consumers to better comprehend longer repayment periods without having to convert the repayment periods themselves from months to years. In consumer testing conducted by the Board on credit card disclosures in relation to the January 2009 Regulation Z Rule, participants reviewed disclosures with estimated minimum payment repayment periods in years, and they indicated they understood the length of time it would take to repay the balance if only minimum payments were made.

2. *Minimum payment total cost estimate*. Consistent with TILA Section 127(b)(11)(B)(ii), as revised by the Credit Card Act, proposed § 226.7(b)(12)(i)(C) provides that if amortization occurs on the account, a credit card issuer generally must disclose on each periodic statement the minimum payment total cost estimate, as described in proposed Appendix M1 to part 226. As described in more detail in the section-by-section analysis to proposed Appendix M1 to part 226, the minimum payment total cost estimate would be an estimate of the total dollar amount of the interest and principal that the consumer would pay if he or she made minimum payments for the length of time calculated as the minimum payment repayment estimate, as described in proposed Appendix M1 to part 226. Under the proposal, the minimum payment total cost estimate must be rounded to the nearest whole dollar.

3. *Disclosure of assumptions used to calculate the minimum payment repayment estimate and the minimum payment total cost estimate*. Under the proposal, a creditor would be required to provide on the periodic statement the following statements: (1) A statement that the minimum payment repayment estimate and the minimum payment total cost estimate are based on the current outstanding balance shown on the periodic statement; and (2) a statement that the minimum payment repayment estimate and the minimum payment total cost estimate are based on the assumption that only minimum payments are made and no other amounts are added to the balance. The Board believes that this information is needed to help consumers understand the minimum payment repayment estimate and the minimum payment total cost estimate. The Board does not propose to require issuers to disclose other assumptions used to calculate these estimates. The many assumptions that are necessary to calculate the minimum payment repayment estimate and the minimum payment total cost estimate are complex and unlikely to be meaningful or useful to most consumers.

Repayment disclosures based on repayment in 36 months. TILA Section 127(b)(11)(B)(iii), as revised by the Credit Card Act, requires that a creditor disclose on each periodic statement: (1) The monthly payment amount that would be required for the consumer to pay off the outstanding balance in 36 months, if no further advances are made; and (2) the total costs to the consumer, including interest and principal payments, of paying that balance in full if the consumer pays the balance over 36 months. 15 U.S.C. 1637(b)(11)(B)(iii).

1. *Estimated monthly payment for repayment in 36 months and total cost estimate for repayment in 36 months*. In implementing TILA Section 127(b)(11)(B)(iii), as revised by the Credit Card Act, proposed § 226.7(b)(12)(i)(F) provides that except when the minimum payment repayment estimate disclosed under proposed § 226.7(b)(12)(i)(B) is 3 years or less, a credit card issuer must disclose on each periodic statement the estimated monthly payment for repayment in 36 months and the total cost estimate for repayment in 36 months, as described in proposed Appendix M1 to part 226. As described in more detail in the section-by-section analysis to proposed Appendix M1 to part 226, the estimated monthly payment for repayment in 36 months would be an estimate of the monthly payment amount that would be required to pay off the outstanding balance shown on the statement within 36 months, assuming the consumer paid the same amount each month for 36 months. Also, as described in proposed Appendix M1 to part 226, the total cost estimate for repayment in 36 months would be the total dollar amount of the interest and principal that the consumer would pay if he or she made the estimated monthly payment each month for 36 months. Under the proposal, the estimated monthly payment for repayment in 36 months and the total cost estimate for repayment in 36 months must be rounded to the nearest whole dollar. Proposed § 226.7(b)(12)(i)(F)(*2*) provides that a credit card issuer generally must disclose on each periodic statement a statement that the card issuer estimates that the consumer will repay the outstanding balance shown on the periodic statement in 3 years if the consumer pays the estimated monthly payment each month for 3 years. The Board believes that this information is needed to help consumers understand the estimated monthly payment for repayment in 36 months. The Board does not propose to require issuers to disclose assumptions used to calculate this estimated monthly payment. The many assumptions that are necessary to calculate the estimated monthly payment for repayment in 36 months are complex and unlikely to be meaningful or useful to most consumers.

2. *Savings estimate for repayment in 36 months*. In addition to the disclosure of the estimated monthly payment for repayment in 36 months and the total cost estimate for repayment in 36 months, proposed § 226.7(b)(12)(i)(F) also requires that a credit card issuer generally must disclose on each periodic statement the savings estimate for repayment in 36 months, as described in proposed Appendix M1 to part 226. As described in proposed Appendix M1 to part 226, the savings estimate for repayment in 36 months would be calculated as the difference between the minimum payment total cost estimate and the total cost estimate for repayment in 36 months. Thus, the savings estimate for repayment in 36 months would represent an estimate of the amount of interest that a consumer would ''save'' if the consumer repaid the balance shown on the statement in 3 years by making the estimated monthly payment for repayment in 36 months each month, rather than making minimum payments each month. The Board proposes to require that credit card issuers disclose the savings estimate for repayment in 36 months on the periodic statement pursuant to the Board's authority to make adjustments to TILA's requirements to effectuate the statute's purposes, which include facilitating consumers' ability to compare credit terms and helping consumers avoid the uninformed use of credit. *See* 15 U.S.C. 1601(a), 1604(a).

The Board believes that the savings estimate for repayment in 36 months will allow consumers more easily to understand the potential savings of paying the balance shown on the periodic statement in 3 years rather than making minimum payments each month. This potential savings appears to be Congress' purpose in requiring that

the total cost for making minimum payments and the total cost for repayment in 36 months be disclosed on the periodic statement. The Board believes that including the savings estimate on the periodic statement allows consumers to comprehend better the potential savings without having to compute this amount themselves from the total cost estimates disclosed on the periodic statement. In consumer testing conducted by the Board on closed-end mortgage disclosures in relation to the August 2009 Regulation Z Closed-End Credit Proposal, some participants were shown two offers for mortgage loans with different APRs and different totals of payments. In that consumer testing, in comparing the two mortgage loans, participants tended not to calculate for themselves the difference between the total of payments for the two loans (*i.e.*, the potential savings in choosing one loan over another), and use that amount to compare the two loans. Instead, participants tended to disregard the total of payments for both loans, because both totals were large numbers. Given the results of that consumer testing, the Board believes it is important to disclose the savings estimate on the periodic statement to focus consumers' attention explicitly on the potential savings of repaying the balance in 36 months.

3. *Minimum payment repayment estimate disclosed on the periodic statement is three years or less*. Under proposed § 226.7(b)(12)(i)(F), a credit card issuer would not be required to provide the disclosures related to repayment in 36 months if the minimum payment repayment estimate disclosed under proposed § 226.7(b)(12)(i)(B) is 3 years or less. The Board proposes this exemption pursuant to the Board's authority exception and exemption authorities under TILA Section 105(a) and (f). The Board has considered the statutory factors carefully, and based on that review, believes that the proposed exemption is appropriate. The Board believes that the estimated monthly payment for repayment in 36 months, and the total cost estimate for repayment in 36 months would not be useful and may be misleading to consumers where based on the minimum payments that would be due on the account, a consumer would be required to repay the outstanding balance in three years or less. For example, assume that based on the minimum payments due on an account, a consumer would repay his or her outstanding balance in two years if the consumer only makes minimum payments and take no additional advances. The consumer under the account terms would not have the option to repay the outstanding balance in 36 months (*i.e.*, 3 years). In this example, disclosure of the estimated monthly payment for repayment in 36 months and the total cost estimate for repayment in 36 months would be misleading, because under the account terms the consumer does not have the option to make the estimated monthly payment each month for 36 months. Requiring that this information be disclosed on the periodic statement where it might be misleading to consumers would undermine TILA's goal of consumer protection, and could make the credit process more expensive by requiring card issuers to incur costs to address customer confusion about these disclosures.

Toll-free telephone number. TILA Section 127(b)(11)(B)(iii), as revised by the Credit Card Act, requires that a creditor disclose on each periodic statement a toll-free telephone number at which the consumer may receive information about credit counseling and debt management services. 15 U.S.C. 1637(b)(11)(B)(iii). Proposed § 226.7(b)(12)(i)(E) provides that a credit card issuer generally must disclose on each periodic statement a toll-free telephone number where the consumer may obtain information about credit counseling services consistent with the requirements set forth in proposed § 226.7(b)(12)(iv). As discussed in more detail below, proposed § 226.7(b)(12)(iv) sets forth the information that a credit card issuer must provide through the toll-free telephone number.

7(b)(12)(ii) Negative or No Amortization

Negative or no amortization can occur if the required minimum payment is the same as or less than the total finance charges and other fees imposed during the billing cycle. Several major credit card issuers have established minimum payment requirements that prevent prolonged negative or no amortization. But some creditors may use a minimum payment formula that allows negative or no amortization (such as by requiring a payment of 2 percent of the outstanding balance, regardless of the finance charges or fees incurred).

The Credit Card Act appears to require the following disclosures even when negative or no amortization occurs: (1) A ''warning'' statement indicating that making only the minimum payment will increase the interest the consumer pays and the time it takes to repay the consumer's balance; (2) the number of months that it would take to repay the outstanding balance if the consumer pays only the required minimum monthly payments and if no further advances are made; (3) the total cost to the consumer, including interest and principal payments, of paying that balance in full, if the consumer pays only the required minimum monthly payments and if no further advances are made; (4) the monthly payment amount that would be required for the consumer to pay off the outstanding balance in 36 months, if no further advances are made, and the total cost to the consumer, including interest and principal payments, of paying that balance in full if the consumer pays the balance over 36 months; and (5) a toll-free telephone number at which the consumer may receive information about credit counseling and debt management services.

Nonetheless, for the reasons discussed in more detail below, the Board proposes to make adjustments to the above statutory requirements when negative or no amortization occurs, pursuant to the Board's authority under TILA Section 105(a) to make adjustments or exceptions to effectuate the purposes of TILA. 15 U.S.C. 1604(a). Specifically, when negative or no amortization occurs, the Board proposes in new § 226.7(b)(12)(ii) to require a credit card issuer to disclose to the consumer on the periodic statement the following information: (1) The following statement: ''Minimum Payment Warning: Even if you make no more charges using this card, if you make only the minimum payment each month we estimate you will never pay off the balance shown on this statement because your payment will be less than the interest charged each month''; (2) the following statement: ''If you make more than the minimum payment each period, you will pay less in interest and pay off your balance sooner''; (3) the estimated monthly payment for repayment in 36 months; (4) the fact that the card issuer estimates that the consumer will repay the outstanding balance shown on the periodic statement in 3 years if the consumer pays the estimated monthly payment each month for 3 years; and (5) the toll-free telephone number for obtaining information about credit counseling services.

When negative or no amortization occurs, the number of months to repay the balance shown on the statement if minimum payments are made and the total cost in interest and principal if the balance is repaid making only minimum payments cannot be calculated because the balance will never be repaid if only minimum payments are made. The Board proposes to replace these statutory disclosures with a warning

that the consumer will never repay the balance if making minimum payments each month.

In addition, if negative or no amortization occurs, card issuers would be required to disclose the following statement: ''If you make more than the minimum payment each period, you will pay less in interest and pay off your balance sooner.'' This sentence is similar to, and accomplishes the goals of, the statutory warning statement, by informing consumers that they can pay less interest and pay off the balance sooner if the consumer pays more than the minimum payment each month.

In addition, consistent with TILA Section 127(b)(11) as revised by the Credit Card Act, if negative or no amortization occurs, the Board proposes that the credit card issuer disclose to the consumer the estimated monthly payment for repayment in 36 months and a statement of the fact the card issuer estimates that the consumer will repay the outstanding balance shown on the periodic statement in 3 years if the consumer pays the estimated monthly payment each month for 3 years.

If negative or no amortization occurs, a card issuer, however, would not disclose the total cost estimate for repayment in 36 months, as described in proposed Appendix M1 to part 226. The Board proposes an exception to TILA's requirement to disclose the total cost estimate for repayment in 36 months pursuant to the Board's exception and exemption authorities under TILA Section 105(f).

The Board has considered each of the statutory factors carefully, and based on that review, believes that the proposed exemption is appropriate. As discussed above, when negative or no amortization occurs, a minimum payment cost estimate cannot be calculated because the balance shown on the statement will never be repaid if only minimum payments are made. Thus, under the proposal, a credit card issuer would not be required to disclose a minimum payment cost estimate as described in proposed Appendix M1 to part 226. Because the minimum payment cost estimate will not be disclosed when negative or no amortization occurs, the Board does not believe that the total cost estimate for repayment in 36 months would be useful to consumers. The Board believes that the total cost estimate for repayment in 36 months is useful when it can be compared to the minimum payment total cost estimate. Requiring that this information be disclosed on the periodic statement when it is not useful to consumers could distract consumers from more important information on the periodic statement, which could undermine TILA's goal of consumer protection.

7(b)(12)(iii) Format Requirements

As discussed above, TILA Section 127(b)(11)(D), as revised by the Credit Card Act, provides that the repayment disclosures (except for the warning statement) must be disclosed in the form and manner which the Board prescribes by regulation and in a manner that avoids duplication; and must be placed in a conspicuous and prominent location on the billing statement. 15 U.S.C. 1637(b)(11)(D). By regulation, the Board must require that the disclosure of the repayment information (except for the warning statement) be in the form of a table that contains clear and concise headings for each item of information and provides a clear and concise form stating each item of information required to be disclosed under each such heading. In prescribing the table, the Board must require that all the information in the table, and not just a reference to the table, be placed on the billing statement. In addition, the items required to be included in the table must be listed in the following order: (1) The minimum payment repayment estimate; (2) the minimum payment total cost estimate; (3) the estimated monthly payment for repayment in 36 months; (4) the total cost estimate for repayment in 36 months; and (5) the toll-free telephone number. In prescribing the table, the Board must use terminology different from that used in the statute, if such terminology is more easily understood and conveys substantially the same meaning.

Samples G–18(C)(1), G–18(C)(2) and G–18(C)(3). Proposed § 226.7(b)(12)(iii) provides that a credit card issuer must provide the repayment disclosures in a format substantially similar to proposed Samples G–18(C)(1), G–18(C)(2) and G–18(C)(3) in Appendix G to part 226, as applicable.

Proposed Sample G–18(C)(1) applies when amortization occurs and the minimum payment repayment estimate disclosed on the periodic statement is more than 3 years. In this case, as discussed above, a credit card issuer would be required under proposed § 226.7(b)(12) to disclose on the periodic statement: (1) The warning statement; (2) the minimum payment repayment estimate; (3) the minimum payment total cost estimate; (4) the fact that the minimum payment repayment estimate and the minimum payment total cost estimate are based on the current outstanding balance shown on the periodic statement, and the fact that the minimum payment repayment estimate and the minimum payment total cost estimate are based on the assumption that only minimum payments are made and no other amounts are added to the balance; (5) the estimated monthly payment for repayment in 36 months; (6) the total cost estimate for repayment in 36 months; (7) the savings estimate for repayment in 36 months; (8) the fact that the card issuer estimates that the consumer will repay the outstanding balance shown on the periodic statement in 3 years if the consumer pays the estimated monthly payment each month for 3 years; and (9) the toll-free telephone number for obtaining information about credit counseling services.

As shown in proposed Sample G–18(C)(1), a card issuer would be required to provide the following disclosures in the form of a table with headings, content and format substantially similar to proposed Sample G–18(C)(1): (1) The fact that the minimum payment repayment estimate and the minimum payment total cost estimate are based on the assumption that only minimum payments are made; (2) the minimum payment repayment estimate; (3) the minimum payment total cost estimate; (4) the estimated monthly payment for repayment in 36 months; (5) the fact the card issuer estimates that the consumer will repay the outstanding balance shown on the periodic statement in 3 years if the consumer pays the estimated monthly payment each month for 3 years; (6) total cost estimate for repayment in 36 months; and (7) the savings estimate for repayment in 36 months. The following information would be incorporated into the headings for the proposed table: (1) The fact that the minimum payment repayment estimate and the minimum payment total cost estimate are based on the current outstanding balance shown on the periodic statement; and (2) the fact that the minimum payment repayment estimate and the minimum payment total cost estimate are based on the assumption that no other amounts are added to the balance. The warning statement would be disclosed above the proposed table and the toll-free telephone number would be disclosed below the proposed table.

Proposed Sample G–18(C)(2) applies when amortization occurs and the minimum payment repayment estimate disclosed on the periodic statement is equal to or less than 3 years. In this case, as discussed above, a credit card issuer would be required under proposed § 226.7(b)(12) to disclose on the periodic statement: (1) The warning statement; (2) the minimum payment repayment estimate; (3) the minimum payment total cost estimate; (4) the fact

that the minimum payment repayment estimate and the minimum payment total cost estimate are based on the current outstanding balance shown on the periodic statement, and the fact that the minimum payment repayment estimate and the minimum payment total cost estimate are based on the assumption that only minimum payments are made and no other amounts are added to the balance; and (5) the toll-free telephone number for obtaining information about credit counseling services.

As shown in proposed Sample G–18(C)(2), disclosure of the above information would be similar in format to how this information is disclosed in proposed Sample G–18(C)(1). Specifically, as shown in proposed Sample G–18(C)(2), a card issuer would be required to disclose the following disclosures in the form of a table with headings, content and format substantially similar to proposed Sample G–18(C)(2): (1) The fact that the minimum payment repayment estimate and the minimum payment total cost estimate are based on the assumption that only minimum payments are made; (2) the minimum payment repayment estimate; and (3) the minimum payment total cost estimate. The following information would be incorporated into the headings for the proposed table: (1) The fact that the minimum payment repayment estimate and the minimum payment total cost estimate are based on the current outstanding balance shown on the periodic statement; and (2) the fact that the minimum payment repayment estimate and the minimum payment total cost estimate are based on the assumption that no other amounts are added to the balance. The warning statement would be disclosed above the proposed table and the toll-free telephone number would be disclosed below the proposed table.

Proposed Sample G–18(C)(3) applies when negative or no amortization occurs. In this case, as discussed above, a credit card issuer would be required under proposed § 226.7(b)(12) to disclose on the periodic statement: (1) The following statement: Minimum Payment Warning: Even if you make no more charges using this card, if you make only the minimum payment each month we estimate you will never pay off the balance shown on this statement because your payment will be less than the interest charged each month;'' (2) the following statement: ''If you make more than the minimum payment each period, you will pay less in interest and pay off your balance sooner;'' (3) the estimated monthly payment for repayment in 36 months; (4) the fact the card issuer estimates that the consumer will repay the outstanding balance shown on the periodic statement in 3 years if the consumer pays the estimated monthly payment each month for 3 years; and (5) the toll-free telephone number for obtaining information about credit counseling services.

As shown in proposed Sample G–18(C)(3), none of the above information would be required to be in the form of a table, notwithstanding TILA's requirement that the repayment information (except the warning statement) be in the form of a table. The Board proposes an exemption to this TILA requirement pursuant to the Board's authority exception and exemption authorities under TILA Section 105(a). The Board does not believe that the tabular format is a useful format for disclosing that negative or no amortization is occurring. The Board believes that a narrative format is better than a tabular format for communicating to consumers that making only minimum payments will not repay the balance shown on the periodic statement. For consistency, proposed Sample G–18(C)(3) also provides the disclosures about repayment in 36 months in a narrative form as well. To help ensure that consumers notice the disclosures about negative or no amortization and the disclosures about repayment in 36 months, the Board would require that card issuers disclose certain key information in bold text, as shown in proposed Sample G–18(C)(3).

As discussed above, TILA Section 127(b)(11)(D), as revised by the Credit Card Act, provides that the toll-free telephone number for obtaining credit counseling information must be disclosed in the table with: (1) The minimum payment repayment estimate; (2) the minimum payment total cost estimate; (3) the estimated monthly payment for repayment in 36 months; and (4) the total cost estimate for repayment in 36 months. As discussed above, the Board does not propose that the toll-free telephone number be in a tabular format. *See* proposed Samples G–18(C)(1), G–18(C)(2) and G–18(C)(3). The Board proposes this exemption pursuant to the Board's exception and exemption authorities under TILA Section 105(a), as discussed above. The Board believes that it might be confusing to consumers to include the toll-free telephone number in the table because it does not logically flow from the other information included in the table. To help ensure that the toll-free telephone number is noticeable to consumer, the Board proposes to require that the toll-free telephone number be grouped with the other repayment information.

Format requirements set forth in proposed § 226.7(b)(13). Proposed § 226.7(b)(12)(iii) also provides that a credit card issuer must provide the repayment disclosures in accordance with the format requirements of proposed § 226.7(b)(13). As discussed in more detail in the section-by-section analysis to proposed § 226.7(b)(13), the Board proposes in § 226.7(b)(13) to require that the repayment disclosures required to be disclosed under proposed § 226.7(b)(12) must be disclosed closely proximate to the minimum payment due. In addition, under the proposal, the repayment disclosures must be grouped together with the due date, late payment fee and annual percentage rate, ending balance, and minimum payment due, and this information must be disclosed on the front of the first page of the periodic statement.

7(b)(12)(iv) Provision of Information About Credit Counseling Services

Section 201(c) of the Credit Card Act requires the Board to issue guidelines by rule, in consultation with the Secretary of the Treasury, for the establishment and maintenance by creditors of the toll-free number disclosed on the periodic statement from which consumers can obtain information about accessing credit counseling and debt management services. The Credit Card Act requires that these guidelines ensure that consumers are referred ''only [to] those nonprofit and credit counseling agencies approved by a United States bankruptcy trustee pursuant to [11 U.S.C. 111(a)].'' The Board proposes to implement Section 201(c) of the Credit Card Act in § 226.7(b)(12)(iv). In developing this proposal, the Board consulted with the Treasury Department as well as the Executive Office for United States Trustees.

Prior to filing a bankruptcy petition, a consumer generally must have received ''an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted [the consumer] in performing a related budget analysis.'' 11 U.S.C. 109(h). This briefing can only be provided by ''nonprofit budget and credit counseling agencies that provide 1 or more [of these] services * * * [and are] currently approved by the United States trustee (or the bankruptcy administrator, if any).'' 11 U.S.C. 111(a)(1); *see also* 11 U.S.C. 109(h). In order to be approved to provide credit counseling services, an agency must, among other things: Be a nonprofit entity; demonstrate that it will

provide qualified counselors, maintain adequate provision for safekeeping and payment of client funds, and provide adequate counseling with respect to client credit problems; charge only a reasonable fee for counseling services and make such services available without regard to ability to pay the fee; and provide trained counselors who receive no commissions or bonuses based on the outcome of the counseling services. *See* 11 U.S.C. 111(c).

Proposed § 226.7(b)(12)(iv)(A) provides that a card issuer must provide through the toll-free telephone number disclosed pursuant to proposed § 226.7(b)(12)(i)(E) or (ii)(E) the name, street address, telephone number, and Web site address for at least three organizations that have been approved by the United States Trustee or a bankruptcy administrator pursuant to 11 U.S.C. 111(a)(1) to provide credit counseling services in the State in which the billing address for the account is located or the State specified by the consumer. In addition, proposed § 226.7(b)(12)(iv)(B) requires that, upon the request of the consumer and to the extent available from the United States Trustee or a bankruptcy administrator, the card issuer must provide the consumer with the name, street address, telephone number, and Web site address for at least one organization meeting the above requirements that provides credit counseling services in a language other than English that is specified by the consumer.

The United States Trustee collects the name, street address, telephone number, and Web site address for approved organizations and provides that information to the public through its Web site.[11] The United States Trustee's Web site organizes this information by State as well as by the language in which the organization can provide credit counseling services. For jurisdictions where credit counseling organizations are approved by a bankruptcy administrator pursuant to 11 U.S.C. 111(a)(1), a card issuer can obtain this information from the relevant administrator. Accordingly, the information that a card issuer is required to provide by proposed § 226.7(b)(12)(iv) is readily available.

Because different credit counseling organizations may provide different services and charge different fees, the Board believes that providing information regarding at least three approved organizations will enable consumers to make a choice about the organization that best suits their needs. However, the Board solicits comment on whether card issuers should provide information regarding a different number of approved organizations.

As proposed, § 226.7(b)(12)(iv) relies in two respects on the Board's authority under TILA Section 105(a) to make adjustments or exceptions to effectuate the purposes of TILA or to facilitate compliance therewith. *See* 15 U.S.C. 1604(a). First, although revised TILA Section 127(b)(11)(B)(iv) and Section 201(c)(1) of the Credit Card Act refer to the creditors' obligation to provide information about accessing ''credit counseling *and* debt management services,'' proposed § 226.7(b)(12)(iv) only requires the creditor to provide information about obtaining credit counseling services.[12] Although credit counseling may include information that assists the consumer in managing his or her debts, 11 U.S.C. 109(h) and 111(a)(1) do not require the United States Trustee or a bankruptcy administrator to approve organizations to provide debt management services. Because Section 201(c) of the Credit Card Act requires that creditors only provide information about organizations approved pursuant to 11 U.S.C. 111(a), the Board does not believe that Congress intended to require creditors to provide information about services that are not subject to that approval process. Accordingly, proposed § 226.7(b)(12)(iv) would not require card issuers to disclose information about debt management services.

Second, although Section 201(c)(2) of the Credit Card Act refers to credit counseling organizations approved pursuant to 11 U.S.C. 111(a), proposed § 226.7(b)(12)(iv) clarifies that creditors may provide information only regarding organizations approved pursuant to 11 U.S.C. 111(a)(1), which addresses the approval process for credit counseling organizations. In contrast, 11 U.S.C. 111(a)(2) addresses a different approval process for instructional courses concerning personal financial management.

Proposed comment 7(b)(12)(iv)–1 would clarify that, when providing the information required by § 226.7(b)(12)(iv)(A), the card issuer may use the billing address for the account or, at its option, allow the consumer to specify a State. The comment would also clarify that a card issuer does not satisfy the requirement to provide information regarding credit counseling agencies approved pursuant to 11 U.S.C. 111(a)(1) by providing information regarding providers that have been approved to offer personal financial management courses pursuant to 11 U.S.C. 111(a)(2).

Proposed comment 7(b)(12)(iv)–2 would clarify that a card issuer complies with the requirements of § 226.7(b)(12)(iv) if it provides the consumer with the information provided by the United States Trustee or a bankruptcy administrator, including information provided on the Web site operated by the United States Trustee. If, for example, the Web site address for an organization approved by the United States Trustee is not available from the Web site operated by the United States Trustee, a card issuer is not required to provide a Web site address for that organization. However, at least annually, the card issuer must verify and update the information it provides for consistency with the information provided by the United States Trustee or a bankruptcy administrator. The Board solicits comment on whether card issuers should be required to verify and update the credit counseling information they provide to consumers more or less frequently.

Proposed comment 7(b)(12)(iv)–3 would clarify that, at their option, card issuers may use toll-free telephone numbers that connect consumers to automated systems, such as an interactive voice response system, through which consumers may obtain the information required by § 226.7(b)(12)(iv) by inputting information using a touch-tone telephone or similar device.

Proposed comment 7(b)(12)(iv)–4 would clarify that a card issuer may provide a toll-free telephone number that is designed to handle customer service calls generally, so long as the option to receive the information required by § 226.7(b)(12)(iv) is prominently disclosed to the consumer. For automated systems, the option to receive the information required by § 226.7(b)(12)(iv) is prominently disclosed to the consumer if it is listed as one of the options in the first menu of options given to the consumer, such as ''Press or say '3' if you would like information about credit counseling services.'' If the automated system permits callers to select the language in which the call is conducted and in which information is provided, the menu to select the language may precede the menu with the option to receive information about accessing credit counseling services.

[11] *See* U.S Trustee Program, List of Credit Counseling Agencies Approved Pursuant to 11 U.S.C. 111 (available at *http://www.usdoj.gov/ust/eo/bapcpa/ccde/cc_approved.htm*).

[12] Similarly, proposed § 226.7(b)(12)(i)(E) and (ii)(E) only require a card issuer to disclose on the periodic statement a toll-free telephone number where the consumer may acquire from the card issuer information about obtaining credit counseling services.

Proposed comment 7(b)(12)(iv)–5 would clarify that, at their option, card issuers may use a third party to establish and maintain a toll-free telephone number for use by the issuer to provide the information required by § 226.7(b)(12)(iv).

Proposed comment 7(b)(12)(iv)–6 would clarify that, when providing the toll-free telephone number on the periodic statement pursuant to § 226.7(b)(12)(iv), a card issuer at its option may also include a reference to a Web site address (in addition to the toll-free telephone number) where its customers may obtain the information required by § 226.7(b)(12)(iv), so long as the information provided on the Web site complies with § 226.7(b)(12)(iv). The Web site address disclosed must take consumers directly to the Web page where information about accessing credit counseling may be obtained. In the alternative, the card issuer may disclose the Web site address for the Web page operated by the United States Trustee where consumers may obtain information about approved credit counseling organizations. Finally, proposed comment 7(b)(12)(iv)–7 would clarify that, if a consumer requests information about credit counseling services, the card issuer may not provide advertisements or marketing materials to the consumer (except for providing the name of the issuer) prior to providing the information required by § 226.7(b)(12)(iv). However, educational materials that do not solicit business are not considered advertisements or marketing materials for this purpose. The comment would also provide examples of how the restriction on the provision of advertisements and marketing materials applies in the context of the toll-free number and a Web page.

7(b)(12)(v) Exemptions

As explained above, the Board proposes that the repayment disclosures required under proposed § 226.7(b)(12) be provided only for a ''credit card account under an open-end (not home-secured) consumer credit plan,'' as that term is defined in proposed § 226.2(a)(15)(ii).

In addition, as discussed below, the Board proposes several additional exemptions from the repayment disclosure requirements pursuant to the Board's exception and exemption authorities under TILA Section 105(a) and (f).

As discussed in more detail below, the Board has considered the statutory factors carefully, and based on that review, believes that the following proposed exemptions are appropriate.

Exemption for charge cards. The Board proposes to exempt charge cards from the repayment disclosure requirements because the Board believes that the repayment disclosures would not be useful for consumers with charge card accounts. *See* proposed § 226.7(b)(12)(vii)(A). Charge cards are used in connection with an account on which outstanding balances cannot be carried from one billing cycle to another and are payable when a periodic statement is received.

Exemption where cardholders have paid their accounts in full for two consecutive billing cycles. In proposed § 226.7(b)(vii)(B), the Board proposes to provide that a card issuer is not required to include the repayment disclosures on the periodic statement for a particular billing cycle immediately following two consecutive billing cycles in which the consumer paid the entire balance in full, had a zero balance or had a credit balance. The Board believes this approach strikes an appropriate balance between benefits to consumers of the repayment disclosures, and compliance burdens on issuers in providing the disclosures. Consumers who might benefit from the repayment disclosures would receive them. Consumers who carry a balance each month would always receive the repayment disclosures, and consumers who pay in full each month would not. Consumers who sometimes pay their bill in full and sometimes do not would receive the repayment disclosures if they do not pay in full two consecutive months (cycles). Also, if a consumer's typical payment behavior changes from paying in full to revolving, the consumer would begin receiving the repayment disclosures after not paying in full one billing cycle, when the disclosures would appear to be useful to the consumer. In addition, credit card issuers typically provide a grace period on new purchases to consumers (that is, creditors do not charge interest to consumers on new purchases) if consumers paid both the current balance and the previous balance in full. Thus, card issuers already currently capture payment history for consumers for two consecutive months (or cycles).

The Board notes that card issuers would not be required to use this proposed exemption. A card issuer would be allowed to provide the repayment disclosures to all of its cardholders, even to those cardholders that fall within this proposed exemption. If issuers choose to provide voluntarily the repayment disclosures to those cardholders that fall within this exemption, the Board would expect issuers to follow the disclosure rules set forth in proposed § 226.7(b)(12), the accompanying commentary, and proposed Appendix M1 to part 226 for those cardholders.

Exemption where minimum payment would pay off the entire balance for a particular billing cycle. In proposed § 226.7(b)(12)(v)(C), the Board proposes to exempt a card issuer from providing the repayment disclosure requirements for a particular billing cycle where paying the minimum payment due for that billing cycle will pay the outstanding balance on the account for that billing cycle. For example, if the entire outstanding balance on an account for a particular billing cycle is $20 and the minimum payment is $20, an issuer would not need to comply with the repayment disclosure requirements for that particular billing cycle. The Board believes that the repayment disclosures would not be helpful to consumers in this context.

Other exemptions. In the January 2009 Regulation Z Rule, the Board in § 226.7(b)(12)(v)(E) exempted a credit card account from the minimum payment disclosure requirements where a fixed repayment period for the account is specified in the account agreement and the required minimum payments will amortize the outstanding balance within the fixed repayment period. This exemption would be applicable to, for example, accounts that have been closed due to delinquency and the required monthly payment has been reduced or the balance decreased to accommodate a fixed payment for a fixed period of time designed to pay off the outstanding balance. *See* comment 7(b)(12)(v)–1.

In addition, in the January 2009 Regulation Z Rule, the Board in § 226.7(b)(12)(v)(F) exempted credit card issuers from providing the minimum payment disclosures on periodic statements in a billing cycle where the entire outstanding balance held by consumers in that billing cycle is subject to a fixed repayment period specified in the account agreement and the required minimum payments applicable to that balance will amortize the outstanding balance within the fixed repayment period. Some retail credit cards have several credit features associated with the account. One of the features may be a general revolving feature, where the required minimum payment for this feature does not pay off the balance in a specific period of time. The card also may have another feature that allows consumers to make specific types of purchases (such as furniture purchases, or other large purchases), and the required minimum payments for that feature will pay off the purchase

within a fixed period of time, such as one year. This exemption was meant to cover retail cards where the entire outstanding balance held by a consumer in a particular billing cycle is subject to a fixed repayment period specified in the account agreement. On the other hand, this exemption would not have applied in those cases where all or part of the consumer's balance for a particular billing cycle is held in a general revolving feature, where the required minimum payment for this feature does not pay off the balance in a specific period of time set forth in the account agreement. *See* comment 7(b)(12)(v)–2.

In adopting these two exemptions to the minimum payment disclosure requirements in the January 2009 Regulation Z Rule, the Board stated that in these two situations, the minimum payment disclosure does not appear to provide additional information to consumers that they do not already have in their account agreements.

The Board proposes not to include these two exemptions in proposed § 226.7(b)(12)(v). In implementing Section 201 of the Credit Card Act, proposed § 226.7(b)(12) would require additional repayment information beyond the disclosure of the estimated length of time it would take to repay the outstanding balance if only minimum payments are made, which was the main type of information that was required to be disclosed under the January 2009 Regulation Z Rule. As discussed above, under proposed § 226.7(b)(12)(i), a card issuer would be required to disclose on the periodic statement information about the total costs in interest and principal to repay the outstanding balance if only minimum payments are made, and information about repayment of the outstanding balance in 36 months. Consumers would not know from the account agreements this additional information about the total cost in interest and principal of making minimum payments, and information about repayment of the outstanding balance in 36 months. Thus, these two exemptions may no longer be appropriate given the additional repayment information that must be provided on the periodic statement pursuant to proposed § 226.7(b)(12). Nonetheless, the Board solicits comment on whether these exemptions should be retained. For example, the Board solicits comment on whether the repayment disclosures relating to repayment in 36 months would be helpful where a fixed repayment period longer than 3 years is specified in the account agreement and the required minimum payments will amortize the outstanding balance within the fixed repayment period. For these types of accounts, the Board solicits comment on whether consumers tend to enter into the agreement with the intent (and the ability) to repay the account balance over the life of the account, such that the disclosures for repayment of the account in 36 months would not be useful to consumers.

7(b)(13) Format Requirements

Under the January 2009 Regulation Z Rule, creditors offering open-end (not home-secured) plans are required to disclose the payment due date (if a late payment fee or penalty rate may be imposed) on the front side of the first page of the periodic statement. The amount of any late payment fee and penalty APR that could be triggered by a late payment is required to be disclosed in close proximity to the due date. In addition, the ending balance and the minimum payment disclosures must be disclosed closely proximate to the minimum payment due. Also, the due date, late payment fee, penalty APR, ending balance, minimum payment due, and the minimum payment disclosures must be grouped together. *See* § 226.7(b)(13). In the supplementary information to the January 2009 Regulation Z Rule, the Board stated that these formatting requirements were intended to fulfill Congress' intent to have the due date, late payment and minimum payment disclosures enhance consumers' understanding of the consequences of paying late or making only minimum payments, and were based on consumer testing conducted for the Board in relation to the January 2009 Regulation Z Rule that indicated improved understanding when related information is grouped together. For the reasons described below, the Board proposes to retain these format requirements, with several revisions. Proposed Sample G–18(D) in Appendix G to part 226 illustrates the proposed requirements.

Due date and late payment disclosures. As discussed above under the section-by-section analysis to proposed § 226.7(b)(11), Section 202 of the Credit Card Act amends TILA Section 127(b)(12) to provide that for a ''credit card account under an open-end consumer credit plan,'' a creditor that charges a late payment fee must disclose in a conspicuous location on the periodic statement (1) the payment due date, or, if the due date differs from when a late payment fee would be charged, the earliest date on which the late payment fee may be charged, and (2) the amount of the late payment fee. In addition, if a late payment may result in an increase in the APR applicable to the credit card account, a creditor also must provide on the periodic statement a disclosure of this fact, along with the applicable penalty APR. The disclosure related to the penalty APR must be placed in close proximity to the due-date disclosure discussed above.

Consistent with TILA Section 127(b)(12), as revised by the Credit Card Act, the Board proposes to retain the requirement in § 226.7(b)(13) that credit card issuers disclose the payment due date on the front side of the first page of the periodic statement. In addition, credit card issuers would be required to disclose the amount of any late payment fee and penalty APR that could be triggered by a late payment in close proximity to the due date. Also, the due date, late payment fee, penalty APR, ending balance, minimum payment due, and the repayment disclosures required by proposed § 226.7(b)(12) must be grouped together. *See* § 226.7(b)(13). The Board believes that these format requirements fulfill Congress' intent that the due date and late payment disclosures be grouped together and be disclosed in a conspicuous location on the periodic statement.

Repayment disclosures. As discussed above under the section-by-section analysis to proposed § 226.7(b)(12), TILA Section 127(b)(11)(D), as revised by the Credit Card Act, provides that the repayment disclosures (except for the warning statement) must be disclosed in the form and manner which the Board prescribes by regulation and in a manner that avoids duplication; and must be placed in a conspicuous and prominent location on the billing statement. 15 U.S.C. 1637(b)(11)(D).

Under proposed § 226.7(b)(13), the ending balance and the repayment disclosures required under proposed § 226.7(b)(12) must be disclosed closely proximate to the minimum payment due. In addition, proposed § 226.7(b)(13) provides that the repayment disclosures must be grouped together with the due date, late payment fee, penalty APR, ending balance, and minimum payment due, and this information must appear on the front of the first page of the periodic statement. The Board believes that these proposed format requirements fulfill Congress' intent that the repayment disclosures be placed in a conspicuous and prominent location on the billing statement.

Samples G–18(D), 18(E), 18(F) and 18(G). As adopted in the January 2009 Regulation Z Rule, Samples G–18(D) and G–18(E) in Appendix G to part 226 illustrate the requirement to group together the due date, late payment fee,

penalty APR, ending balance, minimum payment due, and the repayment disclosures required by § 226.7(b)(12). Sample G–18(D) applies to credit cards and includes all of the above disclosures grouped together. Sample G–18(E) applies to non-credit card accounts, and includes all of the above disclosures except for the repayment disclosures because the repayment disclosures only apply to credit card accounts. Samples G–18(F) and G–18(G) illustrate the front side of sample periodic statements and show the disclosures listed above.

The Board proposes to revise Sample G–18(D), G–18(F) and G–18(G) to incorporate the new format requirements for the repayment disclosures, as shown in proposed Sample G–18(C)(1) and G–18(C)(2). *See* section-by-section analysis to proposed § 226.7(b)(12) for a discussion of these new format requirements. In addition, the Board proposes to delete Sample G–18(E) (which applies to non-credit card accounts) as unnecessary. Under the proposal, the formatting requirements in proposed § 226.7(b)(13) generally are applicable only to credit card issuers because the due date, late payment fee, penalty APR, and repayment disclosures would apply only to a ''credit card account under an open-end (not home-secured) consumer credit plan,'' as that term is defined in proposed § 226.2(a)(15)(ii).

7(b)(14) Deferred Interest or Similar Transactions

In the May 2009 Regulation Z Proposed Clarifications, the Board proposed revisions to comment 7(b)–1 to require creditors to provide consumers with information regarding deferred interest or similar balances on which interest may be imposed under a deferred interest or similar program, as well as the interest charges accruing during the term of a deferred interest or similar program. 74 FR 20797–20798. The Board also proposed to add a new § 226.7(b)(14) to require creditors to include on a consumer's periodic statement, for two billing cycles immediately preceding the date on which deferred interest or similar transactions must be paid in full in order to avoid the imposition of interest charges, a disclosure that the consumer must pay such transactions in full by that date in order to avoid being obligated for the accrued interest. 74 FR 20793. Furthermore, to provide additional guidance on compliance with the disclosure requirement set forth in proposed § 226.7(b)(14), the Board proposed several complementary changes to comment 7(b)–1.

Moreover, proposed Sample G–18(H) provided model language for making the disclosure required by proposed § 226.7(b)(14), and the Board proposed that the language used to make the disclosure under § 226.7(b)(14) would be required to be substantially similar to Sample G–18(H). 74 FR 20797. Finally, the Board proposed conforming technical changes to comment 5(b)(2)(ii)–1, which cross-references comment 7(b)-1. 74 FR 20797. The Board is republishing these same revisions for additional comment in this **Federal Register** notice, with some technical changes to account for the fact that related provisions previously set forth in the January 2009 FTC Act Final Rule, and proposed in the May 2009 FTC Act Rule Proposed Clarifications, have been modified and proposed in this **Federal Register** notice under Regulation Z.

Section 226.9 Subsequent Disclosure Requirements

9(c) Change in Terms

Section 226.9(c) sets forth the advance notice requirements when a creditor changes the terms applicable to a consumer's account. As discussed below, the Board is proposing several changes to § 226.9(c)(2) as adopted in the January 2009 Regulation Z Rule and the associated staff commentary in order to conform to the new requirements of the Credit Card Act.

9(c)(1) Rules Affecting Home-Equity Plans

In the January 2009 Regulation Z Rule, the Board preserved the existing rules for changes in terms for home-equity lines of credit in a new § 226.9(c)(1), in order to clearly delineate the requirements for HELOCs from those applicable to other open-end credit. The Board noted that possible revisions to rules affecting HELOCs would be considered in the Board's review of home-secured credit, which was underway at the time that the January 2009 Regulation Z rule was published. On August 26, 2009, the Board published proposed revisions to those portions of Regulation Z affecting HELOCs in the **Federal Register**. As discussed in I. Background and Implementation of the Credit Card Act, in order to clarify that this proposed rule is not intended to amend or otherwise affect the August 2009 Regulation Z HELOC Proposal, the Board is not republishing § 226.9(c)(1) in this **Federal Register** notice.

The Board anticipates, however, that a final rule will be issued with regard to this proposal prior to completion of final rules regarding HELOCs. Therefore, the Board anticipates that it will include § 226.9(c)(1), as adopted in the January 2009 Regulation Z Rule, in its final rulemaking based on this proposal, to give HELOC creditors guidance on how to comply with change-in-terms requirements between the effective date of this rule and the effective date of the forthcoming HELOC rules.

9(c)(2) Rules Affecting Open-End (Not Home-Secured) Plans

Credit Card Act [13]

New TILA Section 127(i)(1) generally requires creditors to provide consumers with a written notice of an annual percentage rate increase at least 45 days prior to the effective date of the increase, for credit card accounts under an open-end consumer credit plan. 15 U.S.C. 1637(i)(1). The statute establishes several exceptions to this general requirement. 15 U.S.C. 1637(i)(1) and (i)(2). The first exception applies when the change is an increase in an annual percentage rate upon expiration of a specified period of time, provided that prior to commencement of that period, the creditor clearly and conspicuously disclosed to the consumer the length of the period and the rate that would apply after expiration of the period. The second exception applies to increases in variable annual percentage rates that change according to operation of a publicly available index that is not under the control of the creditor. Finally, a third exception applies to rate increases due to the completion of, or failure of a consumer to comply with, the terms of a workout or temporary hardship arrangement, provided that prior to the commencement of such arrangement the creditor clearly and conspicuously disclosed to the consumer the terms of the arrangement, including any increases due to completion or failure.

In addition to the rules in new TILA Section 127(i)(1) regarding rate increases, new TILA Section 127(i)(2) establishes a 45-day advance notice

[13] For convenience, this section summarizes the provisions of the Credit Card Act that apply both to advance notices of changes in terms and rate increases. Consistent with the approach it took in the January 2009 Regulation Z Rule and the July 2009 Regulation Z Interim Final Rule, the Board is implementing the advance notice requirements applicable to contingent rate increases set forth in the cardholder agreement in a separate section (§ 226.9(g)) from those advance notice requirements applicable to changes in the cardholder agreement (§ 226.9(c)). The distinction between these types of changes is that § 226.9(g) addresses changes in a rate being applied to a consumer's account consistent with the existing terms of the cardholder agreement, while § 226.9(c) addresses changes in the underlying terms of the agreement.

requirement for significant changes, as determined by rule of the Board, in the terms (including an increase in any fee or finance charge) of the cardholder agreement between the creditor and the consumer. 15 U.S.C. 1637(i)(2).

New TILA Section 127(i)(3) also establishes an additional content requirement for notices of interest rate increases or significant changes in terms provided pursuant to new TILA Section 127(i). 15 U.S.C. 1637(i)(3). Such notices are required to contain a brief statement of the consumer's right to cancel the account, pursuant to rules established by the Board, before the effective date of the rate increase or other change disclosed in the notice. In addition, new TILA Section 127(i)(4) states that closure or cancellation of an account pursuant to the consumer's right to cancel does not constitute a default under the existing cardholder agreement, and does not trigger an obligation to immediately repay the obligation in full or through a method less beneficial than those listed in revised TILA Section 171(c)(2). 15 U.S.C. 1637(i)(4). The disclosure associated with the right to cancel is discussed in the section-by-section analysis to § 226.9(c) and (g), while the substantive rules regarding this new right are discussed in the section-by-section analysis to § 226.9(h).

The Board implemented TILA Section 127(i), which was effective August 20, 2009, in the July 2009 Regulation Z Interim Final Rule. However, the Board is now proposing to implement additional provisions of the Credit Card Act that are effective on February 22, 2010 that have an impact on the content of change-in-terms notices and the types of changes that are permissible upon provision of a change-in-terms notice pursuant to § 226.9(c) or (g). For example, revised TILA Section 171(a), which the Board proposes to implement in a new § 226.55, as discussed elsewhere in this **Federal Register** notice generally prohibits increases in annual percentage rates, fees, and finance charges applicable to outstanding balances, subject to several exceptions. In addition, revised TILA Section 171(b) requires, for certain types of penalty rate increases, that the advance notice state the reason for a rate increase. Finally, for penalty rate increases applied to outstanding balances when the consumer fails to make a minimum payment within 60 days after the due date, as permitted by revised TILA Section 171(b)(4), a creditor will be required to disclose in the notice of the increase that the increase will be terminated if the consumer makes the subsequent six minimum payments on time.

January 2009 Regulation Z Rule and July 2009 Regulation Z Interim Final Rule

As discussed in I. Background and Implementation of the Credit Card Act, the Board is proposing to implement the changes contained in the Credit Card Act in a manner consistent with the January 2009 Regulation Z Rule, to the extent permitted under the statute. Accordingly, the Board is proposing to retain those requirements of the January 2009 Regulation Z Rule that are not directly affected by the Credit Card Act in this rulemaking, concurrently with the promulgation of regulations implementing the provisions of the Credit Card Act effective February 22, 2010.[14] Consistent with this approach, the Board is proposing to use § 226.9(c)(2) of the January 2009 Regulation Z Rule as the basis for its regulations to implement the change-in-terms requirements of the Credit Card Act. Proposed § 226.9(c)(2) also is intended, except where noted, to contain requirements that are substantively equivalent to the requirements of the July 2009 Regulation Z Interim Final Rule. Accordingly, the Board is proposing to adopt a revised version of § 226.9(c)(2) of the January 2009 Regulation Z Rule, with several amendments necessary to conform to the new Credit Card Act. While the Board is republishing revised § 226.9(c)(2) and the associated commentary in its entirety, this supplementary information will focus on highlighting those aspects in which proposed § 226.9(c)(2) differs from § 226.9(c)(2) of the January 2009 Regulation Z Rule.

May 2009 Regulation Z Proposed Clarifications

On May 5, 2009, the Board published for comment in the **Federal Register** proposed clarifications to the January 2009 Regulation Z Rule. *See* 74 FR 20784. Several of these proposed clarifications pertain to the advance notice requirements in § 226.9(c). The Board is republishing the May 2009 Regulation Z Proposed Clarifications that affect proposed § 226.9(c)(2), with revisions to the extent appropriate, as discussed further in this supplementary information.

9(c)(2)(i) Changes Where Written Advance Notice Is Required

Section § 226.9(c)(2) sets forth the change-in-terms notice requirements for open-end consumer credit plans that are not home-secured. Proposed paragraph (c)(2)(i) states that a creditor must generally provide a written notice at least 45 days prior to the change, when any term required to be disclosed under § 226.6(b)(3), (b)(4), or (b)(5) is changed or the required minimum periodic payment is increased, unless an exception applies. This rule is intended to be substantively equivalent to § 226.9(c)(2) of the January 2009 Regulation Z Rule. The exceptions, as discussed below, are set forth in proposed paragraph (c)(2)(v). In addition, paragraph (c)(2)(iii) provides that 45 days' advance notice is not required for those changes that the Board is not designating as ''significant changes'' in terms using its authority under new TILA Section 127(i). Proposed § 226.9(c)(2)(iii), which is discussed in more detail in this supplementary information, also is intended to be equivalent in substance to the Board's January 2009 Regulation Z Rule.

Proposed § 226.9(c)(2)(i) sets forth two additional clarifications of the scope of the change-in-terms notice requirements, consistent with § 226.9(c)(2) of the January 2009 Regulation Z Rule and the July 2009 Regulation Z Interim Final Rule. First, the 45-day advance notice requirement does not apply if the consumer has agreed to the particular change; in that case, the notice need only be given before the effective date of the change. Second, proposed § 226.9(c)(2) also notes that increases in the rate applicable to a consumer's account due to delinquency, default, or as a penalty described in § 226.9(g) that are not made by means of a change in the contractual terms of a consumer's account must be disclosed pursuant to that section.

The Board notes that proposed § 226.9(c)(2) would apply to all open-end (not home-secured) credit, consistent with the January 2009 Regulation Z Rule. TILA Section 127(i), as adopted by the Credit Card Act and as implemented in the July 2009 Regulation Z Interim Final Rule for the period between August 20, 2009 and February 22, 2010, applies only to credit card accounts. However, the advance notice requirements adopted by the Board in January 2009 apply to all open-end (not home-secured) credit. For

[14] However, as discussed in I. Background and Implementation of the Credit Card Act, the Board intends to leave in place the mandatory compliance date for certain aspects of proposed § 226.9(c)(2) that are not directly required by the Credit Card Act. These provisions would have a mandatory compliance date of July 1, 2010, consistent with the effective date that the Board adopted in the January 2009 Regulation Z Rule. For example, the Board is not proposing to require a tabular format for certain change-in-terms notice requirements before the July 1, 2010 effective date.

consistency with the January 2009 Regulation Z Rule, the proposal accordingly would apply § 226.9(c)(2) to all open-end (not home-secured) credit. The Board notes that while the general notice requirements are consistent for credit card accounts and other open-end credit that is not home-secured, there are certain content and other requirements, such as a consumer's right to reject certain changes in terms, that apply only to credit card accounts. As discussed in more detail in the supplementary information to § 226.9(c)(2)(iv), the regulation would apply such requirements only to credit card accounts.

9(c)(2)(ii) Significant Changes in Account Terms

Pursuant to new TILA Section 127(i), the Board has the authority to determine by rule what are significant changes in the terms of the cardholder agreement between a creditor and a consumer. The Board is proposing § 226.9(c)(2)(ii) to identify which changes are significant changes in terms. Similar to the January 2009 Regulation Z Rule, § 226.9(c)(2)(ii) would state that for the purposes of § 226.9(c), a significant change in account terms means changes to terms required to be disclosed in the table provided at account opening pursuant to § 226.6(b)(1) and (b)(2). The terms included in the account-opening table are those that the Board determined, based on its consumer testing, to be the most important to consumers. In the July 2009 Regulation Z Interim Final Rule, the Board had expressly listed these terms in § 226.9(c)(2)(ii). Because § 226.6(b) was not in effect as of August 20, 2009, the Board could not identify these terms by a cross-reference to § 226.6(b). However, proposed § 226.9(c)(2)(ii) is intended to be substantively equivalent to the list of terms included in § 226.9(c)(2)(ii) of the July 2009 Regulation Z Interim Final Rule. However, for clarity, the Board is proposing to amend the text of § 226.9(c)(2)(ii) to cross-reference the requirements of § 226.6(b)(1) and (b)(2).

9(c)(2)(iii) Charges Not Covered by § 226.6(b)(1) and (b)(2)

Proposed § 226.9(c)(2)(iii) sets forth the disclosure requirements for changes in terms required to be disclosed under § 226.6(b)(3) that are not significant changes in account terms as described in § 226.9(c)(2)(ii). Consistent with TILA Section 127(i), the Board is only proposing a 45-day notice period for changes in the terms that are required to be disclosed as a part of the account-opening table under proposed § 226.6(b)(1) and (b)(2) or for increases in the required minimum periodic payment. A different disclosure requirement would apply when a creditor increases any component of a charge, or introduces a new charge, that is imposed as part of the plan under proposed § 226.6(b)(3) but is not required to be disclosed as part of the account-opening summary table under proposed § 226.6(b)(1) and (b)(2). Under those circumstances, the proposal would require the creditor to either, at its option (1) provide at least 45 days' written advance notice before the change becomes effective, or (2) provide notice orally or in writing of the amount of the charge to an affected consumer at a relevant time before the consumer agrees to or becomes obligated to pay the charge. This is consistent with the requirements of both the January 2009 Regulation Z Rule and the July 2009 Regulation Z Interim Final Rule.

9(c)(2)(iv) Disclosure Requirements

Proposed § 226.9(c)(2)(iv) contains the content and formatting requirements for change-in-terms notices required to be given for significant changes in account terms pursuant to proposed § 226.9(c)(2)(i). Proposed § 226.9(c)(2)(iv)(A) sets forth the content that would be required in notices under § 226.9(c)(2)(i) for all open-end (not home-secured) credit and mirrors the content required to be disclosed in change-in-terms notices pursuant to the Board's January 2009 Regulation Z Rule. Notices provided pursuant to § 226.9(c)(2)(i) would be required to include (1) a summary of the changes made to terms required by § 226.6(b)(1) and (b)(2) or of any increase in the required minimum periodic payment, (2) a statement that changes are being made to the account, (3) for accounts other than credit card accounts under an open-end consumer credit plan subject to § 226.9(c)(2)(iv)(B), a statement indicating that the consumer has the right to opt out of these changes, if applicable, and a reference to additional information describing the opt-out right provided in the notice, if applicable, (4) the date the changes will become effective, (5) if applicable, a statement that the consumer may find additional information about the summarized changes, and other changes to the account, in the notice, (6) if the creditor is changing a rate on the account other than a penalty rate, a statement that if a penalty rate currently applies to the consumer's account, the new rate referenced in the notice does not apply to the consumer's account until the consumer's account balances are no longer subject to the penalty rate, and (7) if the change in terms being disclosed is an increase in an annual percentage rate, the balances to which the increased rate will be applied and, if applicable, a statement identifying the balances to which the current rate will continue to apply as of the effective date of the change in terms.

The content required by proposed § 226.9(c)(2)(iv)(A) generally mirrors the content required under § 226.9(c)(2)(iii) of the January 2009 Regulation Z Rule. Creditors would be required to disclose information regarding the balances to which the increased rate will apply as well as a statement, if applicable, identifying balances to which the current rate will continue to apply as of the effective date of the increase. This content was not included in the July 2009 Regulation Z Interim Final Rule because at that time there were no substantive limitations regarding rate increases equivalent to those in proposed § 226.55. However, consistent with the January 2009 Regulation Z Rule, the Board believes that a statement identifying to which balances an increased rate will apply to is an important disclosure in light of § 226.55, in order to permit consumers to make informed decisions about their account usage.

In addition, the Board is proposing to require a disclosure regarding any applicable right to opt out of changes under proposed § 226.9(c)(2)(iv)(A)(3) only if the change is being made to an open-end (not home-secured) credit plan that is not a credit card account subject to § 226.9(c)(2)(iv)(B). For credit card accounts, as discussed below and in the supplementary information to §§ 226.9(h) and 226.55, the Credit Card Act imposes independent substantive limitations on rate increases, and generally provides the consumer with a right to reject other significant changes being made to their accounts. A disclosure of this right to reject, when applicable, is required for credit card accounts under proposed § 226.9(c)(2)(iv)(B). Therefore, the Board believes a separate reference to other applicable opt-out rights is unnecessary and may be confusing to consumers, when the notice is given in connection with a change in terms applicable to a credit card account.

Proposed § 226.9(c)(2)(iv)(B) sets forth additional content requirements that are applicable only to credit card accounts under an open-end (not home-secured) consumer credit plan. In addition to the information required to be disclosed pursuant to § 226.9(c)(2)(iv)(A), credit card issuers making significant changes to terms must also disclose certain information regarding the consumer's right to reject the change pursuant to

§ 226.9(h). The substantive rule regarding the right to reject is discussed in connection with proposed § 226.9(h); however, the associated disclosure requirements are set forth in § 226.9(c)(2). In particular, a card issuer must generally include in the notice (1) a statement that the consumer has the right to reject the change or changes prior to the effective date, unless the consumer fails to make a required minimum periodic payment within 60 days after the due date for that payment, (2) instructions for rejecting the change or changes, and a toll-free telephone number that the consumer may use to notify the creditor of the rejection, and (3) if applicable, a statement that if the consumer rejects the change or changes, the consumer's ability to use the account for further advances will be terminated or suspended. Section 226.9(c)(2)(iv)(B) mirrors requirements made applicable to credit card issuers in the July 2009 Regulation Z Interim Final Rule, with several amendments discussed below.

As discussed in the supplementary information to § 226.9(h), the Board is proposing that a consumer's right to reject would not extend to increases in the required minimum payment, an increase in an annual percentage rate applicable to a consumer's account, a change in the balance computation method applicable to a consumer's account necessary to comply with the new prohibition on use of ''two-cycle'' balance computation methods in proposed § 226.54, or changes due to the creditor not receiving the consumer's required minimum periodic payment within 60 days after the due date for that payment. The July 2009 Regulation Z Interim Final Rule similarly excluded increases in a consumer's minimum payment from being subject to the right to reject. The Board also is proposing that the right to reject not apply to rate increases, because consumers will automatically receive the protections against rate increases applicable to their balances under proposed § 226.55 without being required to take any action to reject the change. The Board recognizes that it would be an anomalous result for consumers to be able to reject a change in balance computation that is expressly required under the Credit Card Act and implementing rules. Finally, the Board would clarify that, as stated in proposed § 226.9(h)(3), the right to reject does not apply when the account is more than 60 days delinquent. Accordingly, for these types of changes creditors would not be required to give the disclosures associated with the right to reject in § 226.9(c)(2)(iv)(B).

Proposed § 226.9(c)(2)(iv)(C) sets forth the formatting requirements that would apply to notices required to be given pursuant to § 226.9(c)(2)(i). The proposed formatting requirements are generally the same as those that the Board adopted in § 226.9(c)(2)(iii) of the January 2009 Regulation Z Rule, except that the reference to the content of the notice would include, when applicable, the information about the right to reject that credit card issuers must disclose pursuant to § 226.9(c)(2)(iv)(B). These formatting requirements are not affected by the Credit Card Act, and therefore the Board proposes to adopt them generally as adopted in January 2009. Accordingly, as discussed in I. Background and Implementation of the Credit Card Act, the Board is considering making these formatting requirements mandatory beginning on July 1, 2010, consistent with the effective date adopted for the January 2009 Regulation Z Rule. In addition, the Board is proposing to publish revised model forms that would reflect the new disclosure of the right to reject, when applicable.

The Board is proposing to amend Sample G–20 and to add a new sample G–21 to illustrate how a card issuer may comply with the requirements of proposed § 226.9(c)(2)(iv). The Board would amend references to these samples in § 226.9(c)(2)(iv) and comment 9(c)(2)(iv)–8 accordingly. Proposed Sample G–20 is a disclosure of a rate increase applicable to a consumer's credit card account. The sample explains when the new rate will apply to new transactions and to which balances the current rate will continue to apply. Sample G–21 illustrates an increase in the consumer's late payment and returned payment fees, and sets forth the content required in order to disclose the consumer's right to reject those changes.

9(c)(2)(v) Notice Not Required

The Board is proposing § 226.9(c)(2)(v) to set forth the exceptions to the general change-in-terms notice requirements for open-end (not home-secured) credit. With several exceptions noted below, proposed § 226.9(c)(2)(v) is intended to be substantively equivalent to § 226.9(c)(2)(v) of the July 2009 Regulation Z Interim Final Rule. Proposed § 226.9(c)(2)(v)(A) would retain several exceptions that are in current § 226.9(c), including charges for documentary evidence, reductions of finance charges, suspension of future credit privileges (except as provided in § 226.9(c)(vi), discussed below), termination of an account or plan, or when the change results from an agreement involving a court proceeding. The Board is not including these changes in the set of ''significant changes'' giving rise to notice requirements pursuant to new TILA Section 127(i)(2). The Board believes that 45 days' advance notice is not necessary for these changes, which are not of the type that generally result in the imposition of a fee or other charge on a consumer's account that could come as a costly surprise. In addition, the Board believes that for safety and soundness reasons, issuers generally have a legitimate interest in suspending credit privileges or terminating an account or plan when a consumer's creditworthiness deteriorates, and that 45 days' advance notice of these types of changes therefore would not be appropriate.

Proposed § 226.9(c)(2)(v)(B) sets forth an exception contained in the Credit Card Act for increases in annual percentage rates upon the expiration of a specified period of time, provided that prior to the commencement of that period, the creditor disclosed to the consumer clearly and conspicuously in writing the length of the period and the annual percentage rate that would apply after that period. As discussed below, this disclosure would be required to be provided in close proximity and equal prominence to any disclosure of the rate that applies during that period, ensuring that it would be provided at the same time the consumer is informed of the temporary rate. In addition, in order to fall within this exception, the annual percentage rate that applies after the period ends may not exceed the rate previously disclosed.

The exception generally mirrors the statutory language, except for two additional requirements. First, the Board's proposal expressly provides, consistent with July 2009 Regulation Z Interim Final Rule and the standard for Regulation Z disclosures under Subpart B that the disclosure of the period and annual percentage rate that will apply after the period is generally required to be in writing. *See* § 226.5(a)(1). Second, pursuant to its authority under TILA Section 105(a) to prescribe regulations to effectuate the purposes of TILA, the Board is proposing to require that the disclosure of the length of the period and the annual percentage rate that would apply upon expiration of the period be set forth in close proximity and equal prominence to any disclosure of the rate that applies during the specified period of time. 15 U.S.C. 1604(a). The Board believes that both of

these requirements are appropriate in order to ensure that consumers receive, comprehend, and are able to retain the disclosures regarding the rates that will apply to their transactions.

Proposed comment 9(c)(2)(v)–5 clarifies the timing of the disclosure requirements for telephone purchases financed by a merchant or private label credit card issuer. The Board is aware that the general requirement in the July 2009 Regulation Z Interim Final Rule that written disclosures be provided prior to commencement of the period during which a temporary rate will be in effect has caused some confusion for merchants who offer a promotional rate on the telephone to finance the purchase of goods. In order to clarify the application of the rule to such merchants, proposed comment 9(c)(2)(v)–5 would state that the timing requirements of § 226.9(c)(2)(v)(B) are deemed to have been met, and written disclosures required by § 226.9(c)(2)(v)(B) may be provided as soon as reasonably practicable after the first transaction subject to a temporary rate if: (1) The first transaction subject to the temporary rate occurs when a consumer contacts a merchant by telephone to purchase goods and at the same time the consumer accepts an offer to finance the purchase at the temporary rate; (2) the merchant or third-party creditor permits consumers to return any goods financed subject to the temporary rate and return the goods free of cost after the merchant or third-party creditor has provided the written disclosures required by § 226.9(c)(2)(v)(B); and (3) the disclosures required by § 226.9(c)(2)(v)(B) and the consumer's right to reject the temporary rate offer and return the goods are disclosed to the consumer as part of the offer to finance the purchase. This clarification mirrors a timing rule for account-opening disclosures provided by merchants financing the purchase of goods by telephone under § 226.5(b)(1)(iii) of the January 2009 Regulation Z Rule.

The Board is also aware of operational issues arising from application of § 226.9(c)(2)(v)(B) of the July 2009 Regulation Z Interim Final Rule to deferred interest or other promotional rate offers made at the time that a consumer is financing a purchase made at point of sale. At the present time, the systems available to provide disclosures to consumers at point of sale may not have access to the rate currently applicable to purchases made on the consumer's account. This could occur, for example, if the issuer offers a promotion to consumers with existing credit card accounts, and not all consumers in the portfolio have the same rate applicable to purchases. In addition, some consumers' accounts may currently be at a penalty rate that differs from the standard rates on accounts in the portfolio. The Board is aware that such issuers are encountering difficulty, at the present time, providing the disclosure required by § 226.9(c)(2)(v)(B), which requires that the rate that will apply after the expiration of the promotional period be disclosed.

This proposal, consistent with section 226.9(c)(2)(v)(B) of the July 2009 Regulation Z Interim Final Rule, requires disclosure of the specific rate that will apply to a given consumer's account after the expiration of a deferred interest or other promotional rate offer. The Board believes that, in general, the statutory requirement is best implemented by a rule stating that a single rate must be disclosed. However, the Board is supplementing its transition guidance to the July 2009 Regulation Z Interim Final Rule to state, that for a brief period necessary to update their systems to disclose a single rate, issuers offering a deferred interest or other promotional rate program at point of sale may disclose a range of rates or an ''up to'' rate rather than a single rate. The Board notes that stating a range of rates or ''up to'' rate is only permissible for a brief transition period and expects that merchants and creditors will disclose a single rate that will apply when a deferred interest or other promotional rate expires in accordance with § 226.9(c)(2)(v)(B) as soon as possible.

The Board is retaining in the proposal comment 9(c)(2)(v)–6 from the July 2009 Regulation Z Interim Final Rule (redesignated as comment 9(c)(2)(v)–7) to clarify that an issuer offering a deferred interest or similar program may utilize the exception in § 226.9(c)(2)(v)(B). The comment also provides examples of how the required disclosures can be made for deferred interest or similar programs. The Board continues to believe that the application of § 226.9(c)(2)(v)(B) to deferred interest arrangements is consistent with the Credit Card Act and that this clarification remains necessary in order to ensure that the proposed rule does not have unintended adverse consequences for deferred interest promotions.

The Board is proposing to retain generally as adopted in the July 2009 Regulation Z Interim Final Rule § 226.9(c)(2)(v)(C), which also implements an exception contained in the Credit Card Act, for increases in variable annual percentage rates in accordance with a credit card or other account agreement that provides for a change in the rate according to operation of an index that is not under the control of the creditor and is available to the general public. The Board is proposing a minor amendment to the text of § 226.9(c)(2)(v)(C) to reflect the fact that this exception would apply to all open-end (not home-secured) credit. The Board believes that even absent this express exception, such a rate increase would not generally be a change in the terms of the cardholder or other account agreement that gives rise to the requirement to provide 45 days' advance notice, because the index, margin, and frequency with which the annual percentage rate will vary will all be specified in the cardholder or other account agreement in advance. However, in order to clarify that 45 days' advance notice is not required for a rate increase that occurs due to adjustments in a variable rate tied to an index beyond the creditor's control, the Board is proposing to retain § 226.9(c)(2)(v)(C) of the July 2009 Regulation Z Interim Final Rule.

Finally, the proposal retains § 226.9(c)(2)(v)(D) from the July 2009 Regulation Z Interim Final Rule, with several changes. Section 226.9(c)(2)(v)(D) implements a statutory exception for increases in rates or fees or charges due to the completion of, or a consumer's failure to comply with the terms of, a workout or temporary hardship arrangement provided that the annual percentage rate or fee or charge applicable to a category of transactions following the increase does not exceed the rate that applied prior to the commencement of the workout or temporary hardship arrangement.

The Board notes that the exception in proposed § 226.9(c)(2)(v)(D) applies both to completion of or failure to comply with a workout arrangement. In the July 2009 Regulation Z Interim Final Rule, the Board had implemented the exception that applies to completion of an arrangement is implemented in § 226.9(c)(2)(v)(D), while the exception applicable to failure to comply with a workout or temporary hardship arrangement was implemented in § 226.9(g). For clarity, the Board is proposing to implement both of these exceptions in a single § 226.9(c)(2)(v)(D). The exception is conditioned on the creditor's having clearly and conspicuously disclosed, prior to the commencement of the arrangement, the terms of the arrangement (including any such increases due to such completion). The Board notes that the statutory exception applies in the event of either completion

of, or failure to comply with, the terms of such a workout or temporary hardship arrangement. This exception also generally mirrors the statutory language, except that the Board has expressly provided that the disclosures regarding the workout or temporary hardship arrangement are required to be in writing.

The Board proposes to retain comment 9(c)(2)(v)–5 from the July 2009 Regulation Z Interim Final Rule (redesignated as comment 9(c)(2)(v)–6), which is applicable to the exceptions in both § 226.9(c)(2)(v)(B) and (c)(2)(v)(D), and provides additional clarification regarding the disclosure of variable annual percentage rates. The comment provides that if the creditor is disclosing a variable rate, the notice must also state that the rate may vary and how the rate is determined. The comment sets forth an example of how a creditor may make this disclosure. The Board believes that the fact that a rate is variable is an important piece of information of which consumers should be aware prior to commencement of a deferred interest promotion, a promotional rate, or a stepped rate program.

Finally, the Board also proposes to retain comment 9(c)(2)(v)–7 of the July 2009 Regulation Z Interim Final Rule (redesignated as comment 9(c)(2)(v)–8), which provides clarification as to what terms must be disclosed in connection with a workout or temporary hardship arrangement. The comment states that in order for the exception to apply, the creditor must disclose to the consumer the rate that will apply to balances subject to the workout or temporary hardship arrangement, as well as the rate that will apply if the consumer completes or fails to comply with the terms of, the workout or temporary hardship arrangement. For consistency with proposed § 226.55(b)(5)(i), the Board proposes to revise the comment to also state that the creditor must disclose the amount of any reduced fee or charge of a type required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) that will apply to balances subject to the arrangement, as well as the fee or charge that will apply if the consumer completes or fails to comply with the terms of the arrangement. The notice also must state, if applicable, that the consumer must make timely minimum payments in order to remain eligible for the workout or temporary hardship arrangement. The Board believes that it is important for a consumer to be notified of his or her payment obligations pursuant to a workout or similar arrangement, and that the rate, fee or charge may be increased if he or she fails to make timely payments.

9(c)(2)(vi) Reduction of the Credit Limit

Consistent with the January 2009 Regulation Z Rule and the July 2009 Regulation Z Interim Final Rule, the Board is proposing to retain § 226.9(c)(2)(vi) to address notices of changes in a consumer's credit limit. Section 226.9(c)(2)(vi) requires an issuer to provide a consumer with 45 days' advance notice that a credit limit is being decreased or will be decreased prior to the imposition of any over-the-limit fee or penalty rate imposed solely as the result of the balance exceeding the newly decreased credit limit. The Board is not including a decrease in a consumer's credit limit itself as a significant change in a term that requires 45 days' advance notice, for several reasons. First, the Board recognizes that creditors have a legitimate interest in mitigating the risk of a loss when a consumer's creditworthiness deteriorates, and believes there would be safety and soundness concerns with requiring creditors to wait 45 days to reduce a credit limit. Second, the consumer's credit limit is not a term generally required to be disclosed under Regulation Z or TILA. Finally, the Board believes that § 226.9(c)(2)(vi) adequately protects consumers against the two most costly surprises potentially associated with a reduction in the credit limit, namely, fees and rate increases, while giving a consumer adequate time to mitigate the effect of the credit line reduction.

Furthermore, proposed § 226.55 would prohibit a creditor from applying an increased rate, fee, or charge to an existing balance as a result of transactions that exceeded the credit limit. In addition, proposed § 226.56 would allow a creditor to charge a fee for transactions that exceed the credit limit only when the consumer has consented to such transactions.

Proposed Changes to Commentary to § 226.9(c)(2)

The commentary to § 226.9(c)(2) generally is consistent with the commentary to § 226.9(c)(2) of the January 2009 Regulation Z Rule, except for technical changes or changes discussed below. In addition, as discussed above, the Board is proposing to adopt new comment 9(c)(2)(v)–5 (and to renumber comments 9(c)(2)(v)–5 through 9(c)(2)(v)–7 of the July 2009 Regulation Z Interim Final Rule accordingly as comments 9(c)(2)(v)–6 through 9(c)(2)(v)–8).

The Board is proposing to amend comment 9(c)(2)(i)–6 to reference examples in § 226.55 that illustrate how the advance notice requirements in § 226.9(c) relate to the substantive rule regarding rate increases in proposed § 226.55. In the January 2009 Regulation Z Rule, comment 9(c)(2)(i)–6 referred to the commentary to § 226.9(g). Because, as discussed in the supplementary information to § 226.55, the Credit Card Act moved the substantive rule regarding rate increases into Regulation Z, the Board believes that it is not necessary to repeat the examples under § 226.9.

The Board also proposes to amend comment 9(c)(2)(v)–2 (adopted in the January 2009 Regulation Z Rule as comment 9(c)(2)(iv)–2) in order to conform with the new substantive and notice requirements of the Credit Card Act. This comment addresses the disclosures that must be given when a credit program allows consumers to skip or reduce one or more payments during the year or involves temporary reductions in finance charges. However, new § 226.9(c)(2)(v)(B) requires a creditor to provide a notice of the period for which a temporarily reduced rate will be in effect, as well as a disclosure of the rate that will apply after that period, in order for a creditor to be permitted to increase the rate at the end of the period without providing 45 days' advance notice. Similarly, § 226.55, discussed elsewhere in this supplementary information, requires a creditor to provide advance notice of a temporarily reduced rate if a creditor wants to preserve the ability to raise the rate on balances subject to that temporarily reduced rate. Accordingly, the Board is proposing amendments to clarify that if a credit program involves temporary reductions in an interest rate, no notice of the change in terms is required either prior to the reduction or upon resumption of the higher rates if these features are disclosed in advance in accordance with the requirements of § 226.9(c)(2)(v)(B). *See* proposed comment 55(b)–3. The proposed comment further clarifies that if a creditor does not provide advance notice in accordance with § 226.9(c)(2)(v)(B), that it must provide a notice that complies with the timing requirements of § 226.9(c)(2)(i) and the content and format requirements of § 226.9(c)(2)(iv)(A), (B) (if applicable), and (C). The proposed comment notes that creditors should refer to § 226.55 for additional restrictions on resuming the original rate that is applicable to credit card accounts under an open-end (not home-secured) plan.

May 2009 Regulation Z Proposed Clarifications

As discussed in I. Background and Implementation of the Credit Card Act, the Board is generally republishing the May 2009 Regulation Z Proposed Clarifications in connection with this proposed rule. Accordingly, the Board is republishing proposed amendments to § 226.9(c)(2)(v) (proposed as § 226.9(c)(2)(iv) of the May 2009 Regulation Z Proposed Clarifications) and comments 9(c)(2)–4 and 9(c)(2)(i)–3.

The Board is republishing revisions to § 226.9(c)(2)(v) (proposed in May 2009 as § 226.9(c)(2)(iv)) and proposed comment 9(c)(2)–4, which clarifies the relationship between the change-in-terms requirements of § 226.9(c) and the notice provisions of § 226.9(b) that apply when a creditor adds a credit feature or delivers a credit access device for an existing open-end plan. *See* 74 FR 20787 for further discussion of these proposed amendments.

Section 226.9(c)(2)(i), as proposed and under the January 2009 Regulation Z Rule, provides that the 45-day advance notice timing requirement does not apply if the consumer has agreed to a particular change. In this case, notice must be given before the effective date of the change. Comment 9(c)(2)(i)–3 states that the provision is intended for use in ''unusual instances,'' such as when a consumer substitutes collateral or when the creditor may advance additional credit only if a change relatively unique to that consumer is made. In May 2009, the Board proposed to amend the comment to emphasize the limited scope of the exception and provide that the exception applies ''solely'' to the unique circumstances specifically identified in the comment. *See* 74 FR 20788. The proposed comment would also add an example of an occurrence that would not be considered an ''agreement'' for purposes of relieving the creditor of its responsibility to provide an advance change-in-terms notice. This example would state that an ''agreement'' does not include a consumer's request to reopen a closed account or to upgrade an existing account to another account offered by the creditor with different credit or other features. Thus, a creditor that treats an upgrade of a consumer's account as a change in terms would be required to provide the consumer 45 days' advance notice before increasing the rate for new transactions or increasing the amount of any applicable fees to the account in those circumstances.

The Board is aware that some creditors have raised concerns about the 45-day notice requirement causing an undue delay when a consumer requests that his or her account be changed to a different product offered by the creditor, for example to take advantage of a rewards or other program. The Board has sought, in part, to address these concerns in proposed comment 5(b)(1)(i)–6, discussed above. The Board also continues to believe that the proposed clarification to comment 9(c)(2)(i)–3 is appropriate for those circumstances in which a creditor treats an upgrade of an account as a change-in-terms in accordance with proposed comment 5(b)(1)(i)–6. In addition, it would be difficult to define by regulation the circumstances under which a consumer is deemed to have requested the account upgrade, versus circumstances in which the upgrade is suggested by the creditor. The Board seeks further comment on the operational and other burdens that would be associated with the proposed revision to comment 9(c)(2)(i)–3.

9(e) Disclosures Upon Renewal of Credit or Charge Card

The Credit Card Act amended TILA Section 127(d), which sets forth the disclosures that card issuers must provide in connection with renewal of a consumer's credit or charge card account. 15 U.S.C. 1637(d). TILA Section 127(d) is implemented in § 226.9(e), which currently requires card issuers that assess an annual or other fee based on inactivity or activity, on a credit card account of the type subject to § 226.5a, to provide a renewal notice before the fee is imposed. The creditor must provide disclosures required for credit card applications and solicitations (although not in a tabular format) and must inform the consumer that the renewal fee can be avoided by terminating the account by a certain date. The notice must generally be provided at least 30 days or one billing cycle, whichever is less, before the renewal fee is assessed on the account. Under current § 226.9(e), there is an alternative delayed notice procedure where the fee can be assessed provided the fee is reversed if the consumer is given notice and chooses to terminate the account.

The Credit Card Act amended TILA Section 127(d) to eliminate the provision permitting creditors to provide an alternative delayed notice. Thus, all creditors will be required to provide the renewal notice described in § 226.9(e)(1) prior to imposition of any annual or other periodic fee to renew a credit or charge card account of the type subject to § 226.5a, including any fee based on account activity or inactivity. Creditors may no longer assess the fee and provide a delayed notice offering the consumer the opportunity to terminate the account and have the fee reversed. Accordingly, the Board is proposing to delete § 226.9(e)(2) and to renumber § 226.9(e)(3) as § 226.9(e)(2). The Board also proposes technical conforming changes to comments 9(e)–7, 9(e)(2)–1 (currently comment 9(e)(3)–1), and 9(e)(2)–2 (currently comment 9(e)(3)–2).

In addition, amended TILA Section 127(d) provides that a card issuer that has changed or amended any term of the account since the last renewal that has not been previously disclosed must provide the renewal disclosure, even if that card issuer does not charge a periodic or other fee for renewal of the credit or charge card account. The Board proposes to amend § 226.9(e)(1) to provide that the renewal notice must be provided in those circumstances. The amended language in proposed § 226.9(e)(1) would state, in part, that any card issuer that has changed or amended any term of a cardholder's account required to be disclosed under § 226.6(b)(1) and (b)(2) that has not previously been disclosed to the consumer, shall mail or deliver written notice of the renewal to the cardholder. The Board proposes to use its authority pursuant to TILA Section 105(a) to clarify that the requirement to provide the renewal disclosures due to a change in account terms applies only if the change has not been previously disclosed and is a change of the type required to be disclosed in the table provided at account opening.

The Board notes that in most cases, changes to terms required to be disclosed pursuant to § 226.6(b)(1) and (b)(2) will be required to be disclosed 45 days in advance in accordance with § 226.9(c)(2). However, there are several types of changes to terms required to be disclosed under § 226.6(b)(1) and (b)(2) for which advance notice is not required under § 226.9(c)(2)(v)(1), including reductions in finance and other charges and the extension of a grace period. The Board believes that such changes are generally beneficial to the consumer, and therefore a 45-day advance notice requirement is not appropriate for these changes. However, the Board believes that requiring creditors to send consumers subject to such changes a notice prior to renewal disclosing key terms of their accounts will promote the informed use of credit by consumers. The notice will remind consumers of the key terms of their accounts, including any reduced rates or extended

grace periods that apply, when consumers are making a decision as to whether to renew their account and how to use the account in the future.

The Board considered an alternative interpretation of amended TILA Section 127(d) that would have required that the renewal disclosures be provided for all changes in account terms that have not been previously disclosed, even changes that are not required to be disclosed pursuant to § 226.6(b)(1) and (b)(2). Such an interpretation of the statute would require that the renewal disclosures be given even when creditors have made relatively minor changes to the account terms, such as by increasing the amount of a fee to expedite delivery of a credit card. However, the Board believes that providing a renewal notice in these circumstances would not provide a meaningful benefit to consumers. Amended TILA Section 127(d) requires only that the renewal disclosure contain the information set forth in TILA Sections 127(c)(1)(A) and (c)(4)(A), which are implemented in § 226.5a(b)(1) through (b)(7). These sections require disclosure of key terms of a credit card account including the annual percentage rates applicable to the account, annual or other periodic membership fees, minimum finance charges, transaction charges on purchases, the grace period, balance computation method, and disclosure of similar terms for charge card accounts. The Board notes that the required disclosures all address terms required to be disclosed pursuant to § 226.6(b)(1) and (b)(2). Therefore, if the rule required that the renewal disclosures be provided for any change in terms, such as a change in a fee for expediting delivery of a credit card, the renewal disclosures would not disclose the amount of the changed fee. The Board also notes that charges imposed as part of an open-end (not home-secured) plan that are not required to be disclosed pursuant to § 226.6(b)(1) and (b)(2) are required to be disclosed to consumers prior to their imposition pursuant to § 226.5(b)(1)(ii).

Proposed § 226.9(e)(1) would further clarify the timing of the notice requirement when a card issuer has changed a term on the account but does not impose an annual or other periodic fee for renewal, by stating that if the card issuer has changed or amended any term required to be disclosed under § 226.6(b)(1) and (b)(2) and such changed or amended term has not previously been disclosed to the consumer, the notice shall be provided at least 30 days prior to the scheduled renewal date of the consumer's credit or charge card. Accordingly, card issuers that do not charge periodic or other fees for renewal of the credit or charge card account, and who have previously disclosed any changed terms pursuant to § 226.9(c)(2) are not required to provide renewal disclosures pursuant to proposed § 226.9(e).

9(g) Increase in Rates Due to Delinquency or Default or as a Penalty

9(g)(1) Increases Subject to This Section

The Board is proposing to adopt § 226.9(g) substantially as adopted in the January 2009 Regulation Z Rule, except as required to be amended for conformity with the Credit Card Act. Proposed § 226.9(g), in combination with amendments to § 226.9(c), implements the 45-day advance notice requirements for rate increases in new TILA Section 127(i). This approach is consistent with the Board's January 2009 Regulation Z Rule and the July 2009 Regulation Z Interim Final Rule, each of which included change-in-terms notice requirements in § 226.9(c) and increases in rates due to the consumer's default or delinquency or as a penalty for events specified in the account agreement in § 226.9(g). The general rule is set forth in proposed § 226.9(g)(1) and provides that for open-end plans other than home-equity plans subject to the requirements of § 226.5b, a creditor must provide a written notice to each consumer who may be affected when a rate is increased due to a delinquency or default or as a penalty for one or more events specified in the account agreement.

9(g)(2) Timing of Written Notice

Proposed paragraph (g)(2) sets forth the timing requirements for the notice described in paragraph (g)(1), and states that the notice must be provided at least 45 days prior to the effective date of the increase. The notice must, however, be provided after the occurrence of the event that gave rise to the rate increase. That is, a creditor must provide the notice after the occurrence of the event or events that trigger a specific impending rate increase and may not send a general notice reminding the consumer of the conditions that may give rise to penalty pricing. For example, a creditor may send a consumer a notice pursuant to § 226.9(g) if the consumer makes a payment that is one day late disclosing a rate increase applicable to new transactions, in accordance with § 226.55. However, a more general notice reminding a consumer who makes timely payments that paying late may trigger imposition of a penalty rate would not be sufficient to meet the requirements of § 226.9(g) if the consumer subsequently makes a late payment.

9(g)(3) Disclosure Requirements for Rate Increases

Proposed paragraph (g)(3) sets forth the content and formatting requirements for notices provided pursuant to § 226.9(g). Proposed § 226.9(g)(3)(i)(A) sets forth the content requirements applicable to all open-end (not home-secured) credit plans. Similar to the approach discussed above with regard to § 226.9(c)(2)(iv), the Board is proposing a separate § 226.9(g)(3)(i)(B) that would contain additional content requirements required under the Credit Card Act that are applicable only to credit card accounts under an open-end (not home-secured) consumer credit plan.

Proposed § 226.9(g)(3)(i)(A) provides that the notice must state that the delinquency, default, or penalty rate has been triggered, and the date on which the increased rate will apply. The notice also must state the circumstances under which the increased rate will cease to apply to the consumer's account or, if applicable, that the increased rate will remain in effect for a potentially indefinite time period. In addition, the notice must include a statement indicating to which balances the delinquency or default rate or penalty rate will be applied, and, if applicable, a description of any balances to which the current rate will continue to apply as of the effective date of the rate increase, unless a consumer fails to make a minimum periodic payment within 60 days from the due date for that payment.

Proposed § 226.9(g)(3)(i)(B) sets forth additional content that credit card issuers must disclose if the rate increase is due to the consumer's failure to make a minimum periodic payment within 60 days from the due date for that payment. In those circumstances, the notice must state the reason for the increase and disclose that the increase will cease to apply if the creditor receives six consecutive required minimum periodic payments on or before the payment due date, beginning with the first payment due following the effective date of the increase. Proposed § 226.9(g)(3)(i)(B) implements notice requirements contained in amended TILA Section 171(b)(4), as adopted by the Credit Card Act, and implemented in proposed § 226.55(b)(4), as discussed below.

Unlike § 226.9(g)(3) of the July 2009 Regulation Z Interim Final Rule, the notice proposed under § 226.9(g)(3) need not disclose the consumer's right to reject the application of the penalty rate. For the reasons discussed in the

supplementary information to § 226.9(h), the Board believes that a right to reject penalty rate increases is unnecessary in light of the new substantive rule on rate increases in proposed § 226.55. Accordingly, for penalty rate increases no disclosure of a right to reject need be provided.

Proposed paragraph (g)(3)(ii) sets forth the formatting requirements for a rate increase due to default, delinquency, or as a penalty. These requirements are substantively equivalent to the formatting rule adopted in § 226.9(g)(3)(ii) of the January 2009 Regulation Z Rule and would require the disclosures required under § 226.9(g)(3)(i) to be set forth in the form of a table. As discussed elsewhere in this **Federal Register**, the formatting requirements are not directly compelled by the Credit Card Act, and consequently the Board is considering retaining the original July 1, 2010 effective date of the January 2009 Regulation Z Rule for the tabular formatting requirements.

The Board is proposing to amend Sample G–21 from the January 2009 Regulation Z Rule (redesignated as Sample G–22) and to add a new sample G–23 to illustrate how a card issuer may comply with the requirements of proposed § 226.9(g)(3)(i). The Board would amend references to these samples in comment 9(g)–8 accordingly. Proposed Sample G–22 is a disclosure of a rate increase applicable to a consumer's credit card account based on a late payment that is fewer than 60 days late. The sample explains when the new rate will apply to new transactions and to which balances the current rate will continue to apply. Sample G–23 discloses a rate increase based on a delinquency of more than 60 days, and includes the required content regarding the consumer's ability to cure the penalty pricing by making the next six consecutive minimum payments on time.

9(g)(4) Exceptions

Proposed § 226.9(g)(4) sets forth an exception to the advance notice requirements of § 226.9(g), which is consistent with an analogous exception contained in the January 2009 Regulation Z Rule and July 2009 Regulation Z Interim Final Rule. Proposed § 226.9(g)(4) clarifies the relationship between the notice requirements in § 226.9(c)(vi) and (g)(1) when the creditor decreases a consumer's credit limit and under the terms of the credit agreement a penalty rate may be imposed for extensions of credit that exceed the newly decreased credit limit. This exception is substantively equivalent to § 226.9(g)(4)(ii) of the January 2009 Regulation Z Rule. In addition, it is generally equivalent to § 226.9(g)(4)(ii) of the July 2009 Regulation Z Interim Final Rule, except that the proposal implements content requirements analogous to those in proposed § 226.9(g)(3)(i) that pertain to whether the rate applies to outstanding balances or only to new transactions. *See* 74 FR 5355 for additional discussion of this exception.

As discussed in the supplementary information to § 226.9(c)(2)(v), a second exception for an increase in an annual percentage rate due to the failure of a consumer to comply with a workout or temporary hardship arrangement contained in the July 2009 Regulation Z Interim Final Rule has been moved to § 226.9(c)(2)(v)(D).

The Board notes that one respect in which proposed § 226.9(g)(4) differs from the January 2009 Regulation Z Rule is that it does not contain an exception to the 45-day advance notice requirement for penalty rate increases if the consumer's account becomes more than 60 days delinquent prior to the effective date of a rate increase applicable to new transactions, for which a notice pursuant to § 226.9(g) has already been provided. As discussed in the supplementary information to proposed § 226.9(g)(3)(i), amended TILA Section 171(b)(4)(A) requires that specific content be disclosed when a consumer's rate is increased based on a failure to make a minimum payment within 60 days of the due date for that payment. Specifically, TILA Section 171(b)(4)(A) requires the notice to state the reasons for the increase and that the increase will terminate no later than six months from the effective date of the change, provided that the consumer makes the minimum payments on time during that period. The Board believes that the intent of this provision is to create a right for consumers whose rate is increased based on a payment that is more than 60 days late to cure that penalty pricing in order to return to a lower interest rate.

The Board believes that the disclosures associated with this ability to cure will be the most useful to consumers if they receive them after they have already triggered such penalty pricing based on a delinquency of more than 60 days. Under the Board's proposed rule, creditors will be required to provide consumers with a notice specifically disclosing a rate increase based on a delinquency of more than 60 days, at least 45 days prior to the effective date of that increase. The notice will state the effective date of the rate increase, which will give consumers certainty as to the applicable 6-month period during which they must make timely payments in order to return to the lower rate. If creditors were permitted to raise the rate applicable to all of a consumer's balances without providing an additional notice, consumers may be unsure exactly when their account became more than 60 days delinquent and therefore may not know the period in which they need to make timely payments in order to return to a lower rate.

In addition, the Board notes that the Credit Card Act, as implemented in proposed § 226.55(b)(4), does not permit a creditor to raise the interest rate applicable to a consumer's existing balances unless that consumer fails to make a minimum payment within 60 days from the due date. This differs from the Board's January 2009 FTC Act Rule, which permitted such a rate increase based on a failure to make a minimum payment within 30 days from the due date. The exception in § 226.9(g)(4)(iii) of the January 2009 Regulation Z Rule reflected the Board's understanding that some creditors might impose penalty pricing on new transactions based on a payment that is one or several days late, and therefore it might be a relatively common occurrence for consumers' accounts to become 30 days delinquent within the 45-day notice period provided for a rate increase applicable to new transactions. The Board believes that, given the 60-day period imposed by the Credit Card Act and § 226.55(b)(4), it will be less common for consumers' accounts to become delinquent within the original 45-day notice period provided for new transactions.

Proposed Changes to Commentary to § 226.9(g)

The commentary to § 226.9(g) generally is consistent with the commentary to § 226.9(g) of the January 2009 Regulation Z Rule, except for technical changes. In addition, the Board is proposing to amend comment 9(g)–1 to reference examples in § 226.55 that illustrate how the advance notice requirements in § 226.9(g) relate to the substantive rule regarding rate increases applicable to existing balances. Because, as discussed in the supplementary information to § 226.55, the Credit Card Act placed the substantive rule regarding rate increases into TILA and Regulation Z, the Board believes that it is not necessary to repeat the examples under § 226.9.

9(h) Consumer Rejection of Certain Significant Changes in Terms

In the July 2009 Regulation Z Interim Final Rule, the Board adopted § 226.9(h), which provides that, in certain circumstances, a consumer may reject significant changes to account terms and increases in annual percentage rates. *See* 74 FR 36087–36091, 36096, 36099–36101. Section 226.9(h) implemented new TILA Section 127(i)(3) and (4), which—like the other provisions of the Credit Card Act implemented in the July 2009 Regulation Z Interim Final Rule—went into effect on August 20, 2009. *See* Credit Card Act § 101(a) (new TILA Section 127(i)(3)–(4)). However, several aspects of § 226.9(h) were based on revised TILA Section 171, which—like the other statutory provisions addressed in this proposed rule—goes into effect on February 22, 2010. Accordingly, because the Board is now implementing revised TILA Section 171 in proposed § 226.55, the Board proposes to modify § 226.9(h) for clarity and consistency.

Application of Right To Reject to Increases in Annual Percentage Rate

Because revised TILA Section 171 renders the right to reject redundant in the context of rate increases, the Board proposes to amend § 226.9(h) to apply that right only to other significant changes to an account term. Currently, § 226.9(h) provides that, if a consumer rejects an increase in an annual percentage rate prior to the effective date stated in the § 226.9(c) or (g) notice, the creditor cannot apply the increased rate to transactions that occurred within fourteen days after provision of the notice. *See* § 226.9(h)(2)(i), (h)(3)(ii). However, under revised TILA Section 171 (as implemented in proposed § 226.55), a creditor is generally prohibited from applying an increased rate to transactions that occurred within fourteen days after provision of a § 226.9(c) or (g) notice regardless of whether the consumer rejects that increase. Similarly, although the exceptions in § 226.9(h)(3)(i) and revised TILA Section 171(b)(4) permit a creditor to apply an increased rate to an existing balance when an account becomes more than 60 days delinquent, revised TILA Section 171(b)(4)(B) (as implemented in proposed § 226.55(b)(4)(ii)) provides that the creditor must terminate the increase if the consumer makes the next six payments on or before the payment due date. Thus, with respect to rate increases, the right to reject does not provide consumers with any meaningful protections beyond those provided by revised TILA Section 171. Accordingly, the Board believes that, on or after February 22, 2010, the right to reject will be unnecessary for rate increases. Indeed, once revised TILA Section 171 becomes effective, notifying consumers that they have a right to reject a rate increase could be misleading insofar as it could imply that a consumer who does so will receive some additional degree of protection (such as protection against increases in the rate that applies to future transactions).

Accordingly, the Board proposes to remove references to rate increases from § 226.9(h) and its commentary. Similarly, because the exception in § 226.9(h)(3)(ii) for transactions that occurred more than fourteen days after provision of the notice is based on revised TILA Section 171(d),[15] the Board proposes to remove that exception from § 226.9(h) and incorporate it into proposed § 226.55. Finally, the Board proposes to redesignate comment 9(h)(3)–1 as comment 9(h)–1 and amend it to clarify that § 226.9(h) does not apply to increases in an annual percentage rate.

Repayment Restrictions

Because the repayment restrictions in § 226.9(h)(2)(iii) are based on revised TILA Section 171(c), the Board believes that those restrictions should be implemented with the rest of revised Section 171 in proposed § 226.55. Section 226.9(h)(2)(iii) implemented new TILA Section 127(i)(4), which expressly incorporated the repayment methods in revised TILA Section 171(c)(2). Because the rest of revised Section 171 would not be effective until February 22, 2010, the July 2009 Regulation Z Interim Final Rule implemented new TILA Section 127(i)(4) by incorporating the repayment restrictions in Section 171(c)(2) into § 226.9(h)(2)(iii). *See* 74 FR 36089. However, the Board believes that—once revised TILA Section 171 becomes effective on February 22, 2010—these repayment restrictions should be moved to § 226.55(c). In addition to being duplicative, implementing revised TILA Section 171(c)'s repayment methods in both § 228.9(h) and § 226.55(c) would create the risk of inconsistency. Furthermore, because these restrictions will generally be of greater importance in the context of rate increases than other significant changes in terms, the Board believes they should be located in proposed § 226.55. Accordingly, the Board proposes to move the provisions and commentary regarding repayment to proposed § 226.55(c)(2) and to amend § 226.9(h)(2)(iii) to include a cross-reference to § 226.55(c)(2).

The Board also proposes to amend comment 9(h)(2)(iii)–1 to clarify the application of the repayment methods listed in proposed § 226.55(c)(2) in the context of a rejection of a significant change in terms. As revised, this comment would clarify that, when applying the methods listed in § 226.55(c)(2) pursuant to § 226.9(h)(2)(iii), a creditor may utilize the date on which the creditor was notified of the rejection or a later date (such as the date on which the change would have gone into effect but for the rejection). For example, when a creditor increases an annual percentage rate pursuant to § 226.55(b)(3), § 226.55(c)(2)(ii) permits the creditor to establish an amortization period for a protected balance of not less than five years, beginning no earlier than the effective date of the increase. Accordingly, when a consumer rejects a significant change in terms pursuant to § 226.9(h)(1), § 226.9(h)(2)(iii) permits the creditor to establish an amortization period for the balance on the account of not less than five years, beginning no earlier than the date on which the creditor was notified of the rejection. The comment provides an illustrative example.

In addition, comment 9(h)(2)(iii)–2 would be revised to clarify the meaning of ''the balance on the account'' that is subject to the repayment restrictions in proposed § 226.55(c)(2). The revised comment would clarify that, when applying the methods listed in § 226.55(c)(2) pursuant to § 226.9(h)(2)(iii), the provisions in § 226.55(c)(2) and the guidance in the commentary to § 226.55(c)(2) regarding protected balances also apply to a balance on the account subject to § 226.9(h)(2)(iii). Furthermore, the revised comment would clarify that, if a creditor terminates or suspends credit availability based on a consumer's rejection of a significant change in terms, the balance on the account for purposes of § 226.9(h)(2)(iii) is the balance at the end of the day on which credit availability was terminated or suspended. However, if a creditor does not terminate or suspend credit availability, the balance on the account for purposes of § 226.9(h)(2)(iii) is the balance on a date that is not earlier than the date on which the creditor was notified of the rejection. An example is provided.

Additional Revisions to Commentary

Consistent with the proposed revisions discussed above, the Board proposes to make non-substantive,

[15] *See* 74 FR 36089–36090.

technical amendments to the commentary to § 226.9(h). In addition, for organizational reasons, the Board proposes to renumber comments 9(h)(2)(ii)–1 and –2. Finally, the Board proposes to amend comment 9(h)(2)(ii)–2 to clarify the application of the prohibition in § 226.9(h)(2)(ii) on imposing a fee or charge solely as a result of the consumer's rejection of a significant change in terms. In particular, the revised comment would clarify that, if credit availability is terminated or suspended as a result of the consumer's rejection, a creditor is prohibited from imposing a periodic fee that was not charged before the consumer rejected the change (such as a closed account fee).

Section 226.10 Payments

Section 226.10, which implements TILA Section 164, currently contains rules regarding the prompt crediting of payments and is entitled ''Prompt crediting of payments.'' 15 U.S.C. 1666c. As is discussed further in the section-by-section analysis, the Board is proposing to implement several new provisions of the Credit Card Act regarding payments in § 226.10, such as requirements regarding the permissibility of certain fees to make expedited payments. Several of these rules do not pertain directly to the prompt crediting of payments, but more generally to the conditions that may be imposed upon payments. Accordingly, the Board is proposing to amend the title of § 226.10 to ''Payments'' to more accurately reflect the content of amended § 226.10.

226.10(b) Specific Requirements for Payments

Cut-Off Times for Payments

TILA Section 164 states that payments received by the creditor from a consumer for an open-end consumer credit plan shall be posted promptly to the account as specified in regulations of the Board. The Credit Card Act amended TILA Section 164 to state that the Board's regulations shall prevent a finance charge from being imposed on any consumer if the creditor has received the consumer's payment in readily identifiable form, by 5 p.m. on the date on which such payment is due, in the amount, manner, and location indicated by the creditor to avoid the imposition of such a finance charge. While amended TILA Section 164 generally mirrors current TILA Section 164, the Credit Card Act added the reference to a 5 p.m. cut-off time for payments received on the due date.

TILA Section 164 is implemented in § 226.10. The Board's January 2009 Regulation Z Rule addressed cut-off times by providing that a creditor may specify reasonable requirements for payments that enable most consumers to make conforming payments. Section 226.10(b)(2)(ii) of the January 2009 Regulation Z Rule stated that a creditor may set reasonable cut-off times for payments to be received by mail, by electronic means, by telephone, and in person. Amended § 226.10(b)(2)(ii) provided a safe harbor for the reasonable cut-off time requirement, stating that it would be reasonable for a creditor to set a cut-off time for payments by mail of 5 p.m. on the payment due date at the location specified by the creditor for the receipt of such payments. While this safe harbor referred only to payments received by mail, the Board noted in the supplementary information to the January 2009 Regulation Z Rule that it would continue to monitor other methods of payment in order to determine whether similar guidance was necessary. *See* 74 FR 5357.

As amended by the Credit Card Act, TILA Section 164 differs from § 226.10 of the January 2009 Regulation Z Rule in several respects. First, amended TILA Section 164 applies the requirement that a creditor treat a payment received by 5 p.m. on the due date as timely to all forms of payment, not only payments received by mail. In contrast, the safe harbor regarding cut-off times that the Board provided in § 226.10(b)(2)(ii) of the January 2009 Regulation Z Rule directly addressed only mailed payments. Second, while the Board's January 2009 Regulation Z Rule left open the possibility that in some circumstances, cut-off times earlier than 5 p.m. might be considered reasonable, amended TILA Section 164 prohibits cut-off times earlier than 5 p.m. on the due date in all circumstances.

The Board proposes to implement amended TILA Section 164 in a revised § 226.10(b)(2)(ii). Proposed § 226.10(b)(2)(ii) would state that a creditor may set reasonable cut-off times for payments to be received by mail, by electronic means, by telephone, and in person, provided that such cut-off times must be no earlier than 5 p.m. on the payment due date at the location specified by the creditor for the receipt of such payments. Creditors would be free to set later cut-off times; however, no cut-off time would be permitted to be earlier than 5 p.m. This paragraph, in accordance with amended TILA Section 164, would apply to payments received by mail, electronic means, telephone, or in person, not only payments received by mail.

Consistent with the January 2009 Regulation Z Rule, proposed § 226.10(b)(2)(ii) refers to the time zone of the location specified by the creditor for the receipt of payments. The Board believes that this clarification is necessary to provide creditors with certainty regarding how to comply with the proposed rule, given that consumers may reside in different time zones from the creditor. The Board believes that a rule requiring a creditor to process payments differently based on the time zone at each consumer's billing address could impose significant operational burdens on creditors. The Board solicits comment on whether this clarification continues to be appropriate for payments made by methods other than mail.

The Board notes that proposed § 226.10(b)(2)(ii) would generally apply to payments made in person. However, as discussed below, the Credit Card Act amends TILA Section 127(b)(12) to establish a special rule for payments on credit card accounts made in person at branches of financial institutions, which the Board proposes to implement in new § 226.10(b)(3). Notwithstanding the general rule in proposed § 226.10(b)(2)(ii), card issuers that are financial institutions that accept payments in person at a branch or office may not impose a cut-off time earlier than the close of business of that office or branch, even if the office or branch closes later than 5 p.m. Accordingly, a financial institution that accepts payments at a branch or office that closes at 6 p.m. would be required to treat all payments received in person at the branch or office prior to 6 p.m. on the due date as timely. The Board notes that this rule refers only to payments made in person at the branch or office. Payments made by other means such as by telephone, electronically, or by mail would be subject to the general rule prohibiting cut-off times prior to 5 p.m., regardless of when a financial institution's branches or offices close. The Board notes that there may be creditors that are not financial institutions that accept payments in person, such as at a retail location, and believes that it is necessary for proposed § 226.10(b)(2)(ii) to refer to payments made in person in order to address cut-off times for such creditors that are not also subject to proposed § 226.10(b)(3).

The Board notes that the Credit Card Act applies the 5 p.m. cut-off time requirement to all open-end credit plans, including open-end (home-secured) credit. Accordingly, proposed § 226.10(b)(2)(ii) would apply to all

open-end credit. This is consistent with current § 226.10, which applies to all open-end credit.

Payments Made at Financial Institution Branches

The Credit Card Act amends TILA Section 127(b)(12) to provide that, for creditors that are financial institutions which maintain branches or offices at which payments on credit card accounts are accepted in person, the date on which a consumer makes a payment on the account at the branch or office is the date on which the payment is considered to have been made for purposes of determining whether a late fee or charge may be imposed. 15 U.S.C. 1637(b)(12). The Board is proposing to implement the requirements of amended TILA Section 127(b)(12) that pertain to payments made at branches or offices of a financial institution in new § 226.10(b)(3). Section 226.10(b)(3), as adopted in the January 2009 Regulation Z Rule, would accordingly be renumbered as § 226.10(b)(4).

Proposed § 226.10(b)(3)(i) states that a card issuer that is a financial institution shall not impose a cut-off time earlier than the close of business for payments made in person on a credit card account under an open-end (not home-secured) consumer credit plan at any branch or office of the card issuer at which such payments are accepted. The proposed regulation further states that payments made in person at a branch or office of the financial institution during the business hours of that branch or office shall be considered received on the date on which the consumer makes the payment. Proposed § 226.10(b)(3) interprets amended TILA Section 127(b)(12) as requiring card issuers that are financial institutions to treat in-person payments they receive at branches or offices during business hours as conforming payments that must be credited as of the day the consumer makes the in-person payment. The Board believes that this is the appropriate reading of amended TILA Section 127(b)(12) because it is consistent with consumer expectations that in-person payments made at a branch of the financial institution will be credited on the same day that they are made.

The Board notes that neither the Credit Card Act nor TILA defines ''financial institution.'' In order to give clarity to card issuers, the Board proposes to adopt a definition of ''financial institution,'' for purposes of § 226.10(b)(3), in a new § 226.10(b)(3)(ii). Proposed § 226.10(b)(3)(ii) would state that ''financial institution'' has the same meaning as ''depository institution'' as defined in the Federal Deposit Insurance Act (12 U.S.C. 1813(c)). The Board believes that this definition effectuates the purposes of amended TILA Section 127(b)(12) by including all banks and savings associations, while excluding entities such as retailers that should not be considered ''financial institutions'' for purposes of proposed § 226.10(b)(3). The Board solicits comment on whether an alternative definition would be appropriate. In particular, the Board solicits comment on whether there are other credit card issuers that should be considered ''financial institutions'' for purposes of the rule.

The Board also is proposing a new comment 10(b)–5 to clarify the application of proposed § 226.10(b)(3) for payments made at point of sale. Proposed comment 10(b)–5 would state that if a creditor that is a financial institution issues a credit card that can be used only for transactions with a particular merchant or merchants, and a consumer is able to make a payment on that credit card account at a retail location maintained by such a merchant, that retail location is not considered to be a branch or office of the creditor for purposes of § 226.10(b)(3). The Board believes that the intent of TILA Section 127(b)(12) is to apply only to payments made at a branch or office of the creditor, not to payments made at a location maintained by a third party that is not the creditor. This comment is intended to clarify that this rule does not apply when a retailer accepts payments at its stores for a co-branded or private label credit card that is issued by a separate financial institution.

Finally, the Board also is proposing a new comment 10(b)–6 to clarify what constitutes a payment made ''in person'' at a branch or office of a financial institution. Proposed comment 10(b)–6 would state that for purposes of § 226.10(b)(3), payments made in person at a branch or office of a financial institution include payments made with the direct assistance of, or to, a branch or office employee, for example a teller at a bank branch. In contrast, the comment would provide that a payment made at the bank branch without the direct assistance of a branch or office employee, for example a payment placed in a branch or office mail slot, is not a payment made in person for purposes of § 226.10(b)(3). The Board believes that this is consistent with consumer expectations that payments made with the assistance of a financial institution employee will be credited immediately, while payments that are placed in a mail slot or other receptacle at the branch or office may require additional processing time.

10(d) Crediting of Payments When Creditor Does Not Receive or Accept Payments on Due Date

The Credit Card Act adopted a new TILA Section 127(o) that provides, in part, that if the payment due date for a credit card account under an open-end consumer credit plan is a day on which the creditor does not receive or accept payments by mail (including weekends and holidays), the creditor may not treat a payment received on the next business day as late for any purpose. 15 U.S.C. 1637(o). New TILA Section 127(o) is similar to § 226.10(d) of the Board's January 2009 Regulation Z Rule, with two notable differences. Amended § 226.10(d) of the January 2009 Regulation Z Rule stated that if the due date for payments is a day on which the creditor does not receive or accept payments by mail, the creditor may not treat a payment received *by mail* the next business day as late for any purpose. In contrast, new TILA Section 127(o) provides that if the due date is a day on which the creditor does not receive or accept payments by mail, the creditor may not treat a payment received the next business day as late for any purpose. TILA Section 127(o) applies to payments made by any method on a due date which is a day on which the creditor does not receive or accept mailed payments, and is not limited to payments received the next business day by mail. Second, new TILA Section 127(o) applies only to credit card accounts under an open-end consumer plan, while § 226.10(d) of the January 2009 rule applies to all open-end consumer credit.

The Board is proposing to implement new TILA Section 127(o) in an amended § 226.10(d). The general rule in proposed § 226.10(d) would track the statutory language of new TILA Section 127(o) to state that if the due date for payments is a day on which the creditor does not receive or accept payments by mail, the creditor may generally not treat a payment received by any method the next business day as late for any purpose. The Board is proposing, however, to provide that if the creditor accepts or receives payments made by a method other than mail, such as electronic or telephone payments, a due date on which the creditor does not receive or accept payments by mail, it is not required to treat a payment made by that method on the next business day as timely. The Board is proposing this clarification using its authority under TILA Section 105(a) to make

adjustments necessary to effectuate the purposes of TILA. 15 U.S.C. 1604(a).

The Board believes that it is not the intent of new TILA Section 127(o) to permit consumers who can make timely payments by methods other than mail, such as payments by phone, to have an extra day after the due date to make payments using those methods without those payments being treated as late. Rather, the Board believes that new TILA Section 127(o) was intended to address those limited circumstances in which a consumer cannot make a timely payment on the due date, for example if it falls on a weekend or holiday and the creditor does not accept or receive payments on that date. In those circumstances, without the protections of new TILA Section 127(o), the consumer would have to make a payment one or more days in advance of the due date in order to have that payment treated as timely. The Credit Card Act provides other protections designed to ensure that consumers have adequate time to make payments, such as amended TILA Section 163, which was implemented in § 226.5(b) in the July 2009 Regulation Z Interim Final Rule, which generally requires that creditors mail or deliver periodic statements to consumers at least 21 days in advance of the due date. Therefore, proposed § 226.10(d) would provide that if a creditor receives or accepts payments by a method other than mail on the due date, the creditor need not treat payments made by that method on the next business day as timely, even if the creditor does not receive or accept mailed payments on the due date. For example, if a creditor receives or accepts electronic payments on a Sunday due date, that creditor need not treat as timely an electronic payment made on the following Monday, even if it does not receive or accept payments by mail on that Sunday due date.

Finally, the Board is proposing to apply amended § 226.10(d) to all open-end consumer credit plans, not just credit card accounts, even though new TILA Section 127(o) applies only to credit card accounts. The Board believes that it is appropriate to have one consistent rule regarding the treatment of payments when the due date falls on a date on which the creditor does not receive or accept payments by mail. The Board believes that that Regulation Z should treat payments on an open-end plan that is not a credit card account the same as payments on a credit card account. Regardless of the type of open-end plan, if the payment due date is a day on which the creditor does not accept or receive payments by mail, a consumer should not be required to make payments prior to the due date in order for them to be treated as timely. This is consistent with § 226.10(d) of the January 2009 Regulation Z Rule, which set forth one consistent rule for all open-end credit.

10(e) Limitations on Fees Related to Method of Payment

The Credit Card Act adopted new TILA Section 127(l) which generally prohibits creditors, in connection with a credit card account under an open-end consumer credit plan, from imposing a separate fee to allow a consumer to repay an extension of credit or pay a finance charge, unless the payment involves an expedited service by a customer service representative. 15 U.S.C. 1637(l). The Board is proposing to implement TILA Section 127(l) in § 226.10(e). Proposed § 226.10(e) would generally track the statutory language of new TILA Section 127(l) and would state that, for credit card accounts under an open-end (not home-secured) consumer credit plan, a creditor may not impose a separate fee to allow consumers to make a payment by any method, such as mail, electronic, or telephone payments, unless such payment method involves an expedited service by a customer service representative of the creditor. The text of proposed § 226.10(e) differs from the text of TILA Section 127(l), in order to clarify that a separate fee for any payment made to an account is prohibited, with the exception of a payment involving expedited service by a customer service representative. *See* 15 U.S.C. 1604(a).

The Board believes that the intent of new TILA Section 127(l) is to prohibit the imposition of a separate fee for making any payment, unless the payment transaction involves expedited service by a customer service representative. Accordingly, the Board notes that proposed § 226.10(e) would cover all methods of payment, such as mail, electronic, and telephone payments. Under proposed § 226.10(e), consistent with TILA Section 127(i), creditors would be permitted to charge a separate fee only for those payment transactions that involve expedited service by a customer service representative. A creditor, however, would not be permitted to charge a separate fee for payment transactions that do not involve a customer service representative, such as payments sent by mail.

The Board is proposing several comments to provide guidance to creditors in complying with § 226.10(e). Proposed comment 10(e)–1 would clarify that the term ''separate fee'' means any fee imposed on a consumer for making a single payment to the consumer's account. Proposed comment 10(e)–1 would clarify, however, that a fees or charge imposed if payment is made after the due date, such as a late fee or finance charge, is not a ''separate fee to allow consumers to make a payment'' for purposes of § 226.10(e).

The Board also proposes to adopt comment 10(e)–2, which clarifies that the term ''expedited'' means crediting a payment to the account the same day or, if the payment is received after the creditor's cut-off time, the next business day.[16] For example, if a creditor accepts a nonconforming payment (such as a payment mailed to a branch office when it had specified the payment be sent to a different location) and a customer service representative credits the payment to the consumer's account the same day, the creditor may impose a separate fee. The Board believes that this standard for determining whether service is expedited will promote consistent practices among different creditors and will provide certainty as to how to comply with proposed § 226.10(e). In contrast, it would be difficult to apply a standard defining expedited service in relation to the time required for a payment to post using standard mail service because the length of time for delivery by mail for a given consumer or creditor may vary. In addition, a standard for determining whether service is expedited based on proximity to the due date would not address those circumstances in which consumers may want to make an expedited payment to the account in advance of the due date, such as in order to increase the amount of available credit.

Proposed comment 10(e)–3 would clarify that expedited service by a live customer service representative of the creditor would be required in order for a creditor to charge a separate fee to allow consumers to make a payment. Payments made on the account with the assistance of a live representative or agent may include payments made in person, on the telephone, or by electronic means. The Board understands that automated systems, such as a voice response unit or an interactive voice response system, are widely used to permit customers to

[16] The Board notes that any cut-off time specified by the creditor must comply with proposed § 226.10(b)(2)(ii), discussed earlier in the supplementary information. Furthermore, the Board notes that the creditor must also comply with § 226.10(a), which generally requires a creditor to credit payments to the consumer's account as of the date of receipt, except when a delay in crediting does not result in a finance or other charge.

make a payment by telephone or other electronic means. The proposed comment clarifies that a customer service representative does not include automated payment systems because these transactions do not involve a live customer service representative.

Section 226.10(f) Changes by Card Issuer

The Credit Card Act adopted new TILA Section 164(c), which provides that a card issuer may not impose any late fee or finance charge for a late payment on a credit card account if a card issuer makes ''a material change in the mailing address, office, or procedures for handling cardholder payments, and such change causes a material delay in the crediting of a cardholder payment made during the 60-day period following the date on which the change took effect.'' 15 U.S.C. 1666c(c). The Board proposes to implement new TILA Section 164(c) in proposed § 226.10(f).

The text of proposed § 226.10(f) generally follows the language provided in new TILA Section 164(c) with a modification to clarify the meaning of ''office.'' With respect to a change in office, the Board believes the intent of Section 164(c) is to apply only to changes in the address of a branch or office at which payments on a credit card account are accepted. *See* 15 U.S.C. 1604(a). Accordingly, proposed § 226.10(f) would prohibit a credit card issuer from imposing any late fee or finance charge for a late payment on a credit card account if a card issuer makes a material change in the address for receiving cardholder payments or procedures for handling cardholder payments, and such change causes a material delay in the crediting of a payment made during the 60-day period following the date on which the change took effect. As an initial matter, the Board notes that proposed § 226.10(f) would apply only to credit card accounts under an open-end (not home-secured) consumer credit plan, consistent with the approach the Board has taken with regard to other provisions of the Credit Card Act applicable to credit card accounts.

The Board proposes to adopt comment 10(f)–1 to clarify that ''address for receiving payment'' means a mailing address for receiving payment, such as a post office box, or the address of a branch or office at which payments on credit card accounts are accepted.

The Board is also proposing comment 10(f)–2 to provide guidance to creditors in determining whether a change or delay is material. Proposed comment 10(f)–2 would clarify that ''material change'' means any change in address for receiving payment or procedures for handling cardholder payments which causes a material delay in the crediting of a payment. Proposed comment 10(f)–2 would further clarify that a ''material delay'' means any delay in crediting a payment to a consumer's account which would result in a late payment and the imposition of a late fee or finance charge. The Board understands that it may be difficult for a card issuer to ascertain, for any given change in the address for receiving payment or procedures for handling payments, whether that change did in fact cause a material delay in the crediting of a consumer's payment.

Proposed comment 10(f)–3 would provide card issuers with a safe harbor, which the Board believes will give card issuers certainty in how to comply with the proposed rule. The Board requests comment on other reasonable methods that card issuers may use in complying with proposed § 226.10(f). In order to provide additional guidance to creditors in complying with this rule, proposed comment 10(f)–4 provides illustrative examples consistent with proposed § 226.10(f). For example, assume that a card issuer changes the mailing address for receiving payments by mail from one post office box number to another post office box number. The card issuer continues to use both post office box numbers for the collection of payments received by mail. The change in mailing address would not cause a material delay in crediting a payment because payments would be received and credited at both addresses. Therefore, a card issuer may impose a late fee or finance charge for a late payment on the account. Furthermore, for example, assume the same facts as above except the prior post office box number is no longer valid and mail sent to that address would be returned to sender. The change in mailing address is material and the change could cause a material delay in the crediting of a payment because a payment sent to the old address could be delayed past the due date. If, as a result, a consumer makes a late payment on the account during the 60-day period following the date on which the change took effect, a card issuer may not impose any late fee or finance charge for the late payment.

Proposed comment 10(f)–5 would clarify that when an account is not eligible for a grace period, imposing a finance charge due to a periodic interest rate does not constitute imposition of a finance charge for a late payment for the purposes of § 226.10(f). Notwithstanding the proposed rule, a card issuer may impose a finance charge due to a periodic interest rate in those circumstances.

Section 226.11 Treatment of Credit Balances; Account Termination

11(c) Timely Settlement of Estate Debts

New TILA Section 140A requires that the Board, in consultation with the Federal Trade Commission and each other agency referred to in § 108(a) of TILA, prescribe regulations requiring creditors, with respect to credit card accounts under an open-end consumer credit plan, to establish procedures to ensure that any administrator of an estate can resolve the outstanding credit balance of a deceased accountholder in a timely manner. 15 U.S.C. 1651. The Board proposes to implement TILA Section 140A in new § 226.11(c). In developing this proposal, the Board consulted with the Federal Trade Commission and the agencies referred to in § 108(a) of TILA. Proposed § 226.11(c)(1) requires creditors to adopt reasonable procedures designed to ensure that any administrator or executor of an estate of a deceased accountholder can determine the amount of and pay any balance on the decedent's credit card account in a timely manner. Proposed § 226.11(c) would apply only to credit card accounts under an open-end (not home-secured) consumer credit plan, consistent with the approach the Board has taken with regard to other provisions of the Credit Card Act applicable to credit card accounts.

Proposed § 226.11(c) generally follows the language in TILA Section 140A with some modification. For clarity, the Board proposes to interpret the term ''resolve'' for purposes of § 226.11(c) to mean determine the amount of and pay any balance on a deceased consumer's account. In addition, in order to ensure that the rule applies consistently to any personal representative of an estate who has the duty to settle any estate debt, the Board proposes to include ''executor'' in proposed § 226.11(c). The Board notes that the duties and responsibilities of administrators and executors are generally the same; however, it is the Board's understanding that administrators are distinct from executors in the manner in which they are appointed. Specifically, an executor is designated by the decedent's will while an administrator is typically appointed by a court in accordance with State law. The Board believes that TILA Section 140A is intended to apply to any deceased accountholder's estate, regardless of whether an administrator or executor is responsible for the estate.

In addition, the Board is proposing to require creditors to adopt ''reasonable procedures designed to ensure'' that administrators or executors can determine the amount of and pay any balance in a timely manner. The Board recognizes that some creditors may already have established procedures for the resolution of a deceased accountholder's balance. Thus, a ''reasonable procedures'' standard would permit creditors to retain, to the extent appropriate, procedures which may already be in place, in complying with proposed § 226.11(c), as well as applicable State and Federal laws governing probate. Proposed comment 11(c)–1 provides examples of reasonable procedures consistent with proposed § 226.11(c).

In addition to the general rule, the Board is proposing § 226.11(c)(2)(i), which would prohibit creditors from imposing fees and charges on a deceased consumer's account upon receiving a request for the amount of any balance from an administrator or executor of an estate. The intent of new TILA Section 140A is to ensure the timely settlement of a deceased accountholder's credit card balance. The Board understands that establishing and administering an estate may be a complex, time-consuming process, which is subject to various State law requirements and can involve a probate court. Furthermore, the Board understands that some administrators and executors currently may be unable to obtain the amount of a deceased accountholder's balance in a timely manner, which in turn, delays the settlement of estate debts. If balances cannot be obtained and settled in a timely manner, fees and other charges, such as a late fee or finance charge, may continue to accrue on the account balance. Under these circumstances, the Board believes that the estate and its assets may be disadvantaged if fees and charges continue to accrue on the account. Accordingly, proposed § 226.11(c)(2)(i) would prohibit a creditor from imposing fees and charges on the deceased consumer's account upon receiving a request for the amount of the balance on the account from an administrator or executor of an estate. The Board believes that this prohibition is necessary to provide certainty for all parties as to the balance amount and to ensure the timely settlement of estate debts. Proposed comment 11(c)–2 would clarify that a creditor may impose finance charges based on balances for days that precede the date on which the creditor receives a request pursuant to proposed § 226.11(c)(3). The Board solicits comment on whether a creditor should be permitted to resume the imposition of fees and charges if the administrator or executor of an estate has not paid the account balance within a specified period of time.

Proposed § 226.11(c)(2)(ii) would provide that a creditor may impose fees and charges on a deceased consumer's account if a joint accountholder remains on the account. For joint accounts, a joint accountholder remains liable for the account. In contrast, because an authorized user is not liable for the account, proposed § 226.11(c)(2)(ii) would not extend to such users. Accordingly, a creditor may not impose fees and charges on the account if only an authorized user remains on the account. Proposed comment 11(c)–3 would clarify that a creditor may impose fees and charges on a deceased consumer's account if a joint accountholder remains on the account. The proposed comment would further clarify that a creditor may not impose fees and charges on a deceased consumer's account if an authorized user remains on the account.

The Board is also proposing comment 11(c)–4 to clarify that a creditor may receive a request for the amount of the balance on the account in writing or by telephone call from the administrator or executor of an estate. If a request is made in writing, such as by mail, the request is received when the creditor receives the correspondence.

Under proposed § 226.11(c)(3)(i), a creditor would be required to disclose the amount of the balance on the account in a timely manner, upon request by the administrator or executor of the estate. The Board believes a timely statement reflecting the deceased accountholder's balance is necessary to assist administrators and executors with the settlement of estate debts. Proposed comment 11(c)–5 provides guidance to creditors in complying with § 226.11(c)(3). Creditors may provide the amount of the balance, if any, by a written statement or by telephone. Proposed comment 11(c)–5 also clarifies that proposed § 226.11(c)(3) would not preclude a creditor from providing the balance amount to appropriate persons, other than the administrator or executor of an estate. For example, the Board notes that the proposed rule would not preclude creditors, subject to applicable Federal and State laws, from providing a spouse or family members who indicate that they will pay the decedent's debts from obtaining a balance amount for that purpose.

Proposed § 226.11(c)(3)(ii) provides creditors with a safe harbor for disclosing the balance amount in a timely manner, stating that it would be reasonable for a creditor to provide the balance on the account within 30 days of receiving a request by the administrator or executor of an estate. The Board believes that 30 days is reasonable to ensure that transactions and charges have been accounted for and calculated and to provide a written statement or confirmation. The Board seeks comment as to whether 30 days provides creditors with sufficient time to provide a statement of the balance on the deceased consumer's account.

Section 226.16 Advertising

16(f) Misleading Terms

See the supplementary information to § 226.5(a)(2)(iii) for a discussion of the Board's proposals regarding use of the term ''fixed'' in advertisements for open-end plans set forth in proposed § 226.16(f).

16(h) Deferred Interest or Similar Offers

In May 2009, the Board proposed to use its authority under TILA Section 143(3) to implement new advertising requirements related to deferred interest or similar offers for open-end (not home-secured) credit plans. 15 U.S.C. 1663(3). These requirements, which the Board proposed to implement in a new § 226.16(h), were similar to those originally proposed by the Board in May 2009. *See* 73 FR 28866, 28884–28886. The Board continues to believe that these requirements would better inform consumers of the terms of deferred interest or similar offers and that these advertising requirements will complement the proposed periodic statement disclosures for such programs that are discussed in the supplementary information to § 226.7(b). Therefore, the Board is republishing these same requirements for additional comment in this **Federal Register** notice.

Specifically, these disclosure requirements would apply to advertisements that use terms such as ''no interest,'' ''no payments,'' ''deferred interest,'' ''same as cash,'' or similar terms in describing these offers.[17] Proposed § 226.16(h)(1) would limit these requirements to advertisements of open-end (not home-secured) credit, and proposed § 226.16(h)(2) would define terms applicable to the section. 74 FR 20793–20794. Proposed § 226.16(h)(3) would require that the deferred interest period be disclosed in immediate proximity to each deferred interest triggering term. Also, under

[17] For ease of reference, the supplementary information to proposed § 226.16(h) refers generically to these terms as ''deferred interest triggering terms.''

proposed § 226.16(h)(3), for advertisements stating ''no interest'' or a similar term, the fact that the balance must be paid in full by the end of the deferred interest period also would need to be disclosed in immediate proximity to that term. 74 FR 20794. Proposed § 226.16(h)(4) also would require that certain additional information about the terms of the deferred interest or similar offer be disclosed in close proximity to the first statement of a deferred interest triggering term. 74 FR 20794. To facilitate compliance with this provision, the Board proposed model language in Sample G–22 in Appendix G. 74 FR 20797. Sample G–22 from the May 2009 Regulation Z Proposed Clarifications has been renumbered as Sample G–24 in this proposal. Proposed § 226.16(h)(4) would require that advertisements of deferred interest or similar offers use language similar to Sample G–24. Finally, under proposed § 226.16(h)(5), most of these requirements would not apply to envelopes or other enclosures in which an application or solicitation is mailed, or banner advertisements or pop-up advertisements linked to an electronic application or solicitation, bearing the triggering terms. 74 FR 20794.

In addition, the Board proposed new commentary to provide further guidance on the requirements under proposed § 226.16(h), and also proposed to amend comments 16–1 and 16–2 to clarify the clear and conspicuous requirements for these disclosures. 74 FR 20800. Proposed comment 16(h)–1 provided further clarification on what types of offers were included as deferred interest or similar offers, while proposed comment 16(h)–2 further clarified the meaning of ''deferred or waived interest period.'' [18] 74 FR 20800. Similar to guidance adopted in the January 2009 Regulation Z Rule for advertisements of promotional rates under § 226.16(g), the Board proposed comment 16(h)–3 to further clarify the meaning of ''immediate proximity,'' comment 16(h)–4 to further clarify the meaning of ''prominent location closely proximate,'' and comment 16(h)–5 to further clarify the meaning of ''first listing.'' 74 FR 20800. The Board also proposed comment 16(h)–6 to clarify that the information required under proposed § 226.16(h)(4) need not be segregated from other information the advertisement discloses about the deferred interest or similar offer. 74 FR 20800. Finally, proposed comment 16(h)–7 provided examples of phrases that could be used to comply with proposed 226.16(h)(3). 74 FR 20801.

Section 226.51 Ability To Pay

51(a) General Ability To Pay

Section 109 of the Credit Card Act adds new TILA Section 150 prohibiting a card issuer from opening a credit card account for a consumer, or increasing the credit limit applicable to a credit card account, unless the card issuer considers the consumer's ability to make the required payments under the terms of such account. 15 U.S.C. 1665e. The Board proposes to implement TILA Section 150 in § 226.51(a).

Proposed § 226.51(a)(1) generally follows the language provided in TILA Section 150 with two modifications. First, because the minimum payment is the amount that a consumer is required to pay each billing cycle under the terms of the contract with the card issuer, the Board proposes to interpret the term ''required payments'' to mean the required minimum periodic payment.

Second, the Board believes an evaluation of a consumer's current ability to pay must include a review of the consumer's income or assets as well as the consumer's current obligations. Therefore, proposed § 226.51(a)(1) would provide that the card issuer's consideration of the ability of the consumer to make the required minimum periodic payments must be based on the consumer's income or assets and the consumer's current obligations. Proposed § 226.51(a)(1) would also require that card issuers have reasonable policies and procedures in place to consider this information. A card issuer has not complied with this provision if, for example, a card issuer does not review any information about a consumer's income, assets, or current obligations, or issues a credit card to a consumer who does not have any income or assets. In addition, the Board believes that other factors may be useful for card issuers to evaluate a consumer's ability to pay. Accordingly, proposed comment 51(a)–1 would clarify that card issuers may also consider credit reports or credit scores, and any other factors that are consistent with the Board's Regulation B (12 CFR Part 202).

Because the minimum payments a consumer is required to pay each billing cycle may vary depending on the amount of the balance as well as the finance and other charges a consumer incurs during the billing cycle, card issuers would be required to estimate the minimum payments a consumer might be obligated to pay before the account is opened or the credit line is increased. Proposed § 226.51(a)(2)(i) would require card issuers to use a reasonable method for estimating the required minimum periodic payments, and proposed § 226.51(a)(2)(ii) would provide a safe harbor that card issuers could use to comply with this requirement. Specifically, the safe harbor requires the card issuer to assume utilization of the full credit line that the issuer is considering offering to the consumer from the first day of the billing cycle. The safe harbor also requires the issuer to use a minimum payment formula employed by the issuer for the product the issuer is considering offering to the consumer or, in the case of an existing account, the minimum payment formula that currently applies to that account. For example, in evaluating an application to open a new account, if the minimum payment formula used by the card issuer for the product is 2% of the outstanding balance, the estimated required minimum periodic payment for a $10,000 credit line would be $200 under the safe harbor.

However, if the applicable minimum payment formula includes interest charges, the safe harbor requires the card issuer to estimate those charges using an interest rate that the issuer is considering offering to the consumer for purchases or, in the case of an existing account, the interest rate that currently applies to purchases. For example, if the minimum payment formula that applies to an existing consumer's account is 3% plus interest and fees, the current purchase rate for the account is 10%, and the card issuer is considering increasing the consumer's credit line to $10,000, the estimated required minimum periodic payment would be approximately $380 under the safe harbor. Finally, if the applicable minimum payment formula includes fees, the card issuer may assume that no fees have been charged to the account.

In developing the proposed safe harbor, the Board considered a number of different approaches. The Board recognizes that consumers generally do not use the full credit line, and consequently, the Board's proposed safe harbor approach could have the effect of overstating the consumer's likely required payments. The Board, however, believes that since card issuers are qualifying consumers for a certain credit line, of which consumers presumably have full use, card issuers should be expected to underwrite based on required payments on the full amount under the safe harbor. Furthermore, although estimating a

[18] While the May 2009 Regulation Z Proposed Clarifications referred to a ''deferred or waived interest'' offer, this proposal refers to such promotional programs more generally as deferred interest or similar offers.

consumer's required minimum periodic payments may be more accurate with the addition of some estimated fees when using a minimum payment formula that includes the interest and fees, the Board believes that estimating the amount of fees that a typical consumer might incur could be speculative. As a result the Board's proposed safe harbor does not require issuers to estimate fees. The Board seeks comment on other reasonable methods that card issuers may use in estimating minimum payments.

Proposed comment 51(a)–2 would clarify that in considering a consumer's ability to pay, a card issuer must base the consideration on facts and circumstances known to the card issuer at the time the consumer applies to open the credit card account or when the card issuer considers increasing the credit line on an existing account. This guidance is similar to comment 34(a)(4)–5 addressing a creditor's requirement to consider a consumer's repayment ability for certain closed-end mortgage loans based on facts and circumstances known to the creditor at loan consummation. Furthermore, since credit line increases can occur at the request of a consumer or through a unilateral decision by the card issuer, proposed comment 51(a)–3 would clarify that § 226.51(a) applies in both situations.

Proposed comment 51(a)–4 would provide examples of assets and income the card issuer may consider in evaluating a consumer's ability to pay. The comment would provide similar guidance to comment 34(a)(4)–6 regarding the requirement for creditors to consider a consumer's repayment ability with respect to certain closed-end mortgage loans. The Board also proposes comment 51(a)–5 to clarify that in considering a consumer's current obligations, a card issuer may rely on information provided by the consumer or in a consumer's credit report.

Finally, for several reasons, the proposal does not require that card issuers verify information before the account is opened or the credit line is increased. First, TILA Section 150 does not require verification of a consumer's ability to make required payments. Second, verification can be burdensome for both consumers and card issuers, especially when accounts are opened at point of sale or by telephone. For example, because consumers generally do not have documentation readily available to verify their income, assets, or obligations at point of sale, a verification requirement would restrict consumers' ability to open a new credit card account at point of sale. As a result, the Board believes that card issuers need flexibility to determine instances when they need to verify information. Furthermore, since these accounts are generally unsecured, the Board believes that card issuers have reasons to verify the information when either the information supplied by the applicant is inconsistent with the data the card issuers already have or are able to gather on the consumer or when the risk in the amount of the credit line warrants such verification. While the Board has required creditors to verify information before credit is extended for certain mortgage loans, the Board's decision with respect to such loans was based on evidence that borrower income was inflated for these types of mortgage loans and that lending decisions based on overstated incomes contributed to the recent substantial increase in mortgage delinquencies. In contrast, the Board does not have evidence that this is the case in the credit card market. As a result, the Board believes a verification requirement before a credit card account is opened or credit line increased would not be necessary and could burden consumers. The Board, however, seeks comment on whether there is evidence that warrants a requirement to verify information before a credit card account is opened or a credit line is increased.

51(b) Rules Affecting Young Consumers

Currently, card issuers may grant credit to young consumers on the assumption that a parent or guardian of the consumer will pay the debt, even if the issuer does not obtain the express agreement of such parent or guardian to assume liability. Sections 301 and 303 of the Credit Card Act are meant to address this situation. Under new Section 127(c)(8)(A) of TILA, as adopted by Section 301 of the Credit Card Act, no credit card may be issued to, or open-end consumer credit plan established by, or on behalf of a consumer, who has not attained the age of 21 unless the consumer has submitted a written application to the card issuer that meets certain requirements. 15 U.S.C. 1637(c)(8)(A). New TILA Section 127(c)(8)(B) further provides that an application to open a credit card account by a consumer who has not attained the age of 21 as of the date of submission of the application shall require either: (1) The signature of a cosigner who has attained the age of 21 having a means to repay debts incurred by the consumer in connection with the account, indicating joint liability for debts incurred by the consumer in connection with the account before the consumer has attained the age of 21; or (2) the submission by the consumer of financial information, including through an application, indicating an independent means of repaying any obligation arising from the proposed extension of credit in connection with the account. 15 U.S.C. 1637(c)(8)(B).

Section 303 of the Credit Card Act adds new TILA Section 127(p). 15 U.S.C. 1637(p). TILA Section 127(p) states that no increase may be made in the amount of credit authorized to be extended under a credit card account for which an individual has assumed joint liability for debts incurred by the consumer in connection with the account before the consumer attains the age of 21, unless that individual approves in writing, and assumes joint liability for, such increase.

The Board proposes to implement these provisions in proposed § 226.51(b) and associated commentary. Proposed § 226.51(b)(1) would provide that a card issuer may not open a credit card account under an open-end (not home-secured) consumer credit plan for a consumer less than 21 years old, unless the consumer submits a written application and provides either a signed agreement of a cosigner, guarantor, or joint applicant pursuant to § 226.51(b)(1)(i) or financial information consistent with § 226.51(b)(1)(ii), as further discussed below. The language in § 226.51(b)(1) has been modified from the statutory language in TILA Section 127(c)(8)(A) for consistency with § 226.51(a) and to clarify that the provision applies only to credit card accounts and only in connection with the opening of the account. Furthermore, the language has been modified to improve readability.

Although the text of TILA Section 127(c)(8)(A) references open-end consumer credit plans other than credit cards, the Board believes that the intent of the provision, read as a whole, is to apply only to credit card accounts. While the provision references other open-end consumer credit plans, the requirements under the provision apply only to ''card issuers.'' Based on the fact that the requirements of the provision are limited to card issuers as well as language in other related sections of the Credit Card Act and the location of the provision in TILA, the Board believes that the restrictions in TILA Section 127(c)(8)(A) are meant to apply only to credit card accounts.

First, TILA Section 127(c)(8)(B), which discusses the requirements for an application submitted by a consumer who has not attained the age of 21, refers solely to an application to open a credit card account. Second, TILA

Section 127(p), which restricts credit line increases for accounts in which an individual assumes joint liability for debts incurred by the consumer in connection with the account before the consumer attains the age of 21, refers only to a credit card account. Third, these provisions have been placed in TILA Section 127(c), a section that deals exclusively with credit card accounts. Therefore, the Board believes it is appropriate to apply proposed § 226.51(b)(1) only to credit card accounts.

Furthermore, proposed § 226.51(b)(1) refers to the opening of a credit card account, which differs from the statute's reference to the issuance of a credit card. The ''issuance'' of a credit card can refer to a card sent to the consumer as a replacement card or upon renewal of the card. *See* § 226.12(a). As a result, the Board believes that limiting the scope of § 226.51(b) to the opening of a credit card account is appropriate. Otherwise, the provision could be construed to require card issuers to evaluate a cardholder's ability or obtain the signature of a cosigner even when a card is being sent to an existing cardholder to replace an expired card. The Board notes that the renewal of an existing account or change in the terms of an existing account generally does not constitute the opening of an account for purposes of Regulation Z.

The Board proposes to implement the specific application requirements detailed in TILA Section 127(c)(8)(B) in § 226.51(b)(1)(i) and (ii). Proposed § 226.51(b)(1)(i) and (ii) generally follow the language in TILA Section 127(c)(8)(B) with some changes. While most of these modifications are minor and are meant to improve the readability of the regulation without any substantive change in meaning, the Board also proposes to clarify the meaning of cosigner and joint liability.

The terms cosigner and joint liability can have several meanings. For example, a cosigner can refer to a guarantor who has no credit privileges on the account but is secondarily liable for a consumer's debt if the consumer defaults. A cosigner can also mean a joint accountholder who shares credit privileges with the consumer on the account and is jointly liable on the debt incurred by either the consumer or the joint accountholder. The Board believes it is appropriate to modify the language used in the regulation from the statutory language to make clear that all types of cosigners and joint liability arrangements would be included. Accordingly, proposed § 226.51(b)(1)(i) states that a consumer who is less than 21 years old can provide the signed agreement of a cosigner, guarantor, or joint applicant who is at least 21 years old to be either secondarily liable for any debt on the account incurred by the consumer before the consumer has attained the age of 21 in the event the consumer defaults on the account or jointly liable with the consumer for any debt on the account incurred by either party.

Furthermore, to maintain consistency, the Board proposes to interpret the phrase ''means to repay'' or ''means of repaying'' as equivalent to evaluating a consumer's ability to make the required payments under TILA Section 150, which the Board proposes to implement in § 226.51(a), as discussed above. Therefore, § 226.51(b)(1)(i) and (ii) both reference § 226.51(a) in discussing the ability of a cosigner, guarantor, or joint applicant to make the minimum payments on the consumer's debts and the consumer's independent ability to make the minimum payments on any obligations arising under the account.

Proposed § 226.51(b)(2) generally follows the language in TILA Section 127(p), though the Board has modified some of the wording used in the statute. These changes are meant to improve readability without any substantive change in meaning. For example, TILA Section 127(p) states that a parent, guardian, or spouse must approve the credit line increase in writing; however, the statute also concedes that an individual who is not a parent, guardian, or spouse may have assumed liability for debts incurred by the consumer. In those cases, that individual should be the one to approve the credit line increase, and assume liability for that increased amount. Therefore, proposed § 226.51(b)(2) eliminates the reference to parent, guardian, or spouse to apply the provision more generally to cosigners, guarantors, or joint accountholders.

The Board also proposes several comments to provide guidance to card issuers in complying with § 226.51(b). Proposed comment 51(b)–1 would clarify that § 226.51(b)(1) and (b)(2) apply only to a consumer who has not attained the age of 21 as of the date of submission of the application under § 226.51(b)(1) or the date the credit line increase is requested by the consumer under § 226.51(b)(2). If no request has been made (for example, for unilateral credit line increases by the card issuer), the provision would apply only to a consumer who has not attained the age of 21 as of the date the credit line increase is considered by the card issuer.

Proposed comment 51(b)–2 would address the ability of a card issuer to require a cosigner, guarantor, or joint accountholder to assume liability for debts incurred after the consumer has attained the age of 21. While § 226.51(b)(1)(i) and (b)(2) require, at a minimum, that a cosigner, guarantor, or joint accountholder assume liability for any debt on the account incurred by the consumer before the consumer has attained the age of 21, proposed comment 51(b)–2 would clarify that § 226.51(b)(1)(i) and (b)(2) do not restrict a card issuer from extending this liability to debt incurred by the consumer after the consumer has attained the age of 21, at the card issuer's option, consistent with any agreement made between the parties.

The Board proposes comment 51(b)–3 to clarify that § 226.51(b)(1) and (b)(2) do not apply to a consumer under the age of 21 who is being added to another person's account as an authorized user and has no liability for debts incurred on the account. The Board believes that the protections under TILA Sections 127(c)(8) and 127(p) would not be necessary if the consumer under the age of 21 is not assuming any liability, and would therefore not be legally obligated to make any payments on the account.

Proposed comment 51(b)–4 would provide card issuers with guidance concerning electronic applications and explain how the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*) would govern the submission of such an application. TILA Section 127(c)(8) requires a consumer who has not attained the age of 21 to submit a written application. In addition, under TILA Section 127(p), a cosigner, guarantor, or joint accountholder must approve a credit line increase in writing. However, in accordance with the purposes of the E-Sign Act, contracts and other records cannot be denied legal effect, validity or enforceability solely because they are in electronic form. *See* 15 U.S.C. 7001(a). Therefore, the Board believes that, consistent with the purposes of the E-Sign Act, applications submitted under TILA Section 127(c)(8) and approvals under TILA Section 127(p), which must be provided in writing, may also be submitted electronically. Moreover, the E-Sign Act requires that before any disclosure that is required to be in writing is provided to a consumer electronically, the consumer must affirmatively consent to the provision of the information electronically, among other things. Since the submission of an application or approval by a consumer, cosigner, guarantor, or joint accountholder is not a disclosure *to* a consumer, the consumer consent and other

requirements necessary to provide consumer disclosures electronically pursuant to the E-Sign Act would not apply. Furthermore, § 226.5(a)(1)(iii), which was adopted in the January 2009 Regulation Z Rule, provides that an application may be provided to a consumer in electronic form without regard to the consumer consent or other provisions of the E-Sign Act in the circumstances set forth in § 226.5a.

Proposed comment 51(b)(1)–1 explains that when evaluating an application to open a credit card account or credit line increase for a consumer under the age of 21, creditors must comply with applicable rules in Regulation B (12 CFR Part 202). Given that age is generally a prohibited basis for any creditor to take into account in any system evaluating the creditworthiness of applicants under Regulation B, the Board believes that Regulation B prohibits card issuers from refusing to consider the application of a consumer solely because the applicant has not attained the age of 21 (assuming the consumer has the legal ability to enter into a contract). Furthermore, because TILA Section 127(c)(8) permits card issuers to open a credit card account for a consumer who has not attained the age of 21 if either of the conditions under TILA Section 127(c)(8)(B) are met, the Board believes that a card issuer may choose to evaluate an application of a consumer who is less than 21 years old solely on the basis of the information provided under § 226.51(b)(1)(ii). Therefore, the Board believes, a card issuer is not required to accept an application from a consumer less than 21 years old with the signature of a cosigner, guarantor, or joint applicant pursuant to § 226.51(b)(1)(i), unless refusing such applications would violate Regulation B. For example, if the card issuer permits other applicants of non-business credit card accounts who have attained the age of 21 to provide the signature of a cosigner, guarantor, or joint applicant, the card issuer must provide this option to applicants of non-business credit card accounts who have not attained the age of 21 (assuming the consumer has the legal ability to enter into a contract).

Proposed comment 51(b)(2)–1 would provide that the requirement under § 226.51(b)(2) that a cosigner, guarantor, or joint accountholder for a credit card account opened pursuant to § 226.51(b)(1)(ii) must agree in writing to assume liability for a credit line increase does not apply if the cosigner, guarantor or joint accountholder who is at least 21 years old requests the increase. Because the party that must approve the increase is the one that is requesting the increase in this situation, the Board believes that § 226.51(b)(2) would be redundant.

Section 226.52 Limitations on Fees

52(a) Limitations During First Year After Account Opening

New TILA Section 127(n)(1) applies ''[i]f the terms of a credit card account under an open end consumer credit plan require the payment of any fees (other than any late fee, over-the-limit fee, or fee for a payment returned for insufficient funds) by the consumer in the first year during which the account is opened in an aggregate amount in excess of 25 percent of the total amount of credit authorized under the account when the account is opened.'' 15 U.S.C. 1637(n)(1). If the 25 percent threshold is met, then ''no payment of any fees (other than any late fee, over-the-limit fee, or fee for a payment returned for insufficient funds) may be made from the credit made available under the terms of the account.'' However, new TILA Section 127(n)(2) provides that Section 127(n) may not be construed as authorizing any imposition or payment of advance fees prohibited by any other provision of law. The Board is proposing to implement new TILA Section 127(n) in § 226.52(a).[19]

Subprime credit cards often charge substantial fees at account opening and during the first year after the account is opened. For example, these cards may impose multiple one-time fees when the consumer opens the account (such as an application fee, a program fee, and an annual fee) as well as a monthly maintenance fee, fees for using the account for certain types of transactions, and fees for increasing the credit limit. The account-opening fees are often billed to the consumer on the first periodic statement, substantially reducing from the outset the amount of credit that the consumer has available to make purchases or other transactions on the account. For example, some subprime credit card issuers assess $250 in fees at account opening on accounts with credit limits of $300, leaving the consumer with only $50 of available credit with which to make purchases or other transactions. In addition, the consumer may pay interest on the fees until they are paid in full.

Because of concerns that some consumers were not aware of how fees would affect their ability to use the card for its intended purpose of engaging in transactions, the Board's January 2009 Regulation Z Rule enhanced the disclosure requirements for these types of fees and clarified the circumstances under which a consumer who has been notified of the fees in the account-opening disclosures (but has not yet used the account or paid a fee) may reject the plan and not be obligated to pay the fees. *See* § 226.5(b)(1)(iv), 74 FR 5402; § 226.5a(b)(14), 74 FR 5404; § 226.6(b)(1)(xiii), 74 FR 5408. In addition, because the Board and the other Agencies were concerned that disclosure alone was insufficient to protect consumers from unfair practices regarding high-fee subprime credit cards, the January 2009 FTC Act Rule prohibited institutions from charging certain types of fees during the first year after account opening that, in the aggregate, constituted the majority of the credit limit. In addition, these fees were limited to 25 percent of the initial credit limit in the first billing cycle with any additional amount (up to 50 percent) spread equally over the next five billing cycles. Finally, institutions were prohibited from circumventing these restrictions by providing the consumer with a separate credit account for the payment of additional fees. *See* 12 CFR 227.26, 74 FR 5561, 5566; *see also* 74 FR 5538–5543.[20]

52(a)(1) General Rule

As noted above, new TILA Section 127(n)(1) applies when ''the terms of a credit card account * * * require the payment of any fees (other than any late fee, over-the-limit fee, or fee for a payment returned for insufficient funds) by the consumer in the first year during which the account is opened in an aggregate amount in excess of 25 percent of the total amount of credit authorized under the account when the account is opened.'' Congress's use of ''require'' could be construed to mean that Section 127(n)(1) applies only to fees that are unconditional requirements of the account—in other words, fees that all consumers are required to pay regardless of how the account is used (such as account-opening fees, annual fees, and monthly maintenance fees). However, such a narrow reading would be inconsistent with the words ''*any*

[19] In a subsequent rulemaking, the Board intends to implement new TILA Section 149 in § 226.52(b). New TILA Section 149, which is effective August 22, 2010, requires that credit card penalty fees and charges be reasonable and proportional to the consumer's violation of the cardholder agreement.

[20] Although the Board, OTS, and NCUA adopted substantively identical rules under the FTC Act, each agency placed its rules in its respective part of Title 12 of the Code of Federal Regulations. Specifically, the Board placed its rules in part 227, the OTS in part 535, and the NCUA in part 706. For simplicity, this supplementary information cites to the Board's rules and official staff commentary.

fees,'' which indicate that Congress intended the provision to apply to a broader range of fees. Furthermore, categorically excluding fees that are conditional (in other words, fees that consumers are only required to pay in certain circumstances) would enable card issuers to circumvent the 25 percent limit by, for example, requiring consumers to pay fees in order to receive a particular credit limit or to use the account for purchases or other transactions. Finally, new TILA Section 127(n)(1) specifically excludes three fees that are conditional (late payment fees, over-the-limit fees, and fees for a payment returned for insufficient funds), which suggests that Congress otherwise intended Section 127(n)(1) to apply to fees that a consumer is required to pay only in certain circumstances (such as fees for other violations of the account terms or fees for using the account for transactions).

New TILA Section 127(n)(1) further provides that, if the 25 percent threshold is met, ''no payment of any fees (other than any late fee, over-the-limit fee, or fee for a payment returned for insufficient funds) may be made from the credit made available under the terms of the account.'' Although this language could be read to require card issuers to determine at account opening the total amount of fees that will be charged during the first year, the Board does not believe this was Congress's intent because the total amount of fees charged during the first year will depend on how the account is used. For example, most card issuers currently require consumers who use a credit card account for cash advances, balance transfers, or foreign transactions to pay a fee that is equal to a percentage of the transaction. Thus, the total amount of fees charged during the first year will depend on, among other things, the number and amount of cash advances, balance transfers, or foreign transactions. Although card issuers could address this uncertainty by ceasing to charge such fees, card issuers that did so would also likely reduce consumers' ability to use their credit cards for these types of transactions, which could be detrimental for some consumers. Accordingly, the Board believes Section 127(n)(1) should be interpreted to limit the fees charged to a credit card account during the first year to 25 percent of the initial credit limit and to prevent card issuers from collecting additional fees by other means (such as directly from the consumer or by providing a separate credit account). In order to effectuate this purpose and to facilitate compliance, the Board proposes to use its authority under TILA Section 105(a) to implement new TILA Section 127(n) as set forth below.

Proposed § 226.52(a)(1)(i) provides that, if a card issuer charges any fees to a credit card account under an open-end (not home-secured) consumer credit plan during the first year after account opening, those fees must not in total constitute more than 25 percent of the credit limit in effect when the account is opened. Proposed comment 52(a)(1)(i)–1 provides an illustrative example of the application of the rule.

Proposed comment 52(a)(1)(i)–2 clarifies that a card issuer that charges a fee to a credit card account that exceeds the 25 percent limit complies with § 226.52(a)(1)(i) if the card issuer waives or removes the fee and any associated interest charges or credits the account for an amount equal to the fee and any associated interest charges at the end of the billing cycle during which the fee was charged. Thus, if a card issuer's systems automatically assess a fee based on certain account activity (such as automatically assessing a cash advance fee when the account is used for a cash advance) and, as a result, the total amount of fees subject to § 226.52(a) that have been charged to the account during the first year exceeds the 25 percent limit, the card issuer can comply with § 226.52(a)(1)(i) by removing the fee and any interest charged on that fee at the end of the billing cycle.

Proposed comment 52(a)(1)(i)–3 clarifies that, because the limitation in § 226.52(a)(1)(i) is based on the credit limit in effect when the account is opened, a subsequent increase in the credit limit during the first year does not permit the card issuer to charge to the account additional fees that would otherwise be prohibited (such as a fee for increasing the credit limit). An illustrative example is provided.

Proposed § 226.52(a)(1)(ii) would prevent card issuers from circumventing proposed § 226.52(a)(1)(i) by providing that a card issuer that charges fees to the account during the first year after account opening must not require the consumer to pay any fees in excess of the 25 percent limit with respect to the account during the first year. Proposed comment 52(a)(1)(ii)–1 clarifies that § 226.52(a)(1)(ii) prohibits a card issuer that charges to a credit card account fees during the first year that total 25 percent of the initial credit limit from requiring the consumer to pay any additional fees through other means during the first year (such as through a payment from the consumer to the card issuer or from another credit account provided by the card issuer). An illustrative example is provided.

52(a)(2) Fees Not Subject to Limitations

Proposed § 226.52(a)(2)(i) implements the exception in new TILA Section 127(n)(1) for late payment fees, over-the-limit fees, and fees for payments returned for insufficient funds. However, pursuant to the Board's authority under TILA Section 105(a), proposed § 226.52(a)(2)(i) applies to all fees for returned payments because a payment may be returned for reasons other than insufficient funds (such as because the account on which the payment is drawn has been closed or because the consumer has instructed the institution holding that account not to honor the payment).

As discussed above, new TILA Section 127(n)(1) applies to fees that a consumer is required to pay with respect to a credit card account. Accordingly, proposed § 226.52(a)(2)(ii) would create an exception to § 226.52(a) for fees that a consumer is not required to pay with respect to the account. The proposed commentary to § 226.52(a) illustrates the distinction between fees the consumer is required to pay and those the consumer is not required to pay. Proposed comment 52(a)(2)–1 clarifies that, except as provided in § 226.52(a)(2), the limitations in § 226.52(a)(1) apply to any fees that a card issuer will or may require the consumer to pay with respect to a credit card account during the first year after account opening. The comment lists several types of fees as examples of fees covered by § 226.52(a). First, fees that the consumer is required to pay for the issuance or availability of credit described in § 226.5a(b)(2), including any fee based on account activity or inactivity and any fee that a consumer is required to pay in order to receive a particular credit limit. Second, fees for insurance described in § 226.4(b)(7) or debt cancellation or debt suspension coverage described in § 226.4(b)(10) written in connection with a credit transaction, if the insurance or debt cancellation or debt suspension coverage is required by the terms of the account. Third, fees that the consumer is required to pay in order to engage in transactions using the account (such as cash advance fees, balance transfer fees, foreign transaction fees, and other fees for using the account for purchases). And fourth, fees that the consumer is required to pay for violating the terms of the account (except to the extent specifically excluded by § 226.52(a)(2)(i)).

Proposed comment 52(a)(2)–2 provides as examples of fees that

generally fall within the exception in § 226.52(a)(2)(ii) fees for making an expedited payment (to the extent permitted by § 226.10(e)), fees for optional services (such as travel insurance), fees for reissuing a lost or stolen card, and statement reproduction fees.

Finally, proposed comment 52(a)(2)–3 clarifies that a security deposit that is charged to a credit card account is a fee for purposes of § 226.52(a). However, the comment also clarifies that § 226.52(a) would not prohibit a creditor from providing a secured credit card that requires a consumer to provide a cash collateral deposit that is equal to the credit line for the account.

52(a)(3) Rule of Construction

New TILA Section 127(n)(2) states that ''[n]o provision of this subsection may be construed as authorizing any imposition or payment of advance fees otherwise prohibited by any provision of law.'' 15 U.S.C. 1637(n)(2). The Board proposes to implement this provision in § 226.52(a)(3). As an example of a provision of law limiting the payment of advance fees, proposed comment 52(a)(3)–1 cites 16 CFR 310.4(a)(4), which prohibits any telemarketer or seller from ''[r]equesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person.''

Section 226.53 Allocation of Payments

As amended by the Credit Card Act, TILA Section 164(b)(1) provides that, ''[u]pon receipt of a payment from a cardholder, the card issuer shall apply amounts in excess of the minimum payment amount first to the card balance bearing the highest rate of interest, and then to each successive balance bearing the next highest rate of interest, until the payment is exhausted.'' 15 U.S.C. 1666c(b)(1). However, amended Section 164(b)(2) provides the following exception to this general rule: ''A creditor shall allocate the entire amount paid by the consumer in excess of the minimum payment amount to a balance on which interest is deferred during the last 2 billing cycles immediately preceding expiration of the period during which interest is deferred.'' As discussed in detail below, the Board proposes to implement amended TILA Section 164(b) in a new § 226.53.

As an initial matter, however, the Board proposes to interpret amended TILA Section 164(b) to apply to credit card accounts under an open-end (not home-secured) consumer credit plan rather than to all open-end consumer credit plans. Although the requirements in amended TILA Section 164(a) regarding the prompt crediting of payments apply to ''[p]ayments received from [a consumer] under an open end consumer credit plan,'' the general payment allocation rule in amended TILA Section 164(b)(1) applies ''[u]pon receipt of a payment from a *cardholder.*'' Furthermore, the exception for deferred interest plans in amended Section 164(b)(1) requires ''the *card issuer* [to] apply amounts in excess of the minimum payment amount first to the *card balance* bearing the highest rate of interest. * * *'' Based on this language, it appears that Congress intended to apply the payment allocation requirements in amended Section 164(b) only to credit card accounts. This is consistent with the approach taken by the Board and the other Agencies in the January 2009 FTC Act Rule. *See* 74 FR 5560. Furthermore, the Board is not aware of concerns regarding payment allocation with respect to other open-end credit products, likely because such products generally do not apply different annual percentage rates to different balances.

53(a) General Rule

The Board proposes to implement amended TILA Section 164(b)(1) in § 226.53(a), which would state that, except as provided in § 226.53(b), when a consumer makes a payment in excess of the required minimum periodic payment for a credit card account under an open-end (not home-secured) consumer credit plan, the card issuer must allocate the excess amount first to the balance with the highest annual percentage rate and any remaining portion to the other balances in descending order based on the applicable annual percentage rate. The Board and the other Agencies adopted a similar provision in the January 2009 FTC Act Rule in response to concerns that card issuers were applying consumers' payments in a manner that inappropriately maximized interest charges on credit card accounts with balances at different annual percentage rates. *See* 12 CFR 227.23, 74 FR 5512–5520, 5560. Specifically, most card issuers currently allocate consumers' payments first to the balance with the lowest annual percentage rate, resulting in the accrual of interest at higher rates on other balances (unless all balances are paid in full). Because many card issuers offer different rates for purchases, cash advances, and balance transfers, this practice can result in consumers who do not pay the balance in full each month incurring higher finance charges than they would under any other allocation method.[21]

The Board is also proposing comment 53–1, which would clarify that proposed § 226.53 does not limit or otherwise address the card issuer's ability to determine, consistent with applicable law and regulatory guidance, the amount of the required minimum periodic payment or how that payment is allocated. It would further clarify that a card issuer may, but is not required to, allocate the required minimum periodic payment consistent with the requirements in proposed § 226.53 to the extent consistent with other applicable law or regulatory guidance.

Comment 53–2 would clarify that proposed § 226.53 permits a card issuer to allocate an excess payment based on the annual percentage rates and balances on the date the preceding billing cycle ends, on the date the payment is credited to the account, or on any day in between those two dates. Because the rates and balances on an account affect how excess payments will be applied, this comment is intended to provide flexibility regarding the point in time at which payment allocation determinations required by proposed § 226.53 can be made. For example, it is possible that, in certain circumstances, the annual percentage rates may have changed between the close of a billing cycle and the date on which payment for that billing cycle is received.

Comment 53–3 addresses the relationship between the dispute rights in § 226.12(c) and the payment allocation requirements in proposed § 226.53. This comment would clarify that, when a consumer has asserted a claim or defense against the card issuer pursuant to § 226.12(c), the card issuer must apply the consumer's payment in a manner that avoids or minimizes any reduction in the amount of that claim or defense. *See* footnote 25 to current § 226.12(c) (redesignated in January 2009 Regulation Z Rule as comment 12(c)–4, 74 FR 5488).

[21] For example, assume that a credit card account charges annual percentage rates of 12% on purchases and 20% on cash advances. Assume also that, in the same billing cycle, the consumer uses the account for purchases totaling $3,000 and cash advances totaling $300. If the consumer makes an $800 payment, most card issuers would apply the entire excess payment to the purchase balance and the consumer would incur interest charges on the more costly cash advance balance. Under these circumstances, the consumer is effectively prevented from paying off the balance with the higher interest rate (cash advances) unless the consumer pays the total balance (purchases and cash advances) in full.

Comment 53–4 addresses circumstances in which the same annual percentage rate applies to more than one balance on a credit card account but a different rate applies to at least one other balance on that account. For example, an account could have a $500 cash advance balance at 20%, a $1,000 purchase balance at 15%, and a $2,000 balance also at 15% that was previously at a 5% promotional rate. The comment would clarify that, in these circumstances, proposed § 226.53 generally does not require that any particular method be used when allocating among the balances with the same rate and that the card issuer may treat the balances with the same rate as a single balance or separate balances.[22]

However, this comment would further clarify that, when a balance on a credit card account is subject to a deferred interest or similar program that provides that a consumer will not be obligated to pay interest that accrues on the balance if the balance is paid in full prior to the expiration of a specified period of time, that balance must be treated as a balance with an annual percentage rate of zero for purposes of proposed § 226.53 during that period of time rather than a balance with the rate at which interest accrues (the accrual rate).[23] As an initial matter, treating the rate as zero is consistent with the nature of deferred interest and similar programs insofar as the consumer will not be obligated to pay any accrued interest if the balance is paid in full prior to expiration. In addition, treating the rate on a balance subject to a deferred interest or similar program as zero until the program expires ensures that excess payments will generally be applied first to balances on which interest is being charged, which will generally result in lower interest charges if the consumer pays the balance in full prior to expiration. Although treating the rate on this type of balance as zero could prevent consumers who wish to pay off that balance in installments over the course of the program from doing so, the Board believes that this treatment produces the best overall outcome for consumers and is consistent with amended TILA Section 164(b)(2) (as discussed below).

Finally, proposed comment 53(a)–1 provides examples of allocating excess payments consistent with proposed § 226.53. The proposed commentary discussed above is similar to commentary adopted by the Board and the other Agencies in the January 2009 FTC Act Rule as well as to amendments to that commentary proposed in May 2009. *See* 74 FR 5561–5562; 74 FR 20815–20816.

53(b) Special Rule for Balances Subject to Deferred Interest or Similar Programs

The Board proposes to implement amended TILA Section 164(b)(2) in § 226.53(b), which would provide that, when a balance on a credit card account under an open-end (not home-secured) consumer credit plan is subject to a deferred interest or similar program, the card issuer must allocate any amount paid by the consumer in excess of the required minimum periodic payment first to that balance during the two billing cycles immediately preceding expiration of the deferred interest period and any remaining portion to any other balances consistent with proposed § 226.53(a). *See* 15 U.S.C. 1666c(b)(2).

The Board and the other Agencies proposed a similar exception to the January 2009 FTC Act Rule's payment allocation provision in the May 2009 proposed clarifications and amendments. *See* proposed 12 CFR 227.23(b), 74 FR 20814. This exception was based on the Agencies' concern that, if the deferred interest balance was not the only balance on the account, the general payment allocation rule could prevent consumers from paying off the deferred interest balance prior to expiration of the deferred interest period unless they also paid off all other balances on the account.[24] If the consumer is unaware of the need to pay off the entire balance, the consumer would be charged interest on the deferred interest balance and thus would not obtain the benefits of the deferred interest program. *See* 74 FR 20807–20808.

The Board is also proposing comment 53(b)–1, which clarifies the application of proposed § 226.53(b) in circumstances where the deferred interest or similar program expires during a billing cycle (rather than at the end of a billing cycle). The comment would clarify that, for purposes of § 226.53(b), a billing cycle does not constitute one of the two billing cycles immediately preceding expiration of a deferred interest or similar program if the expiration date for the program precedes the payment due date in that billing cycle. An example is provided. The Board believes that this interpretation is consistent with the purpose of amended TILA Section 164(b)(2) insofar as it ensures that, at a minimum, the consumer will receive two complete billing cycles to avoid accrued interest charges by paying off a balance subject to a deferred interest or similar program.

In addition, the Board is proposing comment 53(b)–2, which clarifies that a grace period during which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate is not a deferred interest or similar program for purposes of § 226.53(b). The Board and the other Agencies proposed a similar comment in May 2009. *See* 12 CFR 227.23 proposed comment 23(b)–1, 74 FR 20816.

Section 226.54 Limitations on the Imposition of Finance Charges

The Credit Card Act creates a new TILA Section 127(j), which applies when a consumer loses any time period provided by the creditor with respect to a credit card account within which the consumer may repay any portion of the credit extended without incurring a finance charge (*i.e.*, a grace period). 15 U.S.C. 1637(j). In these circumstances, new TILA Section 127(j)(1)(A) prohibits the creditor from imposing a finance charge with respect to any balances for days in billing cycles that precede the most recent billing cycle (a practice that is sometimes referred to as ''two-cycle'' or ''double-cycle'' billing). Furthermore, in these circumstances, Section 127(j)(1)(B) prohibits the creditor from imposing a finance charge with respect to any balances or portions thereof in the current billing cycle that were repaid within the grace period. However, Section 127(j)(2) provides that these prohibitions do not apply to any adjustment to a finance charge as a result of the resolution of a dispute or the return of a payment for insufficient funds. As discussed below, the Board proposes to implement new TILA Section 127(j) in § 226.54.

[22] An example of how excess payments could be applied in these circumstances is provided in proposed comment 53(a)–1.iv.

[23] For example, if an account has a $1,000 purchase balance and a $2,000 balance that is subject to a deferred interest program that expires on July 1 and a 15% annual percentage rate applies to both, the balances must be treated as balances with different rates for purposes of proposed § 226.53 until July 1. In addition, for purposes of allocating pursuant to proposed § 226.53, any amount paid by the consumer in excess of the required minimum periodic payment must be applied first to the $1,000 purchase balance except during the last two billing cycles of the deferred interest period (when it must be applied first to any remaining portion of the $2,000 balance). *See* proposed comment 53(a)–1.v.

[24] For example, assume that a credit card account has a $2,000 purchase balance with a 20% annual percentage rate and a $1,000 balance on which interest accrues at a 15% annual percentage rate, but the consumer will not be obligated to pay that interest if that balance is paid in full by a specified date. If the general rule in proposed § 226.53(a) applied, the consumer would be required to pay $3,000 in order to avoid interest charges on the $1,000 balance.

54(a) Limitations on Imposing Finance Charges as a Result of the Loss of a Grace Period

54(a)(1) General Rule

Prohibition on Two-Cycle Billing

As noted above, new TILA Section 127(j)(1)(A) prohibits the balance computation method sometimes referred to as ''two-cycle billing'' or ''double-cycle billing.'' The January 2009 FTC Act Rule contained a similar prohibition. *See* 12 CFR 227.25, 74 FR 5560–5561; *see also* 74 FR 5535–5538. The two-cycle balance computation method has several permutations but, generally speaking, a card issuer using the two-cycle method assesses interest not only on the balance for the current billing cycle but also on balances on days in the preceding billing cycle. This method generally does not result in additional finance charges for a consumer who consistently carries a balance from month to month (and therefore does not receive a grace period) because interest is always accruing on the balance. Nor does the two-cycle method affect consumers who pay their balance in full within the grace period every month because interest is not imposed on their balances. The two-cycle method does, however, result in greater interest charges for consumers who pay their balance in full one month but not the next month (and therefore lose the grace period).

The following example illustrates how the two-cycle method results in higher costs for these consumers than other balance computation methods: Assume that the billing cycle on a credit card account starts on the first day of the month and ends on the last day of the month. The payment due date for the account is the twenty-fifth day of the month. Under the terms of the account, the consumer will not be charged interest on purchases if the balance at the end of a billing cycle is paid in full by the following payment due date (in other words, if the consumer receives a grace period). The consumer uses the credit card to make a $500 purchase on March 15. The consumer pays the balance for the February billing cycle in full on March 25. At the end of the March billing cycle (March 31), the consumer's balance consists only of the $500 purchase and the consumer will not be charged interest on that balance if it is paid in full by the following due date (April 25). The consumer pays $400 on April 25, leaving a $100 balance. Because the consumer did not pay the balance for the March billing cycle in full on April 25, the consumer would lose the grace period and most card issuers would charge interest on the $500 purchase from the start of the April billing cycle (April 1) through April 24 and interest on the remaining $100 from April 25 through the end of the April billing cycle (April 30). Card issuers using the two-cycle method, however, would also charge interest on the $500 purchase from the date of purchase (March 15) to the end of the March billing cycle (March 31).

The Board proposes to implement new TILA Section 127(j)(1)(A)'s prohibition on two-cycle billing in proposed § 226.54(a)(1)(i), which states that, except as provided in proposed § 226.54(b), a card issuer must not impose finance charges as a result of the loss of a grace period on a credit card account if those finance charges are based on balances for days in billing cycles that precede the most recent billing cycle. The Board also proposes to adopt § 226.54(a)(2), which would define ''grace period'' for purposes of § 226.54(a)(1) as having the same meaning as in § 226.5(b)(2)(ii). Section 226.5(b)(2)(ii) was amended by the July 2009 Regulation Z Interim Final Rule to define ''grace period'' as a period within which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate. 74 FR 36094. Finally, proposed comment 54(a)(1)–4 explains that § 226.54(a)(1)(i) prohibits use of the two-cycle average daily balance computation method.

Partial Grace Period Requirement

As discussed above, many credit card issuers that provide a grace period currently require the consumer to pay off the entire balance on the account or the entire balance subject to the grace period before the period expires. However, new TILA Section 127(j)(1)(B) limits this practice. Specifically, Section 127(j)(1)(B) provides that a creditor may not impose any finance charge on a credit card account as a result of the loss of any time period provided by the creditor within which the consumer may repay any portion of the credit extended without incurring a finance charge with respect to any balances or portions thereof in the current billing cycle that were repaid within such time period. The Board proposes to implement this prohibition in proposed § 226.54(a)(1)(ii), which states that, except as provided in proposed § 226.54(b), a card issuer must not impose finance charges as a result of the loss of a grace period on a credit card account if those finance charges are based on any portion of a balance subject to a grace period that was repaid prior to the expiration of the grace period.

The Board also proposes to adopt comment 54(a)(1)–5, which would clarify that card issuers are not required to use a particular method to comply with § 226.54(a)(1)(ii) but provides an example of a method that is consistent with the requirements of § 226.54(a)(1)(ii). Specifically, it states that a card issuer can comply with the requirements of § 226.54(a)(1)(ii) by applying the consumer's payment to the balance subject to the grace period at the end of the prior billing cycle (in a manner consistent with the payment allocation requirements in § 226.53) and then calculating interest charges based on the amount of that balance that remains unpaid. An example of the application of this method is provided in proposed comment 54(a)(1)–6 along with other examples of the application of § 226.54(a)(1)(i) and (ii).

In addition to the commentary clarifying the specific prohibitions in § 226.54(a)(1)(i) and (ii), the Board is proposing to adopt three comments clarifying the general scope and applicability of § 226.54. First, proposed comment 54(a)(1)–1 would clarify that § 226.54 does not require the card issuer to provide a grace period or prohibit a card issuer from placing limitations and conditions on a grace period to the extent consistent with § 226.54. Currently, neither TILA nor Regulation Z requires a card issuer to provide a grace period. Nevertheless, for competitive and other reasons, many credit card issuers choose to do so, subject to certain limitations and conditions. For example, credit card grace periods generally apply to purchases but not to other types of transactions (such as cash advances). In addition, as noted above, card issuers that provide a grace period generally require the consumer to pay off all balances on the account or the entire balance subject to the grace period before the period expires.

Although new TILA Section 127(j) prohibits the imposition of finance charges as a result of the loss of a grace period in certain circumstances, the Board does not interpret this provision to mandate that card issuers provide such a period or to limit card issuers' ability to place limitations and conditions on a grace period to the extent consistent with the statute. Instead, Section 127(j)(1) refers to ''*any time provided by the creditor* within which the [consumer] may repay any portion of the credit extended without incurring a finance charge.'' This language indicates that card issuers retain the ability to determine when and

under what conditions to provide a grace period on a credit card account so long as card issuers that choose to provide a grace period do so consistent with the requirements of new TILA Section 127(j).

The Board also proposes to adopt comment 54(a)(1)–2, which would clarify that proposed § 226.54 does not prohibit the card issuer from charging accrued interest at the expiration of a deferred interest or similar promotional program. Specifically, the comment would state that, when a card issuer offers a deferred interest or similar promotional program, § 226.54 does not prohibit the card issuer from charging that accrued interest to the account if the balance is not paid in full prior to expiration of the period (consistent with § 226.55 and other applicable law and regulatory guidance). A contrary interpretation of proposed § 226.54 (and new TILA Section 127(j)) would effectively eliminate deferred interest and similar programs by prohibiting the card issuer from charging interest based on the deferred interest balance during the deferred interest period if that balance was not paid in full at expiration. However, as discussed above with respect to proposed § 226.53, the Credit Card Act's revisions to TILA Section 164 specifically create an exception to the general rule governing payment allocation for deferred interest programs, which indicates that Congress did not intend to ban such programs. *See* Credit Card Act § 104(1) (revised TILA Section 164(b)(2)).

Finally, proposed comment 54(a)(1)–3 would clarify that card issuers must comply with the payment allocation requirements in § 226.53 even if doing so will result in the loss of a grace period. For example, as illustrated in proposed comment 54(a)(1)–6.ii, a card issuer must generally allocate a payment in excess of the required minimum periodic payment to a cash advance balance with a 25% rate before a purchase balance with a purchase balance with a 15% rate even if this will result in the loss of a grace period on the purchase balance. Although there could be a narrow set of circumstances in which—depending on the size of the balances and the amount of the difference between the rates—this allocation would result in higher interest charges than if the excess payment were applied in a way that preserved the grace period, Congress did not create an exception for these circumstances in the provisions of the Credit Card Act specifically addressing payment allocation.

54(b) Exceptions

New TILA Section 127(j)(2) provides that the prohibitions in Section 127(j)(1) do not apply to any adjustment to a finance charge as a result of resolution of a dispute or as a result of the return of a payment for insufficient funds. The Board proposes to implement these exceptions in proposed § 226.54(b).

The Board interprets the exception for the ''resolution of a dispute'' in new TILA Section 127(j)(2)(A) to apply when the dispute is resolved pursuant to TILA's dispute resolution procedures. Accordingly, proposed § 226.54(b)(1) would permit adjustments to finance charges when a dispute is resolved under § 226.12 (which governs the right of a cardholder to assert claims or defenses against the card issuer) or § 226.13 (which governs resolution of billing errors).

In addition, because a payment may be returned for reasons other than insufficient funds (such as because the account on which the payment is drawn has been closed or because the consumer has instructed the institution holding that account not to honor the payment), the Board proposes to use its authority under TILA Section 105(a) to apply the exception in new TILA Section 127(j)(2)(B) to all circumstances in which adjustments to finance charges are made as a result of the return of a payment.

Section 226.55 Limitations on Increasing Annual Percentage Rates, Fees, and Charges

As revised by the Credit Card Act, TILA Section 171(a) generally prohibits creditors from increasing any annual percentage rate, fee, or finance charge applicable to any outstanding balance on a credit card account under an open-end consumer credit plan. *See* 15 U.S.C. 1666i–1. Revised TILA Section 171(b), however, provides exceptions to this rule for temporary rates that expire after a specified period of time and rates that vary with an index. Revised TILA Section 171(b) also provides exceptions in circumstances where the creditor has not received the required minimum periodic payment within 60 days after the due date and where the consumer completes or fails to comply with the terms of a workout or temporary hardship arrangement. Revised TILA Section 171(c) limits a creditor's ability to change the terms governing repayment of an outstanding balance. The Credit Card Act also creates a new TILA Section 172, which provides that a creditor generally cannot increase a rate, fee, or finance charge during the first year after account opening and that a promotional rate (as defined by the Board) generally cannot expire earlier than six months after it takes effect. As discussed in detail below, the Board proposes to implement both revised TILA Section 171 and new TILA Section 172 in § 226.55.

55(a) General Rule

As noted above, revised TILA Section 171(a) generally prohibits increases in annual percentage rates, fees, and finance charges on outstanding balances. Revised TILA Section 171(d) defines ''outstanding balance'' as the amount owed as of the end of the fourteenth day after the date on which the creditor provides notice of an increase in the annual percentage rate, fee, or finance charge in accordance with TILA Section 127(i).[25] TILA Section 127(i)(1) and (2), which went into effect on August 20, 2009, generally require creditors to notify consumers 45 days before an increase in an annual percentage rate or any other significant change in the terms of a credit card account (as determined by rule of the Board).

In the July 2009 Regulation Z Interim Final Rule, the Board implemented new TILA Section 127(i)(1) and (2) in § 226.9(c) and (g). In addition to increases in annual percentage rates, § 226.9(c)(2)(ii) lists the fees and other charges for which an increase constitutes a significant change to the account terms necessitating 45 days' advance notice, including annual or other periodic fees, fixed finance charges, minimum interest charges, transaction charges, cash advance fees, late payment fees, over-the-limit fees, balance transfer fees, returned-payment fees, and fees for required insurance, debt cancellation, or debt suspension coverage. As discussed above, however, the Board is proposing to amend § 226.9(c)(2)(ii) to identify these significant account terms by a cross-reference to the account-opening disclosure requirements in § 226.6(b). Because the definition of outstanding balance in revised TILA Section 171(d) is expressly conditioned on the provision of the 45-day advance notice,

[25] As discussed in the July 2009 Regulation Z Interim Final Rule (at 74 FR 36090), the Board believes that this fourteen-day period is intended to balance the interests of consumers and creditors. On the one hand, the fourteen-day period ensures that the increased rate, fee, or charge will not apply to transactions that occur before the consumer has received the notice and had a reasonable amount of time to review it and decide whether to use the account for additional transactions. On the other hand, the fourteen-day period reduces the potential that a consumer—having been notified of an increase for new transactions—will use the 45-day notice period to engage in transactions to which the increased rate, fee, or charge cannot be applied.

the Board believes that it is consistent with the purposes of the Credit Card Act to limit the general prohibition in revised TILA Section 171(a) on increasing fees and finance charges to increases in fees and charges for which a 45-day notice is required under § 226.9.

Furthermore, because revised TILA Section 171(a) prohibits the application of increased fees and charges to outstanding balances rather than to new transactions or to the account as a whole, the Board believes that it is appropriate to apply that prohibition only to fees and charges that could be applied to an outstanding balance. For example, increased cash advance or balance transfer fees would apply only to new cash advances or balance transfers, not to existing balances. Similarly, increased penalty fees such as late payment fees, over-the-limit fees, and returned-payment fees would apply to the account as a whole rather than any specific balance.[26] Accordingly, the Board proposes to use its authority under TILA Section 105(a) to limit the general prohibition in revised TILA Section 171(a) to increases in annual percentage rates and in fees and charges required to be disclosed under § 226.6(b)(2)(ii) (fees for the issuance or availability of credit), § 226.6(b)(2)(iii) (fixed finance charges and minimum interest charges), or § 226.6(b)(2)(xii) (fees for required insurance, debt cancellation, or debt suspension coverage).[27]

In addition, for clarity and organizational purposes, proposed § 226.55(a) generally prohibits increases in annual percentage rates and fees and charges required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) with respect to all transactions, rather than just increases on existing balances. The Board does not intend to alter the substantive requirements in revised TILA Section 171. Instead, the Board believes that revised TILA Section 171 can be more clearly and effectively implemented if increases in rates, fees, and charges that apply to transactions that occur more than fourteen days after provision of a § 226.9(c) or (g) notice are addressed in an exception to the general prohibition rather than placed outside that prohibition. The Board and the other Agencies adopted a similar approach in the January 2009 FTC Act Rule. *See* 12 CFR 227.24, 74 FR 5560. Accordingly, proposed § 226.55(a) states that, except as provided in § 226.55(b), a card issuer must not increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii).

Proposed comment 55(a)–1 provides examples of the general application of § 226.55(a) and the exceptions in § 226.55(b). Additional examples illustrating specific aspects of the exceptions in § 226.55(b) are provided in the commentary to those exceptions.

Proposed comment 55(a)–2 clarifies that nothing in § 226.55 prohibits a card issuer from assessing interest due to the loss of a grace period to the extent consistent with § 226.54. In addition, the comment states that a card issuer has not reduced an annual percentage rate on a credit account for purposes of § 226.55 if the card issuer does not charge interest on a balance or a portion thereof based on a payment received prior to the expiration of a grace period. For example, if the annual percentage rate for purchases on an account is 15% but the card issuer does not charge any interest on a $500 purchase balance because that balance was paid in full prior to the expiration of the grace period, the card issuer has not reduced the 15% purchase rate to 0% for purposes of § 226.55.

55(b) Exceptions

Revised TILA Section 171(b) lists the exceptions to the general prohibition in revised Section 171(a). Similarly, proposed § 226.55(b) lists the exceptions to the general prohibition in proposed § 226.55(a). In addition, proposed § 226.55(b) clarifies that the listed exceptions are not mutually exclusive. In other words, a card issuer may increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) pursuant to an exception set forth in § 226.55(b) even if that increase would not be permitted under a different exception. Proposed comment 55(b)–1 clarifies that, for example, although a card issuer cannot increase an annual percentage rate pursuant to § 226.55(b)(1) unless that rate is provided for a specified period of at least six months, the card issuer may increase an annual percentage rate during a specified period due to an increase in an index consistent with § 226.55(b)(2). Similarly, although § 226.55(b)(3) does not permit a card issuer to increase an annual percentage rate during the first year after account opening, the card issuer may increase the rate during the first year after account opening pursuant to § 226.55(b)(4) if the required minimum periodic payment is not received within 60 days after the due date.

Proposed comment 55(b)–2 addresses circumstances where the date on which a rate, fee, or charge may be increased pursuant to an exception in § 226.55(b) does not fall on the first day of a billing cycle. Because the Board understands that it may be operationally difficult for some card issuers to apply an increased rate, fee, or charge in the middle of a billing cycle, the comment clarifies that, in these circumstances, the card issuer may delay application of the increased rate, fee, or charge until the first day of the following billing cycle without relinquishing the ability to apply that rate, fee, or charge. An illustrative example is provided.

Proposed comment 55(b)–3 clarifies that, although nothing in § 226.55 prohibits a card issuer from lowering an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii), a card issuer that does so cannot subsequently increase the rate, fee, or charge unless permitted by one of the exceptions in § 226.55(b). The Board believes that this interpretation is consistent with the intent of revised TILA Section 171 insofar as it ensures that consumers are informed of the key terms and conditions associated with a lowered rate, fee, or charge before relying on that rate, fee, or charge. For example, revised Section 171(b)(1)(A) requires creditors to disclose how long a temporary rate will apply and the rate that will apply after the temporary rate expires *before* the consumer engages in transactions in reliance on the temporary rate. Similarly, revised Section 171(b)(3)(B) requires the creditor to disclose the terms of a workout or temporary hardship arrangement before the consumer agrees to the arrangement. The comment provides examples illustrating the application of § 226.55 when an annual percentage rate is lowered.

As discussed below, several of the exceptions in proposed § 226.55 require the creditor to determine when a transaction occurred. For example, consistent with revised TILA Section 171(d)'s definition of ''outstanding balance,'' proposed § 226.55(b)(3)(ii) provides that a card issuer that discloses an increased rate pursuant to § 226.9(c) or (g) may not apply that increased rate to transactions that occurred prior to or within fourteen days after provision of the notice. Accordingly, proposed comment 55(b)–4 clarifies that when a transaction occurred, for purposes of § 226.55, is generally determined by the

[26] However, the Board notes that a consumer that does not want to accept an increase in these types of fees may reject the increase pursuant to § 226.9(h).

[27] As discussed below with respect to proposed § 226.55(b)(3), a card issuer may still increase these types of fees and charges so long as the increased fee or charge is not applied to the outstanding balance.

date of the transaction. The Board understands that, in certain circumstances, a short delay can occur between the date of the transaction and the date on which the merchant charges that transaction to the account. As a general matter, the Board believes that these delays should not affect the application of § 226.55. However, to address the operational difficulty for card issuers in the rare circumstance where a transaction that occurred within fourteen days after provision of a § 226.9(c) or (g) notice is not charged to the account prior to the effective date of the increase or change, this comment would clarify that the card issuer may treat the transaction as occurring more than fourteen days after provision of the notice for purposes of § 226.55. In addition, the comment would clarify that, when a merchant places a ''hold'' on the available credit on an account for an estimated transaction amount because the actual transaction amount will not be known until a later date, the date of the transaction for purposes of § 226.55 is the date on which the card issuer receives the actual transaction amount from the merchant. Illustrative examples are provided in proposed comment 55(b)(3)–4.iii. This comment is based on comment 9(h)(3)(ii)–2, which was adopted in the July 2009 Regulation Z Interim Final Rule. *See* 74 FR 36101.

Proposed comment 55(b)–5 clarifies the meaning of the term ''category of transactions,'' which is used in some of the exceptions in § 226.55(b). This comment states that, for purposes of § 226.55, a ''category of transactions'' is a type or group of transactions to which an annual percentage rate applies that is different than the annual percentage rate that applies to other transactions.[28] For example, purchase transactions, cash advance transactions, and balance transfer transactions are separate categories of transactions for purposes of § 226.55 if a card issuer applies different annual percentage rates to each. Furthermore, if, for example, the card issuer applies different annual percentage rates to different types of purchase transactions (such as one rate for purchases of gasoline or purchases over $100 and a different rate for all other purchases), each type constitutes a separate category of transactions for purposes of § 226.55.

Proposed comment 55(b)–6 clarifies the relationship between the exceptions in § 226.55(b) and the 45-day advance notice requirements in § 226.9(c) and (g). Specifically, it states that nothing in § 226.55 alters the requirements in § 226.9(c) and (g) that creditors provide written notice at least 45 days prior to the effective date of certain increases in annual percentage rates, fees, and charges. For example, although proposed § 226.55(b)(3)(ii) permits a card issuer that discloses an increased rate pursuant to § 226.9(c) or (g) to apply that rate to transactions that occurred more than fourteen days after provision of the notice, the card issuer cannot begin to accrue interest at the increased rate until that increase goes into effect, consistent with § 226.9(c) or (g). Illustrative examples are provided in proposed comment 55(b)(3)–4. Similarly, the comment clarifies that, on or after the effective date, the card issuer cannot calculate interest charges for days before the effective date based on the increased rate.[29]

55(b)(1) Temporary Rate Exception

Revised TILA Section 171(b)(1) provides that a creditor may increase an annual percentage rate upon the expiration of a specified period of time, subject to three conditions. First, prior to commencement of the period, the creditor must have disclosed to the consumer, in a clear and conspicuous manner, the length of the period and the increased annual percentage rate that will apply after expiration of the period. Second, at the end of the period, the creditor must not apply a rate that exceeds the increased rate that was disclosed prior to commencement of the period. Third, at the end of the period, the creditor must not apply the previously-disclosed increased rate to transactions that occurred prior to commencement of the period. Thus, under this exception, a creditor that, for example, discloses at account opening that a 5% rate will apply to purchases for six months and that a 15% rate will apply thereafter would be permitted to increase the rate on the purchase balance to 15% after six months.

Proposed § 226.55(b)(1) implements the exception in revised TILA Section 171(b)(1) regarding temporary rates as well as the requirements in new TILA Section 172(b) regarding promotional rates. New TILA Section 172(b) provides that ''[n]o increase in any * * * promotional rate (as that term is defined by the Board) shall be effective before the end of the 6-month period beginning on the date on which the promotional rate takes effect, subject to such reasonable exceptions as the Board may establish by rule.'' Pursuant to this authority, the Board believes that promotional rates should be subject to the same requirements and exceptions as other temporary rates that expire after a specified period of time. In particular, the Board believes that consumers who rely on promotional rates should receive the disclosures and protections set forth in revised TILA Section 171(b)(1) and proposed § 226.55(b)(1). This will ensure that a consumer will receive disclosure of the terms of the promotional rate before engaging in transactions in reliance on that rate and that, at the expiration of the promotion, the rate will only be increased consistent with those terms. Accordingly, the Board has incorporated the requirement that promotional rates last at least six months into proposed § 226.55(b)(1), which would permit a card issuer to increase a temporary annual percentage rate upon the expiration of a specified period that is six months or longer.

Furthermore, pursuant to its authority under new TILA Section 172(b) to establish reasonable exceptions to the six-month requirement for promotional rates, the Board believes that it is appropriate to apply the other exceptions in revised TILA Section 171(b) and proposed § 226.55(b) to promotional rate offers. For example, the Board believes that a card issuer should be permitted to offer a consumer a promotional rate that varies with an index consistent with revised TILA Section 171(b)(2) and proposed § 226.55(b)(2) (such as a rate that is one percentage point over a prime rate that is not under the card issuer's control). Similarly, the Board believes that a card issuer should be permitted to increase a promotional rate if the account becomes more than 60 days delinquent during the promotional period consistent with revised TILA Section 171(b)(4) and proposed § 226.55(b)(4). Thus, the Board would apply to promotional rates the general proposition in proposed § 226.55(b) that a rate may be increased pursuant to an exception in § 226.55(b) even if that increase would not be permitted under a different exception.

The Board proposes to implement the requirement in revised TILA Section

[28] Similarly, a type or group of transactions is a ''category of transactions'' for purposes of § 226.55 if a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) applies to those transactions that is different than the fee or charge that applies to other transactions.

[29] The Board understands that, when the effective date for an increased rate falls in the middle of a billing cycle, some card issuers are unable to begin accruing interest at the increased rate on the effective date without applying that increased rate for the entire billing cycle (including to balances on days preceding the effective date). Although neither § 226.9 nor § 226.55 permits a card issuer to accrue interest at the increased rate for days that precede the effective date, proposed comment 55(b)–2 acknowledges this operational difficulty by clarifying that card issuers may delay application of the increased rate until the first day of the following billing cycle without relinquishing the ability to apply that rate.

171(b)(1)(A) that creditors disclose the length of the period and the annual percentage rate that will apply after the expiration of that period in proposed § 226.55(b)(1)(i). This language tracks § 226.9(c)(2)(v)(B)(*1*), which the Board adopted in the July 2009 Regulation Z Interim Final Rule as part of an exception to the general requirement that creditors provide 45 days notice before an increase in annual percentage rate. Because the disclosure requirements in § 226.9(c)(2)(v)(B)(*1*) and proposed § 226.55(b)(1)(i) implement the same statutory provision (revised TILA Section 171(b)(1)(A)), the Board believes a single set of disclosures should satisfy both requirements. Accordingly, proposed comment 55(b)(1)–1 clarifies that a card issuer that has complied with the disclosure requirements in § 226.9(c)(2)(v)(B) has also complied with the disclosure requirements in § 226.55(b)(2)(i). In other words, the expiration of a temporary rate cannot be used as a reason to apply an increased rate to a balance that preceded application of the temporary rate. For example, assume that a credit card account has a $5,000 purchase balance at a 15% rate and that the card issuer reduces the rate that applies to all purchases (including the $5,000 balance) to 10% for six months with a 22% rate applying thereafter. Under proposed § 226.55(b)(1)(ii)(A), the card issuer could not apply the 22% rate to the $5,000 balance upon expiration of the six-month period (although the card issuer could apply the original 15% rate to that balance).

The Board proposes to implement in § 226.55(b)(1)(ii) the limitations in revised TILA Section 171(b)(1)(B) and (C) on the application of increased rates following expiration of the specified period. First, proposed § 226.55(b)(1)(ii)(A) states that, upon expiration of the specified period, a card issuer must not apply an annual percentage rate to transactions that occurred prior to the period that exceeds the rate that applied to those transactions prior to the period.

Second, proposed § 226.55(b)(1)(ii)(B) states that, if the disclosures required by § 226.55(b)(1)(i) are provided pursuant to § 226.9(c), the card issuer must not—upon expiration of the specified period—apply an annual percentage rate to transactions that occurred within fourteen days after provision of the notice that exceeds the rate that applied to that category of transactions prior to provision of the notice. The Board believes that this clarification is necessary to ensure that card issuers do not apply an increased rate to an outstanding balance (as defined in revised TILA Section 171(d)) upon expiration of the specified period. Accordingly, consistent with the purpose of revised TILA Section 171(d), proposed § 226.55(b)(1)(ii)(B) would ensure that a consumer will have fourteen days to receive the § 226.9(c) notice and review the terms of the temporary rate (including the increased rate that will apply upon expiration of the specified period) before engaging in transactions to which that increased rate may eventually apply.

Third, proposed § 226.55(b)(1)(ii)(C) states that, upon expiration of the specified period, the card issuer must not apply an annual percentage rate to transactions that occurred during the specified period that exceeds the increased rate disclosed pursuant to § 226.55(b)(1)(i). In other words, the card issuer can only increase the rate consistent with the previously-disclosed terms. Examples illustrating the application of proposed § 226.55(b)(1)(ii)(A), (B), and (C) are provided in comments 55(a)–1 and 55(b)–3.

Proposed comment 55(b)(1)–2 clarifies when the specified period begins for purposes of the six-month requirement in § 226.55(b)(1). As a general matter, proposed comment 55(b)(1)–1 states that the specified period must expire no less than six months after the date on which the creditor discloses to the consumer the length of the period and rate that will apply thereafter (as required by § 226.55(b)(1)(i)). However, if the card issuer provides these disclosures before the consumer can use the account for transactions to which the temporary rate will apply, the temporary rate must expire no less than six months from the date on which it becomes available. For example, assume that on January 1 a card issuer offers a 5% annual percentage rate for six months on purchases (with a 15% rate applying thereafter). If a consumer may begin making purchases at the 5% rate on January 1, § 226.55(b)(1) would permit the issuer to begin accruing interest at the 15% rate on July 1. However, if a consumer may not begin making purchases at the 5% rate until February 1, § 226.55(b)(1) would not permit the issuer to begin accruing interest at the 15% rate until August 1.

The Board understands that card issuers often limit the application of a promotional rate to particular categories of transactions (such as balance transfers or purchases over $100). The Board does not believe that the six-month requirement in new TILA Section 172(b) was intended to prohibit this practice so long as the consumer receives the benefit of the promotional rate for at least six months. Accordingly, proposed comment 55(b)(1)–2 clarifies that § 226.55(b)(1) does not prohibit these types of limitations. However, the comment also clarifies that, in circumstances where the card issuer limits application of the temporary rate to a particular transaction, the temporary rate must expire no less than six months after the date on which that transaction occurred. For example, if on January 1 a creditor offers a 0% temporary rate on the purchase of an appliance and the consumer uses the account to purchase a $1,000 appliance on March 1, the creditor cannot increase the rate on that $1,000 purchase until September 1.

The Board believes that this application of the six-month requirement is consistent with the intent of new TILA Section 172(b). Although the six-month requirement could be interpreted as requiring a separate six-month period for every transaction to which the temporary rate applies, the Board believes this interpretation would create a level of complexity that would be not only confusing for consumers but also operationally burdensome for card issuers, potentially leading to a reduction in promotional rate offers that provide significant consumer benefit.

Proposed comment 55(b)(1)–3 clarifies that the general prohibition in § 226.55(a) applies to the imposition of accrued interest upon the expiration of a deferred interest or similar promotional program under which the consumer is not obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time. As discussed in the January 2009 FTC Act Rule, the assessment of deferred interest is effectively an increase in rate on an existing balance. *See* 74 FR 5527–5528. However, if properly disclosed, deferred interest programs can provide substantial benefits to consumers. *See* 74 FR 20812–20813. Furthermore, as discussed above with respect to proposed comment 54(a)(1)–2, the Board does not believe that the Credit Card Act was intended to ban properly-disclosed deferred interest programs. Accordingly, proposed comment 55(b)(1)–3 further clarifies that card issuers may continue to offer such programs consistent with the requirements of § 226.55(b)(1). In particular, prior to the commencement of the deferred interest period, § 226.55(b)(1)(i) requires the card issuer to disclose the length of the period and the rate that will apply to the balance subject to the deferred interest program

if that balance is not paid in full prior to expiration of the period. The comment provides examples illustrating the application of § 226.55 to deferred interest and similar programs.

Finally, proposed comment 55(b)(1)–4 clarifies that § 226.55(b)(1) does not permit a card issuer to apply an increased rate that is contingent on a particular event or occurrence or that may be applied at the card issuer's discretion. The comment provides examples of rate increases that are not permitted by § 226.55.

55(b)(2) Variable Rate Exception

Revised TILA Section 171(b)(2) provides that a card issuer may increase ''a variable annual percentage rate in accordance with a credit card agreement that provides for changes in the rate according to operation of an index that is not under the card issuer's control and is available to the general public.'' The Board proposes to implement this exception in § 226.55(b)(2), which states that a creditor may increase an annual percentage rate that varies according to an index that is not under the creditor's control and is available to the general public when the increase in rate is due to an increase in the index.

The proposed commentary to § 226.55(b)(2) is modeled on commentary adopted by the Board and the other Agencies in the January 2009 FTC Act Rule as well as § 226.5b(f) and its commentary. *See* 12 CFR 227.24 comments 24(b)(2)–1 through 6, 74 FR 5531, 5564; § 226.5b(f)(1), (3)(ii); comment 5b(f)(1)–1 and –2; comment 5b(f)(3)(ii)–1. Proposed comment 55(b)(2)–1 clarifies that § 226.55(b)(2) does not permit a card issuer to increase a variable annual percentage rate by changing the method used to determine that rate (such as by increasing the margin), even if that change will not result in an immediate increase. However, consistent with existing comment 5b(f)(3)(v)–2, the comment also clarifies that a card issuer may change the day of the month on which index values are measured to determine changes to the rate.

Proposed comment 55(b)(1)–2 further clarifies that a card issuer may not increase a variable rate based on its own prime rate or cost of funds. A card issuer is permitted, however, to use a published prime rate, such as that in the *Wall Street Journal*, even if the card issuer's own prime rate is one of several rates used to establish the published rate. In addition, proposed comment 55(b)(2)–3 clarifies that a publicly-available index need not be published in a newspaper, but it must be one the consumer can independently obtain (by telephone, for example) and use to verify the annual percentage rate applied to the credit card account.

Because the conversion of a non-variable rate to a variable rate could lead to future increases in the rate that applies to an existing balance, proposed comment 55(b)(2)–4 clarifies that a non-variable rate may be converted to a variable rate only when specifically permitted by one of the exceptions in § 226.55(b). For example, under § 226.55(b)(1), a card issuer may convert a non-variable rate to a variable rate at the expiration of a specified period if this change was disclosed prior to commencement of the period.

Because § 226.55 applies only to *increases* in annual percentage rates, proposed comment 55(b)(2)–5 clarifies that nothing in § 226.55 prohibits a card issuer from changing a variable rate to an equal or lower non-variable rate. Whether the non-variable rate is equal to or lower than the variable rate is determined at the time the card issuer provides the notice required by § 226.9(c). An illustrative example is provided.

Proposed comment 55(b)(2)–6 clarifies that a card issuer may change the index and margin used to determine a variable rate if the original index becomes unavailable, so long as historical fluctuations in the original and replacement indices were substantially similar and the replacement index and margin will produce a rate similar to the rate that was in effect at the time the original index became unavailable. This comment further clarifies that, if the replacement index is newly established and therefore does not have any rate history, it may be used if it produces a rate substantially similar to the rate in effect when the original index became unavailable.

55(b)(3) Advance Notice Exception

Proposed § 226.55(a) prohibits increases in annual percentage rates and fees and charges required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) with respect to both existing balances and new transactions. However, as discussed above, the prohibition on increases in rates, fees, and finance charges in revised TILA Section 171 applies only to ''outstanding balances'' as defined in Section 171(d). Accordingly, proposed § 226.55(b)(3) provides that a card issuer may generally increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) with respect to new transactions after complying with the notice requirements in § 226.9(b), (c), or (g).

Because § 226.9 applies different notice requirements in different circumstances, proposed § 226.55(b)(3) clarifies that the transactions to which an increased rate, fee, or charge may be applied depend on the type of notice required. As a general matter, when an annual percentage rate, fee, or charge is increased pursuant to § 226.9(c) or (g), proposed § 226.55(b)(3)(ii) provides that the card issuer must not apply the increased rate, fee, or charge to transactions that occurred within fourteen days after provision of the notice. This is consistent with revised TILA Section 171(d), which defines the outstanding balance to which an increased rate, fee, or finance charge may not be applied as the amount due at the end of the fourteenth day after notice of the increase is provided.

However, pursuant to its authority under TILA Section 105(a), the Board proposes to establish a different approach for increased rates, fees, and charges disclosed pursuant to § 226.9(b). As discussed in the July 2009 Regulation Z Interim Final Rule, the Board believes that the fourteen-day period is intended, in part, to ensure that an increased rate, fee, or charge will not apply to transactions that occur before the consumer has received the notice of the increase and had a reasonable amount of time to review it and decide whether to engage in transactions to which the increased rate, fee, or charge will apply. *See* 74 FR 36090. The Board does not believe that a fourteen-day period is necessary for increases disclosed pursuant to § 226.9(b), which requires card issuers to disclose any new finance charge terms applicable to supplemental access devices (such as convenience checks) and additional features added to the account after account opening before the consumer uses the device or feature for the first time. For example, § 226.9(b)(3)(i)(A) requires that card issuers providing checks that access a credit card account to which a temporary promotional rate applies disclose key terms on the front of the page containing the checks, including the promotional rate, the period during which the promotional rate will be in effect, and the rate that will apply after the promotional rate expires. Thus, unlike increased rates, fees, and charges disclosed pursuant to a § 226.9(c) and (g) notice, the fourteen-day period is not necessary for increases disclosed pursuant to § 226.9(b) because the device or feature will not be used before the consumer has received notice of the applicable terms. Accordingly, proposed

§ 226.55(b)(3)(i) provides that, if a card issuer discloses an increased annual percentage rate, fee, or charge pursuant to § 226.9(b), the card issuer must not apply that rate, fee, or charge to transactions that occurred prior to provision of the notice.

Proposed § 226.55(b)(3)(iii) provides that the exception in § 226.55(b)(3) does not permit a card issuer to increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) during the first year after the credit card account is opened. This provision implements new TILA Section 172(a), which generally prohibits increases in annual percentage rates, fees, and finance charges during the one-year period beginning on the date the account is opened.

Proposed comment 55(b)(3)–1 clarifies that a card issuer may not increase a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) pursuant to § 226.55(b)(3) if the consumer has rejected the increased fee or charge pursuant to § 226.9(h). In addition, proposed comment 55(b)(3)–2 clarifies that, if an increased annual percentage rate, fee, or charge is disclosed pursuant to both § 226.9(b) and (c), the requirements in § 226.55(b)(3)(ii) control and the rate, fee, or charge may only be applied to transactions that occur more than fourteen days after provision of the § 226.9(c) notice.

Proposed comment 55(b)(3)–3 clarifies whether certain changes to a credit card account constitute an ''account opening'' for purposes of the prohibition in § 226.55(b)(3)(iii) on increasing annual percentage rates and fees and charges required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) during the first year after account opening. In particular, the comment would distinguish between circumstances in which a card issuer opens multiple accounts for the same consumer and circumstances in which a card issuer substitutes, replaces, or consolidates one account with another. As an initial matter, this comment would clarify that, when a consumer has a credit card account with a card issuer and the consumer opens a new credit card account with the same card issuer (or its affiliate or subsidiary), the opening of the new account constitutes the opening of a credit card account for purposes of § 226.55(b)(3)(iii) if, more than 30 days after the new account is opened, the consumer has the option to obtain additional extensions of credit on each account. Thus, for example, if a consumer opens a credit card account with a card issuer on January 1 of year one and opens a second credit card account with that card issuer on July 1 of year one, the opening of the second account constitutes an account opening for purposes of § 226.55(b)(3)(iii) so long as, on August 1, the consumer has the option to engage in transactions using either account. This is the case even if the consumer transfers a balance from the first account to the second. Thus, because the card issuer has two separate account relationships with the consumer, the prohibition in § 226.55(b)(3)(iii) on increasing annual percentage rates and fees and charges required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) during the first year after account opening would apply to the opening of the second account.[30]

In contrast, the comment would clarify that an account has not been opened for purposes of § 226.55(b)(3)(iii) when a card issuer substitutes or replaces one credit card account with another credit card account (such as when a retail credit card is replaced with a cobranded general purpose card that can be used at a wider number of merchants) or when a card issuer consolidates or combines a credit card account with one or more other credit card accounts into a single credit card account. As discussed below with respect to proposed § 226.55(d)(2), the Board believes that these transfers should be treated as a continuation of the existing account relationship rather than the creation of a new account relationship. Similarly, the comment would also clarify that the substitution or replacement of an acquired credit card account does not constitute an ''account opening'' for purposes of § 226.55(b)(3)(iii). Thus, in these circumstances, the prohibition in § 226.55(b)(3)(iii) would not apply. However, when a substitution, replacement or consolidation occurs during the first year after account opening, proposed comment 55(b)(3)–3.ii.B would clarify that the card issuer may not increase an annual percentage rate, fee, or charge in a manner otherwise prohibited by § 226.55.[31]

Proposed comment 55(b)(3)–4 provides illustrative examples of the application of the exception in proposed § 226.55(b)(3). Proposed comment 55(b)(3)–5 contains a cross-reference to proposed comment 55(c)(1)–3, which clarifies the circumstances in which increased fees and charges required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) may be imposed consistent with § 226.55.

55(b)(4) Delinquency Exception

Revised TILA Section 171(b)(4) permits a creditor to increase an annual percentage rate, fee, or finance charge ''due solely to the fact that a minimum payment by the [consumer] has not been received by the creditor within 60 days after the due date for such payment.'' However, this exception is subject to two conditions. First, revised Section 171(b)(4)(A) provides that the notice of the increase must include ''a clear and conspicuous written statement of the reason for the increase and that the increase will terminate not later than 6 months after the date on which it is imposed, if the creditor receives the required minimum payments on time from the [consumer] during that period.'' Second, revised Section 171(b)(4)(B) provides that the creditor must ''terminate [the] increase not later than 6 months after the date on which it is imposed, if the creditor receives the required minimum payments on time during that period.''

The Board proposes to implement this exception in § 226.55(b)(4). The additional notice requirements in revised TILA Section 171(b)(4)(A) are set forth in proposed § 226.55(b)(4)(i). The requirement in revised Section 171(b)(4)(B) that the increase be terminated if the card issuer receives timely payments during the six months following the increase is implemented in proposed § 226.55(b)(4)(ii), although the Board proposes three adjustments to the statutory requirement pursuant to its authority under TILA Section 105(a).

First, proposed § 226.55(b)(4)(ii) interprets the requirement that the

[30] This comment is based on commentary to the January 2009 FTC Act Rule proposed by the Board and the other Agencies in May 2009. *See* 12 CFR 227.24, proposed comment 24–4, 74 FR 20816; *see also* 74 FR 20809. In that proposal, the Board recognized that the process of replacing one account with another generally is not instantaneous. If, for example, a consumer requests that a credit card account with a $1,000 balance be upgraded to a credit card account that offers rewards on purchases, the second account may be opened immediately or within a few days but, for operational reasons, there may be a delay before the $1,000 balance can be transferred and the first account can be closed. For this reason, the Board sought comment on whether 15 or 30 days was the appropriate amount of time to complete this process. In response, industry commenters generally stated that at least 30 days was required. Accordingly, the Board is proposing a 30-day period in comment 55(b)(3)–3.

[31] For example, assume that, on January 1 of year one, a consumer opens a credit card account with a purchase rate of 15%. On July 1 of year one, the account is replaced with a credit card account issued by the same card issuer, which offers different features (such as rewards on purchases). Under these circumstances, the card issuer could not increase the annual percentage rate for purchases to a rate that is higher than 15% pursuant to § 226.55(b)(3) until January 1 of year two (which is one year after the first account was opened).

creditor ''terminate'' the increase as a requirement that the card issuer reduce the annual percentage rate, fee, or charge to the rate, fee, or charge that applied prior to the increase. The Board believes that this interpretation is consistent with the intent of revised TILA Section 171(b)(4)(B) insofar as the effect of the increase will be undone. The Board does not interpret revised TILA Section 171(b)(4)(B) to require the card issuer to refund or credit the account for amounts charged as a result of the increase prior to the termination.

Second, for clarity, proposed § 226.55(b)(4)(ii) provides that the card issuer must reduce the annual percentage rate, fee, or charge after receiving six consecutive required minimum periodic payments on or before the payment due date beginning with the first payment due following the effective date of the increase. The Board believes that shifting the focus from months to minimum payments provides more specificity and clarity for both consumers and card issuers as to what is required to obtain the reduction. Furthermore, the Board believes that limiting this requirement to the period immediately following the increase is consistent with revised TILA Section 171(b)(4)(B), which requires a creditor to terminate an increase ''6 months *after* the date on which it is imposed, if the creditor receives the required minimum payments on time during that period.'' Thus, as clarified in proposed comment 55(b)(4)–3 (which is discussed below), proposed § 226.55(b)(4)(ii) would not require a card issuer to terminate an increase if, at some later point in time, the card issuer receives six consecutive required minimum periodic payments on or before the payment due date.

Third, proposed § 226.55(b)(4)(ii) provides that the card issuer must also reduce the annual percentage rate, fee, or charge with respect to transactions that occurred within fourteen days after provision of the § 226.9(c) or (g) notice. This requirement is consistent with the definition of ''outstanding balance'' in revised TILA Section 171(d), as applied in proposed § 226.55(b)(1)(ii)(B) and proposed § 226.55(b)(3)(ii).

Proposed comment 55(b)(4)–1 clarifies that, in order to satisfy the condition in § 226.55(b)(4) that the card issuer has not received the consumer's required minimum periodic payment within 60 days after the payment due date, a card issuer that requires monthly minimum payments generally must not have received two consecutive minimum payments. The comment further clarifies that whether a required minimum periodic payment has been received for purposes of § 226.55(b)(4) depends on whether the amount received is equal to or more than the first outstanding required minimum periodic payment. The comment provides the following example: Assume that the required minimum periodic payments for a credit card account are due on the fifteenth day of the month. On May 13, the card issuer has not received the $50 required minimum periodic payment due on March 15 or the $150 required minimum periodic payment due on April 15. If the card issuer receives a $50 payment on May 14, § 226.55(b)(4) does not apply because the payment is equal to the required minimum periodic payment due on March 15 and therefore the account is not more than 60 days delinquent. However, if the card issuer instead received a $40 payment on May 14, § 226.55(b)(4) would apply because the payment is less than the required minimum periodic payment due on March 15. Furthermore, if the card issuer received the $50 payment on May 15, § 226.55(b)(4) would apply because the card issuer did not receive the required minimum periodic payment due on March 15 within 60 days after the due date for that payment.

As discussed above, proposed § 226.9(g)(3)(i)(B) would require that the written notice provided to consumers 45 days before an increase in rate due to delinquency or default or as a penalty include the information required by revised Section 171(b)(4)(A). Accordingly, proposed comment 55(b)(4)–2 clarifies that a card issuer that has complied with the disclosure requirements in § 226.9(g)(3)(i)(B) has also complied with the disclosure requirements in § 226.55(b)(4)(i).

Proposed comment 55(b)(4)–3 clarifies the requirements in § 226.55(b)(4)(ii) regarding the reduction of annual percentage rates, fees, or charges that have been increased pursuant to § 226.55(b)(4). First, as discussed above, the comment clarifies that § 226.55(b)(4)(ii) does not apply if the card issuer does not receive six consecutive required minimum periodic payments on or before the payment due date beginning with the payment due immediately following the effective date of the increase, even if, at some later point in time, the card issuer receives six consecutive required minimum periodic payments on or before the payment due date.

Second, the comment states that, although § 226.55(b)(4)(ii) requires the card issuer to reduce an annual percentage rate, fee, or charge increased pursuant to § 226.55(b)(4) to the annual percentage rate, fee, or charge that applied prior to the increase, this provision does not prohibit the card issuer from applying an increased annual percentage rate, fee, or charge consistent with any of the other exceptions in § 226.55(b). For example, if a temporary rate applied prior to the § 226.55(b)(4) increase and the temporary rate expired before a reduction in rate pursuant to § 226.55(b)(4), the card issuer may apply an increased rate to the extent consistent with § 226.55(b)(1). Similarly, if a variable rate applied prior to the § 226.55(b)(4) increase, the card issuer may apply any increase in that variable rate to the extent consistent with § 226.55(b)(2). This is consistent with proposed § 226.55(b), which provides that a card issuer may increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) pursuant to one of the exceptions in § 226.55(b) even if that increase would not be permitted under a different exception.

Third, the comment states that, if § 226.55(b)(4)(ii) requires a card issuer to reduce an annual percentage rate, fee, or charge on a date that is not the first day of a billing cycle, the card issuer may delay application of the reduced rate, fee, or charge until the first day of the following billing cycle. This is consistent with proposed comment 55(b)–2, which clarifies that a card issuer may delay application of an increase in a rate, fee, or charge until the start of the next billing cycle without relinquishing its ability to apply that rate, fee, or charge. Finally, the comment provides examples illustrating the application of § 226.55(b)(4)(ii).

55(b)(5) Workout and Temporary Hardship Arrangement Exception

Revised TILA Section 171(b)(3) permits a creditor to increase an annual percentage rate, fee, or finance charge ''due to the completion of a workout or temporary hardship arrangement by the [consumer] or the failure of a [consumer] to comply with the terms of a workout or temporary hardship arrangement.'' However, like the exception for delinquencies of more than 60 days in revised TILA Section 171(b)(4), this exception is subject to two conditions. First, revised Section 171(b)(3)(A) provides that ''the annual percentage rate, fee, or finance charge applicable to a category of transactions following any such increase does not exceed the rate, fee, or finance charge that applied to that category of transactions prior to commencement of the arrangement.'' Second, revised Section 171(b)(3)(B) provides that the creditor must have ''provided the

[consumer], prior to the commencement of such arrangement, with clear and conspicuous disclosure of the terms of the arrangement (including any increases due to such completion or failure).''

The Board proposes to implement this exception in § 226.55(b)(5). The notice requirements in revised Section 171(b)(3)(B) are set forth in proposed § 226.55(b)(5)(i). The limitation on increases following completion or failure of a workout or temporary hardship arrangement is set forth in proposed § 226.55(b)(5)(ii).

Proposed comment 55(b)(5)–1 clarifies that nothing in § 226.55(b)(5) permits a card issuer to alter the requirements of § 226.55 pursuant to a workout or temporary hardship arrangement. For example, a card issuer cannot increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) pursuant to a workout or temporary hardship arrangement unless otherwise permitted by § 226.55. In addition, a card issuer cannot require the consumer to make payments with respect to a protected balance that exceed the payments permitted under § 226.55(c).[32]

Proposed comment 55(b)(5)–2 clarifies that a card issuer that has complied with the disclosure requirements in § 226.9(c)(2)(v)(D) has also complied with the disclosure requirements in § 226.55(b)(5)(i). The comment also contains a cross-reference to proposed comment 9(c)(2)(v)–8, which the Board adopted in the July 2009 Regulation Z Interim Final Rule to clarify the terms a creditor is required to disclose prior to commencement of a workout or temporary hardship arrangement for purposes of § 226.9(c)(2)(v)(D), which is an exception to the general requirement that a creditor provide 45 days advance notice of an increase in annual percentage rate. *See* 74 FR 36099. Because the disclosure requirements in § 226.9(c)(2)(v)(D) and proposed § 226.55(b)(5)(i) implement the same statutory provision (revised TILA Section 171(b)(3)(B)), the Board believes a single set of disclosures should satisfy the requirements of all three provisions.

Similar to the commentary to proposed § 226.55(b)(4), proposed comment 55(b)(5)–3 states that, although the card issuer may not apply an annual percentage rate, fee, or charge to transactions that occurred prior to commencement of the arrangement that exceeds the rate, fee, or charge that applied to those transactions prior to commencement of the arrangement, § 226.55(b)(5)(ii) does not prohibit the card issuer from applying an increased rate, fee, or charge upon completion or failure of the arrangement to the extent consistent with any of the other exceptions in § 226.55(b) (such as an increase in a variable rate consistent with proposed § 226.55(b)(2)). Finally, proposed comment 55(b)(5)–4 provides illustrative examples of the application of this exception.

55(b)(6) Servicemembers Civil Relief Act Exception

The Board proposes to use its authority under TILA Section 105(a) to clarify the relationship between the general prohibition on increasing annual percentage rates in revised TILA Section 171 and certain provisions of the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. app. 501 *et seq*. Specifically, 50 U.S.C. app. 527(a)(1) provides that ''[a]n obligation or liability bearing interest at a rate in excess of 6 percent per year that is incurred by a servicemember, or the servicemember and the servicemember's spouse jointly, before the servicemember enters military service shall not bear interest at a rate in excess of 6 percent. * * *'' With respect to credit card accounts, this restriction applies during the period of military service. *See* 50 U.S.C. app. 527(a)(1)(B).[33]

Under revised TILA Section 171, a creditor that complies with the SCRA by lowering the annual percentage rate that applies to an existing balance on a credit card account when the consumer enters military service arguably would not be permitted to increase the rate for that balance once the period of military service ends and the protections of the SCRA no longer apply. In May 2009, the Board and the other Agencies proposed to create an exception to the general prohibition in the January 2009 FTC Act Rule on applying increased rates to existing balances for these circumstances, provided that the increased rate does not exceed the rate that applied prior to the period of military service. *See* 12 CFR 227.24(b)(6), 74 FR 20814; *see also* 74 FR 20812. Revised TILA Section 171 does not contain a similar exception. However, the Board does not believe that Congress intended to prohibit creditors from returning an annual percentage rate that has been reduced by operation of the SCRA to its pre-military service level once the SCRA no longer applies. Accordingly, the Board proposes to create § 226.55(b)(6), which states that, if an annual percentage rate has been decreased pursuant to the SCRA, a card issuer may increase that annual percentage rate once the SCRA no longer applies. However, the card issuer would not be permitted to apply an annual percentage rate to any transactions that occurred prior to the decrease that exceeds the rate that applied to those transactions prior to the decrease. Furthermore, because the Board believes that a consumer leaving military service should receive 45 days advance notice of this increase in rate, the Board has not proposed a corresponding exception to § 226.9.

Proposed comment 55(b)(6)–1 clarifies that, although § 226.55(b)(6) requires the card issuer to apply to any transactions that occurred prior to a decrease in annual percentage rate pursuant to 50 U.S.C. app. 527 a rate that does not exceed the rate that applied to those transactions prior to the decrease, the card issuer may apply an increased rate once 50 U.S.C. app 527 no longer applies, to the extent consistent with any of the other exceptions in § 226.55(b). For example, if the rate that applied prior to the decrease was a variable rate, the card issuer may apply any increase in that variable rate to the extent consistent with § 226.55(b)(2). This comment mirrors similar commentary to proposed § 226.55(b)(4) and (b)(5). An illustrative example is provided in proposed comment 26(b)(6)–2.

55(c) Treatment of Protected Balances

Revised TILA Section 171(c)(1) states that ''[t]he creditor shall not change the terms governing the repayment of any outstanding balance, except that the creditor may provide the [consumer] with one of the methods described in [revised Section 171(c)(2)] * * * or a method that is no less beneficial to the [consumer] than one of those methods.'' Revised TILA Section 171(c)(2) lists two methods of repaying an outstanding balance: First, an amortization period of not less than five years, beginning on the effective date of the increase set forth in the Section 127(i) notice; and, second, a required minimum periodic payment that includes a percentage of the outstanding balance that is equal to not more than twice the percentage required before the effective date of the increase set forth in the Section 127(i) notice.

For clarity, proposed § 226.55(c)(1) defines the balances subject to the

[32] The definition of ''protected balance'' and the permissible repayment methods for such a balance are discussed in detail below with respect to proposed § 226.55(c).

[33] 50 U.S.C. app. 527(a)(1)(B) applies to obligations or liabilities that do not consist of a mortgage, trust deed, or other security in the nature of a mortgage.

protections in revised TILA Section 171(c) as ''protected balances.'' Under this definition, a ''protected balance'' is the amount owed for a category of transactions to which an increased annual percentage rate or an increased fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) cannot be applied after the annual percentage rate, fee, or charge for that category of transactions has been increased pursuant to § 226.55(b)(3). For example, when a card issuer notifies a consumer of an increase in the annual percentage rate that applies to new purchases pursuant to § 226.9(c), the protected balance is the purchase balance at the end of the fourteenth day after provision of the notice. *See* § 226.55(b)(3)(ii). The Board and the other Agencies adopted a similar definition in the January 2009 FTC Act Rule. *See* 12 CFR 227.24(c), 74 FR 5560; *see also* 74 FR 5532.

Proposed comment 55(c)(1)–1 would provide an illustrative example of a protected balance. Proposed comment 55(c)(1)–2 would clarify that, because § 226.55(b)(3)(iii) does not permit a card issuer to increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) during the first year after account opening, § 226.55(c) does not apply to balances during the first year after account opening.

Proposed comment 55(c)(1)–3 clarifies that, although § 226.55(b)(3) does not permit a card issuer to apply an increased fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) to a protected balance, a card issuer is not prohibited from increasing a fee or charge that applies to the account as a whole or to balances other than the protected balance. For example, a card issuer may add a new annual or a monthly maintenance fee to an account or increase such a fee so long as the fee is not based solely on the protected balance. However, if the consumer rejects an increase in a fee or charge pursuant to § 226.9(h), the card issuer is prohibited from applying the increased fee or charge to the account and from imposing any other fee or charge solely as a result of the rejection. *See* § 226.9(h)(2)(i) and (ii); comment 9(h)(2)(ii)–2.

Proposed § 226.55(c)(2) implements the restrictions on accelerating the repayment of protected balances in revised TILA Section 171(c). As discussed above with respect to § 226.9(h), the Board previously implemented these restrictions in the July 2009 Regulation Z Interim Final Rule as § 226.9(h)(2)(iii). However, for clarity and consistency, the Board proposes to move these restrictions to proposed § 226.55(c)(2). Proposed § 226.55(c)(2) is consistent with current § 226.9(h)(2)(iii), except that the repayment methods in § 226.55(c)(2) focus on the effective date of the increase (rather than the date on which the card issuer is notified of the rejection pursuant to § 226.9(h)).

Similarly, for the reasons discussed above with respect to § 226.9(h), the Board proposes to move the commentary clarifying the application of these repayment methods from current § 226.9(h)(2)(iii) to § 226.55(c) and to adjust that commentary for consistency with § 226.55(c). In addition, proposed comment 55(c)(2)(iii)–1 would clarify that, although § 226.55(c)(2)(iii) limits the extent to which the portion of the required minimum periodic payment based on the protected balance may be increased, it does not limit or otherwise address the creditor's ability to determine the amount of the required minimum periodic payment based on other balances on the account or to apply that portion of the minimum payment to the balances on the account. Proposed comment 55(c)(2)(iii)–2 would provide an illustrative example.

55(d) Continuing Application of § 226.55

Pursuant to its authority under TILA Section 105(a), the Board proposes to adopt § 226.55(d), which provides that the limitations in § 226.55 continue to apply to a balance on a credit card account after the account is closed or acquired by another card issuer or the balance is transferred from a credit card account issued by a card issuer to another credit account issued by the same card issuer or its affiliate or subsidiary (unless the account to which the balance is transferred is subject to § 226.5b). This provision is based on commentary to the January 2009 FTC Act Rule proposed by the Board and the other Agencies in May 2009, primarily in response to concerns that permitting card issuers to apply an increased rate to an existing balance in these circumstances could lead to circumvention of the general prohibition on such increases. *See* 12 CFR 227.21 comments 21(c)–1 through –3, 74 FR 20814–20815; *see also* 74 FR 20805–20807.

Because the protections in revised TILA Section 171 and new TILA Section 172 cannot be waived or forfeited, proposed § 226.55(d) does not distinguish between closures or transfers initiated by the card issuer and closures or transfers initiated by the consumer. Although there may be circumstances in which individual consumers could make informed choices about the benefits and costs of waiving the protections in revised Section 171 and new Section 172, an exception for those circumstances would create a significant loophole that could be used to deny the protections to other consumers. For example, if a card issuer offered to transfer its cardholder's existing balance to a credit product that would reduce the rate on the balance for a period of time in exchange for the cardholder accepting a higher rate after that period, the cardholder would have to determine whether the savings created by the temporary reduction would offset the cost of the subsequent increase, which would depend on the amount of the balance, the amount and length of the reduction, the amount of the increase, and the length of time it would take the consumer to pay off the balance at the increased rate. Based on extensive consumer testing conducted during the preparation of the January 2009 Regulation Z Rule and the January 2009 FTC Act Rule, the Board believes that it would be very difficult to ensure that card issuers disclosed this information in a manner that will enable most consumers to make informed decisions about whether to accept the increase in rate. Although some approaches to disclosure may be effective, others may not and it would be impossible to distinguish among such approaches in a way that would provide clear guidance for card issuers. Furthermore, consumers might be presented with choices that are not meaningful (such as a choice between accepting a higher rate on an existing balance or losing credit privileges on the account).

Proposed 226.55(d)(1) provides that § 226.55 continues to apply to a balance on a credit card account after the account is closed or acquired by another card issuer. In some cases, the acquiring institution may elect to close the acquired account and replace it with its own credit card account. *See* comment 12(a)(2)–3. The acquisition of an account does not involve any choice on the part of the consumer, and the Board believes that consumers whose accounts are acquired should receive the same level of protection against increases in annual percentage rates after acquisition as they did beforehand.[34] Proposed

[34] Thus, as discussed in the proposed commentary to § 226.55(b)(2), a card issuer that acquires a credit card account with a balance to which a variable rate applies would not be permitted to substitute a new index for the index used to determine the variable rate if the change could result in an increase in the annual percentage

comment 55(d)–1 clarifies that § 226.55 continues to apply regardless of whether the account is closed by the consumer or the card issuer and provides illustrative examples of the application of § 226.55(d)(1). Proposed comment 55(d)–2 clarifies the application of § 226.55(d)(1) to circumstances in which a card issuer acquires a credit card account with a balance by, for example, merging with or acquiring another institution or by purchasing another institution's credit card portfolio.

Proposed 226.55(d)(2) provides that § 226.55 continues to apply to a balance on a credit card account after the balance is transferred from a credit card account issued by a card issuer to another credit account issued by the same card issuer or its affiliate or subsidiary (unless the account to which the balance is transferred is subject to § 226.5b). Proposed comment 55(d)–3.i provides examples of circumstances in which balances may be transferred from one credit card account issued by a card issuer to another credit card account issued by the same card issuer (or its affiliate or subsidiary), such as when the consumer's account is converted from a retail credit card that may only be used at a single retailer or an affiliated group of retailers to a co-branded general purpose credit card which may be used at a wider number of merchants. Because of the concerns discussed above regarding circumvention and informed consumer choice and for consistency with the issuance rules regarding card renewals or substitutions for accepted credit cards under § 226.12(a)(2), the Board believes—and proposed § 226.55(d)(2) provides—that these transfers should be treated as a continuation of the existing account relationship rather than the creation of a new account relationship. *See* comment 12(a)(2)–2.

Proposed § 226.55(d)(2) does not apply to balances transferred from a credit card account issued by a card issuer to a credit account issued by the same card issuer (or its affiliate or subsidiary) that is subject to § 226.5b (which applies to open-end credit plans secured by the consumer's dwelling). The Board believes that excluding transfers to such accounts is appropriate because § 226.5b provides protections that are similar to—and, in some cases, more stringent than—the protections in § 226.55. For example, a card issuer may not change the annual percentage rate on a home-equity plan unless the change is based on an index that is not under the card issuer's control and is available to the general public. *See* 12 CFR 226.5b(f)(1).

Proposed comment 55(d)–3.ii clarifies that, when a consumer chooses to transfer a balance to a credit card account issued by a *different* card issuer, § 226.55 does not prohibit the card issuer to which the balance is transferred from applying its account terms to that balance, provided those terms comply with 12 CFR part 226. For example, if a credit card account issued by card issuer A has a $1,000 purchase balance at an annual percentage rate of 15% and the consumer transfers that balance to a credit card account with a purchase rate of 17% issued by card issuer B, card issuer B may apply the 17% rate to the $1,000 balance. However, card issuer B may not subsequently increase the rate that applies to that balance unless permitted by one of the exceptions in § 226.55(b).

Although balance transfers from one card issuer to another raise some of the same concerns as balance transfers involving the same card issuer, the Board believes that transfers between card issuers are not contrary to the intent of revised TILA Section 171 and proposed § 226.55 because the card issuer to which the balance is transferred is not increasing the cost of credit it previously extended to the consumer. For example, assume that card issuer A has extended a consumer $1,000 of credit at a rate of 15%. Because proposed § 226.55 generally prohibits card issuer A from increasing the rate that applies to that balance, it would be inconsistent with § 226.55 to allow card issuer A to reprice that balance simply by transferring it to another of its accounts. In contrast, in order for the $1,000 balance to be transferred to card issuer B, card issuer B must provide the consumer with a new $1,000 extension of credit in an arms–length transaction and should be permitted to price that new extension consistent with its evaluation of prevailing market rates, the risk presented by the consumer, and other factors. Thus, the transfer from card issuer A to card issuer B does not appear to raise concerns about circumvention of proposed § 226.55 because card issuer B is not increasing the cost of credit it previously extended.

The Board understands from comments on the May 2009 proposal that drawing this distinction between balance transfers involving the same card issuer and balance transfers involving different card issuers may limit a card issuer's ability to offer its existing cardholders the same terms that it would offer another issuer's cardholders. As noted in that proposal, however, the Board understands that currently card issuers generally do not make promotional balance transfer offers available to their existing cardholders for balances held by the issuer because it is not cost-effective to do so. Furthermore, although many card issuers do offer existing cardholders the opportunity to upgrade to accounts offering different terms or features (such as upgrading to an account that offers a particular type of rewards), the Board understands that these offers generally are not conditioned on a balance transfer, which indicates that it may be cost-effective for card issuers to make these offers without repricing an existing balance. Nevertheless, the Board again solicits comment on the extent to which proposed § 226.55(d)(2) would affect card issuers' ability to make offers to their own cardholders.

Section 226.56 Requirements for Over-the-Limit Transactions

When a consumer seeks to engage in a credit card transaction that may cause his or her credit limit to be exceeded, the creditor may, at its discretion, authorize the over-the-limit transaction. If the creditor pays an over-the-limit transaction, the consumer is typically assessed a fee or charge for the service.[35] In addition, the over-the-limit transaction may also be considered a default under the terms of the credit card agreement and trigger a rate increase, in some cases up to the default, or penalty, rate on the account.[36]

The Credit Card Act adds new TILA Section 127(k) and requires a creditor to obtain a consumer's express election, or opt-in, before the creditor may impose any fees on a consumer's credit card account for making an extension of credit that exceeds the consumer's credit limit. 15 U.S.C. 1637(k). TILA Section 127(k)(2) further provides that no election shall take effect unless the consumer, before making such election, has received a notice from the creditor of any fees that may be assessed for an over-the-limit transaction. If the consumer opts in to the service, the creditor is also required to provide

rate. However, the proposed commentary to § 226.55(b)(2) does clarify that a card issuer that does not utilize the index used to determine the variable rate for an acquired balance may convert that rate to an equal or lower non-variable rate, subject to the notice requirements of § 226.9(c).

[35] According to the GAO, the average over-the-limit fee assessed by issuers in 2005 was $30.81, an increase of 138 percent since 1995. *See Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers*, GAO Report 06–929, at 20 (September 2006) (citing data reported by CardWeb.com). The GAO also reported that among cards issued by the six largest issuers in 2005, most charged an over-the-limit fee amount between $35 and $39. *Id.* at 21.

[36] *See id.* at 25.

notice of the consumer's right to revoke that election on any periodic statement that reflects the imposition of an over-the-limit fee during the relevant billing cycle. The Board is proposing to implement the over-the-limit consumer consent requirements in § 226.56.

The Credit Card Act directs the Board to issue rules governing the disclosures required by TILA Section 127(k), including rules regarding (i) the form, manner and timing of the initial opt-in notice and (ii) the form of the subsequent notice describing how an opt-in may be revoked. *See* TILA Section 127(k)(2). In addition, the Board must prescribe rules to prevent unfair or deceptive acts or practices in connection with the manipulation of credit limits designed to increase over-the-limit fees or other penalty fees. *See* TILA Section 127(k)(5)(B).

56(a) Definition

Proposed § 226.56(a) defines ''over-the-limit transaction'' to mean any extension of credit by a creditor to complete a transaction that causes a consumer's credit card account balance to exceed the consumer's credit limit. The proposed term is limited to extensions of credit required to complete a transaction that has been requested by a consumer (for example, to make a purchase at a point of sale or on-line, or to transfer a balance from another account). The term is not intended to cover the assessment of fees or interest charges by the creditor that may cause the consumer to exceed the credit limit. *See, however*, proposed § 226.56(j)(4), discussed below.

56(b) Opt-In Requirement

General rule. Proposed § 226.56(b)(1) sets forth the general rule prohibiting a creditor from assessing a fee or charge on a consumer's account for paying an over-the-limit transaction unless the consumer is given notice and a reasonable opportunity to affirmatively consent, or opt in, to the creditor's payment of over-the-limit transactions and the consumer has opted in. If the consumer affirmatively consents, or ''opts in,'' to the service, the creditor must provide the consumer notice of the right to revoke that consent after assessing an over-the-limit fee or charge on the consumer's account.

Under the proposed rule, the creditor may provide the opt-in notice orally, electronically, or in writing. Compliance with the consumer consent provisions or other requirements necessary to provide consumer disclosures electronically pursuant to the E-Sign Act would not be required if the creditor elects to provide the opt-in notice electronically. *See also* proposed § 226.5(a)(1)(ii)(A). However, as discussed below under proposed § 226.56(d)(1)(ii), before the consumer may consent orally or electronically, the creditor must also have provided the opt-in notice immediately prior to and contemporaneously with obtaining that consent. In addition, while the opt-in notice may be provided orally, electronically, or in writing, the revocation notice must be provided to the consumer in writing, consistent with the statutory requirement that such notice appear on the periodic statement reflecting the assessment of an over-the-limit fee or charge on the consumer's account. *See* TILA Section 127(k)(2), and proposed § 226.56(d)(2), discussed below.

The proposed notice and opt-in requirements would apply only to credit card accounts under an open-end (not home-secured) consumer credit plan, and would therefore not apply to credit cards that access a home equity line of credit or to debit cards linked to an overdraft line of credit. *See* proposed § 226.2(a)(15)(ii). Although creditors must obtain consumer consent before any over-the-limit fees or charges are assessed on a consumer's account, the rule would not require that the creditor obtain the consumer's separate consent for each extension of credit that causes the consumer to exceed his or her credit limit. Such an approach is not compelled by the Credit Card Act. Proposed comment 56(b)–1 also explains, however, that even if a consumer has affirmatively consented or opted in to a creditor's over-the-limit service, the creditor is not required or obligated to pay or authorize any over-the-limit transactions.

Proposed comment 56(b)–2 clarifies that a creditor that has a policy and practice of declining to pay or authorize any transactions that the creditor reasonably believes would cause the consumer to exceed the credit limit is not subject to the requirements of this section and would therefore not be required to provide the consumer notice or an opt-in right. This ''reasonable belief'' standard recognizes that creditors generally do not have real-time information regarding a consumer's prior transactions or credits that may have posted to the consumer's credit card account. As discussed below in proposed § 226.56(b)(2), however, that if an over-the-limit transaction is paid without the consumer providing affirmative consent, the institution would not be permitted to charge a fee for paying the transaction.

Proposed comment 56(b)–3 provides that the opt-in requirement applies whether a creditor assesses over-the-limit fees or charges on a per transaction basis or as a periodic account or maintenance fee that is imposed each cycle for the creditor's payment of over-the-limit transactions regardless of whether the consumer has exceeded the credit limit during a particular cycle (for example, a monthly ''over-the-limit protection'' fee).

As further discussed below, the proposal would require creditors to obtain consumer consent for all credit card accounts, including those opened prior to the effective date of the rule, before the creditor could assess any fees or charges on a consumer's account for paying over-the-limit transactions.

Reasonable opportunity to opt in. Proposed § 226.56(b)(1)(ii) requires a creditor to provide a reasonable opportunity for the consumer to affirmatively consent to the creditor's payment of over-the-limit transactions. TILA Section 127(k)(3) provides that the consumer's affirmative consent (and revocation) may be completed orally, electronically, or in writing, pursuant to regulations prescribed by the Board. *See also* proposed § 226.56(e), discussed below. Proposed comment 56(b)–4 contains examples to illustrate what would constitute providing a consumer a reasonable opportunity to affirmatively consent using the specified methods.

The first example provides that a creditor may include the notice on an application form that a consumer may fill out to request the service as part of the application process. *See* proposed comment 56(b)–4.i. Alternatively, after the consumer has been approved for the card, the creditor could provide a form with the account-opening disclosures that can be filled out separately and mailed to affirmatively request the service. *See* proposed comment 56(b)–4.ii and proposed Model Form G–25(A) in Appendix G, discussed below.

Proposed comment 56(b)–4.iii illustrates that a creditor may obtain consumer consent through a readily available telephone line. Proposed comment 56(b)–4.iv illustrates that a creditor may provide an electronic means for the consumer to affirmatively consent. For example, a creditor could provide a form on its Web site that enables the consumer to check a box to indicate his or her agreement to the over-the-limit service and confirm that opt-in choice by clicking on a consent box. *See also* proposed § 226.56(d)(1)(ii) (requiring the opt-in notice to be provided immediately prior to and contemporaneous with the consumer's consent).

Comment is requested regarding whether creditors should be required to segregate the opt-in notice from other account disclosures. Such a requirement may ensure that the information is not obscured within other account documents and overlooked by the consumer, for example, in preprinted language in the account-opening disclosures, leading the consumer to inadvertently consent to having over-the-limit transactions paid or authorized by the creditor.

Notwithstanding the manner in which notice of the opt-in right may be provided, proposed comment 56(b)–5 would clarify that the consumer's consent must be obtained separately from other consents or acknowledgments provided by the consumer. For example, a consumer's signature on an application for a credit card alone would not sufficiently evidence the consumer's consent to the creditor's payment of over-the-limit transactions. Under the proposal, the consumer must initial, sign, or otherwise make a separate request for the over-the-limit service. However, the proposed comment would not preclude a creditor from including a separate check box or signature line for requesting the over-the-limit service in the signature block on a credit application, provided that the check box or signature is used solely to indicate the consumer's opt-in decision and not for any other purpose, such as to also obtain consumer consents for other account services or features. Under Regulation Z's record retention rules, creditors would be required to retain evidence of the consumer's consent or opt-in for a period of at least two years, regardless of the means by which consent is obtained. *See* § 226.25.

The Board also solicits comment on whether creditors should be required to provide the consumer with written confirmation once the consumer has opted in under proposed § 226.56(b)(1)(iii) to verify that the consumer intended to make the election. In the case of telephone or in person requests in particular, written confirmation may be appropriate to evidence the consumer's intent to opt in to the service. A creditor could comply with such a requirement, for example, by sending a letter to the consumer acknowledging that the consumer has elected to opt in to the creditor's service, or, in the case of a mailed request, the creditor could provide a copy of the consumer's completed opt-in form.

Payment of over-the-limit transactions where consumer has not opted in. Proposed § 226.56(b)(2) provides that a creditor may pay an over-the-limit transaction even if the consumer has not provided affirmative consent, so long as the creditor does not impose a fee or charge for paying the transaction. Proposed comment 56(b)(2)–1 contains further guidance stating that the prohibition on imposing fees for paying an over-the-limit transaction where the consumer has not opted in applies even in circumstances where the creditor is unable to avoid paying a transaction that exceeds the consumer's credit limit. Nothing in the statute suggests that Congress intended to permit an exception to allow any over-the-limit fees to be charged in these circumstances absent consumer consent. Proposed comment 56(b)(2)–1 contains illustrative examples of this provision.

For example, in some cases, a merchant may not submit a credit card transaction to the creditor for authorization. Such an event may occur, for instance, because the transaction is below the floor limits established by the card network rules requiring authorization or because the small dollar amount of the transaction does not pose significant payment risk to the merchant. If the transaction exceeds the consumer's credit limit, the creditor would not be permitted to assess an over-the-limit fee if the consumer has not consented to the creditor's payment of over-the-limit transactions.

Similarly, the proposed rule does not permit the creditor to assess a fee for an over-the-limit transaction that occurs because the final transaction amount exceeds the amount submitted for authorization. For example, a consumer may use his or her credit card at a pay-at-the-pump fuel dispenser to purchase $50 of fuel. At the time of authorization, the gas station may request an authorization hold of $1 to verify the validity of the card. Even if the subsequent $50 transaction amount exceeds the consumer's credit limit, § 226.56(b)(2) would prohibit the creditor from assessing an over-the-limit fee if the consumer has not opted in to the creditor's over-the-limit service.

Proposed comment 56(b)(2)–2 clarifies that a creditor is not precluded from assessing other fees and charges unrelated to the payment of the over-the-limit transaction itself even where the consumer has not provided consent to the creditor's over-the-limit service, to the extent permitted under applicable law. For example, if a consumer has not opted in, a creditor could permissibly assess a balance transfer fee for a balance transfer, provided that such a fee is assessed whether or not the transfer exceeds the credit limit. The creditor could also continue to assess interest charges for the over-the-limit transaction.[37]

56(c) Method of Election

TILA Section 127(k)(2) provides that a consumer may make or revoke consent to permit over-the-limit transactions orally, electronically, or in writing, and directs the Board to prescribe rules to ensure that the same options are available for both making and revoking such election. Proposed § 226.56(c) implements this requirement. Proposed comment 56(c)–1 clarifies that the creditor may determine the means by which consumers may provide affirmative consent. The creditor could decide, for example, whether to obtain consumer consents in writing, electronically, by telephone, or to offer some or all of these options. The proposed rule recognizes that creditors have a strong interest in facilitating a consumer's ability to opt in, and thus would permit them to determine the most effective means in obtaining such consent.

Notwithstanding the creditor's choice(s), however, proposed § 226.56(c) requires that whatever method a creditor provides for obtaining consent, such method must be equally available to the consumer to revoke the prior consent. *See* TILA Section 127(k)(3). Proposed comment 56(c)–2 provides guidance that because consumer consent or revocation requests are not consumer disclosures for purposes of the E-Sign Act, creditors would not be required to comply with the consumer consent or other requirements for providing disclosures electronically pursuant to the E-Sign Act for consumer requests submitted electronically. Comment is requested whether the Board should require creditors to allow consumers to opt in and to revoke that consent using each of the three methods (that is, orally, electronically, and in writing).

56(d) Timing

Proposed § 226.56(d)(1)(i) establishes a general requirement that a creditor provide an opt-in notice before the creditor assesses any fee or charge on the consumer's account for paying an over-the-limit transaction. For example, a creditor could include the notice as part of the credit card application. *See* proposed comment 56(b)–4.i.

[37] The proposed rule does not prohibit a creditor from increasing the consumer's interest rate as a result of an over-the-limit transaction, subject to the creditor's compliance with the 45-day advance notice requirement in § 226.9(g), the limitations on applying an increased rate to an existing balance in § 226.55, and other provisions of the Credit Card Act.

Alternatively, the creditor could include the notice with other account-opening documents, either within the account-opening disclosures under § 226.6 or in a stand-alone document. *See* proposed comment 56(b)–4.ii.

The proposed rule would require that all consumers, including existing account holders, receive notice regarding the opt-in right if the creditor imposes a fee or charge for paying an over-the-limit transaction. The Board believes that had Congress intended to permit existing customers to continue to have over-the-limit transactions paid or authorized without their prior consent, it would have so specified. Nothing in the statute or the legislative history suggests that Congress intended that existing account holders should not have the same rights regarding consumer choice for over-the-limit transactions as those afforded to new customers. As a result, the proposal would apply the over-the-limit consumer consent requirements to credit card accounts opened prior to February 22, 2010.

For credit card accounts opened prior to the effective date of the final rule, a creditor may elect to provide an opt-in notice to all of its account holders on or with the first periodic statement sent after the effective date of the final rule. Creditors that choose to do so would be prohibited from assessing any over-the-limit fees or charges after the effective date of the rule and prior to providing the opt-in notice, and subsequently could not assess any such fees or charges unless and until the consumer opts in.

Comment is requested regarding whether a creditor should be permitted to obtain consumer consent for the payment of over-the-limit transactions prior to the effective date of the final rule and, if so, under what circumstances. Such an approach could allow creditors to phase in their processing of consumer opt-ins and alleviate the compliance burden that may otherwise occur if notices could not be sent, and opt-ins obtained until February 22, 2010.

In addition to the general requirement that the creditor provide an opt-in notice prior to imposing any fee or charge for an over-the-limit transaction, proposed § 226.56(d)(1)(ii) states that if the consumer decides to consent orally or electronically, the opt-in notice must be given by the creditor immediately before and contemporaneously with a consumer's election. For example, if a consumer calls the creditor to consent to the creditor's payment of over-the-limit transactions, the creditor must provide the opt-in notice immediately prior to obtaining the consumer's consent. This proposed requirement is intended to ensure that a consumer has full information regarding the opt-in right at a time that is most likely to be meaningful to the consumer, that is, when the opt-in decision is made.

Proposed § 226.56(d)(2) provides that notice of the consumer's right to revoke a prior election for the creditor's over-the-limit service must appear on each periodic statement that reflects the assessment of an over-the-limit fee or charge on a consumer's account. *See* TILA Section 127(k)(2). A revocation notice would be required regardless of whether the fee was imposed due to an over-the-limit transaction initiated by the consumer in the prior cycle or because the consumer failed to reduce the account balance below the credit limit in the next cycle. To ensure that the revocation notice is clear and conspicuous to the consumer, the proposed rule requires that the notice appear on the front of any page of the periodic statement. Proposed comment 56(d)–1 clarifies that creditors have flexibility regarding how often a revocation notice must be provided. At the creditor's option, it may, but is not required to, include the revocation notice on every periodic statement sent to the consumer, even if the consumer has not incurred an over-the-limit fee or charge during a particular billing cycle.

56(e) Content and Format

TILA Section 127(k)(2) provides that a consumer's election to permit a creditor to extend credit that would exceed the credit limit may not take effect unless the consumer receives notice from the creditor of any over-the-limit fee ''in the form and manner, and at the time, determined by the Board.'' TILA Section 127(k)(2) also requires that the creditor provide notice to the consumer of the right to revoke the election, ''in the form prescribed by the Board,'' in any periodic statement reflecting the imposition of an over-the-limit fee. Proposed § 226.56(e) sets forth the content requirements for both notices. *See also* proposed Model Forms G–25(A) and G–25(B) in Appendix G.

Initial notice content. Proposed § 226.56(e)(1) sets forth the information that must be included in the opt-in notice provided to consumers before a creditor may assess any fees or charges for paying an over-the-limit transaction. To ensure that consumers can make an informed decision regarding whether and how to affirmatively consent to a creditor's payment of over-the-limit transactions, creditors would be required to provide in the opt-in notice certain information in addition to the amount of the over-the-limit fee. The additional information would be prescribed pursuant to the Board's authority under TILA Section 105(a) to make adjustments that are necessary to effectuate the purposes of TILA. 15 U.S.C. 1604(a).

Proposed § 226.56(e)(1)(i) would require the opt-in notice to include information about the dollar amount of any fees or charges assessed on a consumer's credit card account for an over-the-limit transaction. The proposed requirement to state the fee amount on the opt-in notice itself is separate from other required disclosures regarding the amount of the over-the-limit fee. *See, e.g.*, § 226.5a(b)(10). Because a creditor could comply with the opt-in notice requirement in several forms, such as providing the notice in the application or solicitation, in the account-opening disclosures, or as a stand-alone document, the Board believes that including the fee disclosure in the opt-in notice itself is necessary to ensure that consumers can easily determine the amounts they could be charged for an over-the-limit transaction.

Some creditors may wish to vary the fee amount that may be imposed based upon the number of times the consumer has gone over the limit, the amount the consumer has exceeded the credit limit, or due to other factors. Under these circumstances, the creditor may disclose the maximum fee that may be imposed or a range of fees. Proposed comment 56(e)–1 provides that the creditor may indicate that the consumer may be assessed a fee ''up to'' the maximum fee or provide the range of fees. Comment is requested whether additional guidance is necessary if an over-the-limit fee is determined by other means, such as a percentage of the over-the-limit transaction.

In addition to disclosing the amount of the fee or charge that may be imposed for an over-the-limit transaction, proposed § 226.56(e)(1)(ii) would require creditors to disclose any increased rate that may apply if consumers exceed their credit limit. The Board believes the additional requirement is necessary to ensure consumers fully understand the potential consequences of exceeding their credit limit, particularly as a rate increase can be more costly than the imposition of a fee. This requirement is consistent with the content required to be disclosed regarding the consequences of a late payment. *See* TILA Section 127(b)(12); § 226.7(b)(11) of the January 2009 Regulation Z Rule. Accordingly, if, under the terms of the account agreement, an over-the-limit transaction could result in the loss of a promotional

rate, the imposition of a penalty rate, or both, this fact must be included in the opt-in notice.

Proposed § 226.56(e)(1)(iii) requires creditors to explain the consumer's right to affirmatively consent to the creditor's payment of over-the-limit transactions, including the methods that the consumer may use to exercise the right to opt in.

In addition to providing the required content, some creditors may wish to include more information about the effects of opting in, including potential benefits. Proposed comment 56(e)–2 provides that creditors may briefly describe these benefits. For example, the creditor may state that if the consumer consents, or opts in, to the payment of over-the-limit transactions, the consumer may avoid having transactions declined if a transaction may exceed the credit limit. Creditors may also wish to disclose that over-the-limit transactions may be paid at the creditor's discretion or that the payment of over-the-limit transactions is not guaranteed. Comment is requested regarding whether the rule should permit or require any other information to be included in the opt-in notice.

The Board notes that permitting creditors to include additional content in the opt-in notice could lead to the potential consequence that the additional information may overwhelm the required content in the notice. Thus, comment is also requested regarding whether creditors should be permitted to include any information in the opt-in notice beyond the content specified in the rule.

Revocation notice. Proposed § 226.56(e)(2) would implement the requirement in TILA Section 127(k)(2) that a creditor must provide notice of the right to revoke consent that was previously granted for paying over-the-limit transactions. The proposed rule states that the notice must describe the consumer's right to revoke any consent previously granted, including the methods by which the consumer may revoke the service. As discussed above, creditors may include this notice on every periodic statement after the consumer has opted in to the creditor's payment of over-the-limit transactions or only on statements that reflect the imposition of an over-the-limit fee. *See* proposed comment 56(d)–1.

Model forms. Proposed Model Forms G–25(A) and (B) include sample language that creditors may use to comply with the proposed notice content requirement. Use of the model forms, or substantially similar notices, would provide creditors a safe harbor for compliance under proposed § 226.56(e)(3).

56(f)–(i) Additional Provisions Addressing Consumer Opt-in Right

Joint accounts. Proposed § 226.56(f) requires a creditor to treat affirmative consent provided by any joint consumer of a credit card account as affirmative consent for the account from all of the joint consumers. This provision recognizes the operational difficulties that would otherwise arise if a creditor had to determine which account holder was responsible for a particular transaction and then decide whether to authorize or pay an over-the-limit transaction based on that account-holder's opt-in choice. Moreover, because the same credit limit presumably applies to a joint account, one joint account holder's decision to opt in to the payment of over-the-limit transactions would also necessarily impact the other account holder. Accordingly, if one joint consumer opts in to the creditor's payment of over-the-limit transactions, the creditor must treat the consent as applying to all over-the-limit transactions for that account. The proposed rule also provides that a creditor shall treat a revocation of consent by any of the joint consumers as revocation of consent for the joint account. Proposed § 226.56(f) applies only to consumer consent and revocation requests from consumers that are jointly liable on a credit card account. Accordingly, creditors would not be required or permitted to honor a request by an authorized user on an account to opt in or revoke a prior consent with respect to the creditor's over-the-limit transaction. Proposed comment 56(f)–1 provides this guidance.

Continuing right to opt in or revoke opt-in. Proposed § 226.56(g) provides that a consumer may affirmatively consent to a creditor's payment of over-the-limit transactions at any time in the manner described in the opt-in notice. Similarly, a consumer may revoke a prior consent at any time in the manner described in the revocation notice provided under § 226.56(b)(1)(iv). *See* TILA Section 127(k)(4).

Proposed comment 56(g)–1 clarifies that a consumer's decision to revoke a prior consent would not require the creditor to waiver or reverse any over-the-limit fee or charges assessed to the consumer's account prior to the creditor's implementation of the consumer's revocation request. In addition, the proposed rule does not prevent the creditor from assessing over-the-limit fees in a subsequent cycle if the consumer's account balance continues to exceed the credit limit as a result of an over-the-limit transaction that was completed prior to the consumer's revocation of consent.

Duration of opt-in. Proposed § 226.56(h) provides that a consumer's affirmative consent is generally effective until revoked by the consumer. Proposed comment 56(h)–1 clarifies, however, that a creditor may cease paying over-the-limit transactions at any time and for any reason even if the consumer has consented to the service. For example, a creditor may wish to stop providing the service in response to changes in the credit risk presented by the consumer.

Time to implement consumer revocation. Proposed § 226.56(i) requires that a creditor must implement a consumer's revocation request as soon as reasonably practicable after the creditor receives the request. The proposed requirement recognizes that while creditors will presumably want to implement a consumer's consent request as soon as possible, the same incentives may not apply if the consumer subsequently decides to revoke that request. The Board is not proposing to prescribe a specific period of time within which the creditor must honor the consumer's revocation request, however, because the appropriate time period may depend on a number of variables, including the method used by the consumer to communicate the revocation request (for example, in writing or orally) and the channel in which the request is received (for example, if a consumer sends a written request to the creditor's general address for receiving correspondence or to an address specifically designated to receive consumer opt-in and revocation requests). Comment is requested whether a safe harbor for implementing revocation requests, such as five business days from the date of the request, may be helpful to facilitate compliance with the proposed rule.

The Board also solicits comment on the merits of an alternative approach which would require creditors to implement revocation requests within the same time period that a creditor generally takes to implement opt-in requests. Such a timing rule could be dependent upon the method of the consumer's request. For example under the alternative approach, if the creditor typically takes three business days to implement a consumer's written opt-in request, it should take no more than three business days to implement the consumer's later written request to revoke that consent. However, if a creditor typically implements written consent requests within three business

days and telephone requests within one business day, the alternative approach would provide that the creditor could implement a written revocation request within three business days, even if the consumer had previously opted into the service by telephone.

56(j) Prohibited Practices

Proposed § 226.56(j) prohibits certain creditor practices in connection with the assessment of over-the-limit fees or charges. These prohibitions implement separate requirements set forth in TILA Sections 127(k)(5) and 127(k)(7), and apply even if the consumer has affirmatively consented to the creditor's payment of over-the-limit transactions.

56(j)(1) Fees Imposed per Billing Cycle

New TILA Section 127(k)(7) provides that a creditor may not impose more than one over-the-limit fee during a billing cycle. In addition, Section 127(k)(7) generally provides that an over-the-limit fee may be imposed ''only once in each of the 2 subsequent billing cycles'' for the same over-the-limit transaction. Proposed § 226.56(j)(1) implements these restrictions.

Proposed § 226.56(j)(1)(i) would prohibit a creditor from imposing more than one over-the-limit fee or charge on a consumer's credit card account in any billing cycle. In addition, a creditor must not impose an over-the-limit fee or charge on the account for the same over-the-limit transaction or transactions in more than three billing cycles. As a further limitation, however, fees may not be imposed for the second or third cycle unless the consumer has failed to reduce the account balance below the credit limit by the payment due date of either cycle. The Board believes that this interpretation of TILA Section 127(k)(7) is consistent with Congress's general intent to limit a creditor's ability to impose multiple over-the-limit fees for the same transaction as well as the requirement in TILA Section 106(b) that consumers be given a sufficient amount of time to make payments. Moreover, as discussed below, a creditor's failure to provide a consumer sufficient time to reduce his or her balance below the credit limit would appear to be an unfair or deceptive act or practice. *See* TILA Section 127(k)(5) and discussion below.

As discussed above, the proposed rule would give a consumer until the payment due date to reduce the account balance below the credit limit to avoid over-the-limit fees during the second and third billing cycles. Although new TILA Section 127(k)(7) could be construed as providing until the end of the billing cycle to make a payment that reduces the account balance below the credit limit, the Board believes that using the payment due date as the relevant date will facilitate compliance.

Under current billing practices, the end of the billing cycle serves as the statement cut-off date and occurs a certain number of days after the due date for payment on the prior cycle's activity. The time period between the payment due date and the end of the billing cycle allows the creditor sufficient time to reflect timely payments on the subsequent periodic statement and to determine the fees and interest charges for the statement period. If the rule were to give consumers until the end of the billing cycle to reduce the account balance below the credit limit, creditors would have difficulty determining whether or not they could impose another over-the-limit fee for the statement cycle, which could delay the generation and mailing of the periodic statement and impede their ability to comply with the 21-day requirement for mailing statements in advance of the payment due date.

Moreover, tying the time in which a consumer could make payment to reduce the account balance below the credit limit to the payment due date would cause minimal if any adverse harm to consumers. Because a consumer is likely to make payment by the due date to avoid other adverse financial consequences (such as a late payment fee or increased APRs for new transactions), the additional time to make payment to avoid successive over-the-limit fees would appear to be unnecessary from a consumer protection perspective. Such a date also could confuse consumers by providing two distinct dates, each with different consequences (that is, penalties for late payment or the assessment of over-the-limit fees). For these reasons, the Board is proposing to exercise its TILA Section 105(a) authority to provide that a creditor may not impose an over-the-limit fee or charge on the account for a consumer's failure to reduce the account balance below the credit limit during the second or third billing cycle unless the consumer has not done so by the payment due date.

To illustrate the proposed limitation, assume that a consumer has exceeded the credit limit and is assessed an over-the-limit fee on the January billing statement for a transaction in the December billing cycle. Under this circumstance, the creditor must not assess additional over-the-limit fees on the consumer's credit card account for the February or March billing statements for the same over-the-limit transaction unless the consumer has not made sufficient payment by the January or February payment due dates to reduce the account balance below the credit limit.

Proposed § 226.56(j)(1)(ii) provides that the limitation on imposing over-the-limit fees for more than three billing cycles does not apply if a consumer engages in an additional over-the-limit transaction in either of the two billing cycles following the cycle in which the consumer is first assessed a fee for exceeding the credit limit. The assessment of fees or interest charges by the creditor would not constitute an additional over-the-limit transaction for purposes of this exception, consistent with the definition of ''over-the-limit transaction'' under proposed § 226.56(a). In addition, the proposed exception would not permit a creditor to impose fees for both the initial over-the-limit transaction as well as the additional over-the-limit transaction(s), as the general restriction on assessing more than one over-the-limit fee in the same billing cycle would continue to apply. Proposed comment 56(j)–1 contains examples illustrating the general rule and the exception.

Proposed Prohibitions on Unfair or Deceptive Over-the-Limit Acts or Practices

Proposed § 226.56(j) includes additional substantive limitations and restrictions on certain creditor acts or practices regarding the imposition of over-the-limit fees. These proposed limitations and restrictions are based on the Board's authority under TILA Section 127(k)(5)(B) which directs the Board to prescribe regulations that prevent unfair or deceptive acts or practices in connection with the manipulation of credit limits designed to increase over-the-limit fees or other penalty fees.

Legal Authority

The Credit Card Act does not set forth a standard for what is an ''unfair or deceptive act or practice'' and the legislative history for the Credit Card Act is similarly silent. Congress has elsewhere codified standards developed by the Federal Trade Commission for determining whether acts or practices are unfair under Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).[38] Specifically, the FTC Act provides that an act or practice is unfair when it causes or is likely to cause

[38] *See* 15 U.S.C. 45(n); Letter from FTC to the Hon. Wendell H. Ford and the Hon. John C. Danforth, S. Comm. On Commerce, Science & Transp. (Dec. 17, 1980) (FTC Policy Statement on Unfairness) (available at *http://www.ftc.gov/bcp/policystmt/ad-unfair.htm*).

substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In addition, in determining whether an act or practice is unfair, the FTC may consider established public policy, but public policy considerations may not serve as the primary basis for its determination that an act or practice is unfair. 15 U.S.C. 45(a).

According to the FTC, an unfair act or practice will almost always represent a market failure or market imperfection that prevents the forces of supply and demand from maximizing benefits and minimizing costs.[39] Not all market failures or imperfections constitute unfair acts or practices, however. Instead, the central focus of the FTC's unfairness analysis is whether the act or practice causes substantial consumer injury.[40]

The FTC has also adopted standards for determining whether an act or practice is deceptive, although these standards, unlike unfairness standards, have not been incorporated in to the FTC Act.[41] Under the FTC's standards, an act or practice is deceptive where: (1) There is a representation or omission of information that is likely to mislead consumers acting reasonably under the circumstances; and (2) that information is material to consumers.[42]

Many states also have adopted statutes prohibiting unfair or deceptive acts or practices, and these statutes may employ standards that are different from the standards currently applied to the FTC Act.[43] In proposing rules under TILA Section 127(k)(5), the Board has considered the standards currently applied to the FTC Act's prohibition against unfair or deceptive acts or practices, as well as the standards applied to similar state statutes. These proposals should not, however, be construed as a definitive conclusion by the Board that a particular practice is unfair or deceptive.

Insufficient Time To Reduce Excess Credit

As discussed above, proposed § 226.56(j)(1) would generally prohibit a creditor from assessing an over-the-limit fee on a consumer's credit card account in a subsequent billing cycle unless the consumer has not reduced the account balance below the credit limit by the payment due date. This provision, which implements a statutory restriction set forth in TILA Section 127(k)(7), is intended to ensure that a consumer who has been assessed an over-the-limit fee or charge in one billing cycle does not incur a second over-the-limit fee or charge in the next billing cycle solely because the consumer has not made payment on or before the due date. For example, a creditor would be prohibited from assessing a second over-the-limit fee or charge on the first day of the next billing cycle before the consumer has had an opportunity to reduce the account balance. Assessing an over-the-limit fee in a subsequent billing cycle without providing the consumer sufficient time to reduce the account balance would also appear to be an unfair or deceptive act or practice.

Legal Analysis

Potential injury that is not reasonably avoidable. Consumers may incur substantial monetary injury due to the fees assessed in connection with the payment of over-the-limit transactions. In addition to costly per transaction fees, consumers may also trigger rate increases if the over-the-limit transaction is deemed to be a violation of the credit card contract. A 2006 Government Accountability Office (GAO) report on credit cards indicates that the average cost to consumers resulting from over-the-limit transactions exceeded $30 in 2005.[44] The GAO also reported that in the majority of credit card agreements that it surveyed, default rates could apply if a consumer exceeded the credit limit on the card.[45]

Although consumers can reduce the risk of exceeding their credit limit by carefully tracking their credit card transactions and payments made, consumers often lack sufficient information about key aspects of their credit card accounts. For example, a consumer cannot know with any degree of certainty when a payment will be credited to his or her account and the credit limit replenished or when a credit for a returned purchase will be made available. Equally, given the lack of real-time information available to the authorization system, even the creditor's decision to authorize a transaction does not necessarily indicate at the time of the authorization that the creditor has knowingly authorized an over-the-limit transaction.[46]

Potential costs and benefits. There appears to be little if any direct benefit to consumers from receiving insufficient time to bring their account balances below their credit limit. While requiring creditors to wait an additional period of time before assessing over-the-limit fees or charges may reduce revenue for some institutions and those institutions may replace that revenue by charging consumers higher annual percentage rates or fees, it appears that consumers will benefit overall from having a reasonable period of time in which to reduce their account balances below the credit limit and avoiding additional penalties such as the assessment of an over-the-limit fee or application of a rate increase.

56(j)(2) Failure to Promptly Replenish

Section 226.10 generally requires creditors to credit consumer payments as of the date of receipt, except when a delay in crediting does not result in a finance or other charge. This provision does not address, however, when a creditor must *replenish* the consumer's credit limit after receiving payment. Thus, a consumer may submit payment sufficient to reduce his or her account balance below the credit limit and make additional purchases during the next cycle on the assumption that the credit line will be replenished once the payment is credited. If the creditor does not promptly replenish the credit line, the additional transactions may cause the consumer to exceed the credit limit and incur fees. Proposed § 226.56(j)(2) would prohibit a creditor from assessing

[39] Statement of Basis and Purpose and Regulatory Analysis for Federal Trade Commission Credit Practices Rule (Statement for FTC Credit Practices Rule), 49 FR 7740, 7744 (Mar. 1, 1984).

[40] *Id.* at 7743.

[41] Letter from the FTC to the Hon. John H. Dingell, H. Comm. on Energy & Commerce (Oct. 14, 1983) (FTC Policy Statement on Deception) (available at *http://www.ftc.gov/bcp/policystmt/ad-decept.html*).

[42] *Id.* at 1–2. The FTC views deception as a subset of unfairness but does not apply the full unfairness analysis because deception is very unlikely to benefit consumers or competition and consumers cannot reasonably avoid being harmed by deception.

[43] For example, a number of states follow an unfairness standard formerly used by the FTC. Under this standard, an act or practice is unfair where it offends public policy; or is immoral, unethical, oppressive, or unscrupulous; and causes substantial injury to consumers. *See, e.g., Kenai Chrysler Ctr., Inc.* v. *Denison,* 167 P.3d 1240, 1255 (Alaska 2007) (quoting *FTC v. Sperry & Hutchinson Co.,* 405 U.S. 233, 244–45 n.5 (1972)); *State* v. *Moran,* 151 N.H. 450, 452, 861 A.2d 763, 755–56 (N.H. 2004); *Robinson* v. *Toyota Motor Credit Corp.,* 201 Ill. 2d 403, 417–418, 775, N.E.2d 951, 961–62 (2002).

[44] *See* U.S. Gov't Accountability Office, *Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers* at 20–21 (Sept. 2006) (GAO Credit Card Report) (available at *http://www.gao.gov/new.items/d06929.pdf*).

[45] *See id.* at 25.

[46] *See Household Credit Servs.* v. *Pfennig,* 541 U.S. 232, 244 (2004) (recognizing that a creditor's ''authorization'' of a point of sale transaction ''does not represent a final determination that a particular transaction is within a consumer's credit limit because the authorization system is not suited to identify instantaneously and accurately over-limit transactions'').

an over-the-limit fee or charge that is caused by the creditor's failure to promptly replenish the consumer's available credit.

Legal Analysis

Potential injury that is not reasonably avoidable. In most cases, creditors replenish the available credit on a credit card account shortly after the payment has been credited to the account to enable the cardholder to make new transactions on the account. As a result, a consumer that has used all or most of the available credit during one billing cycle would again be able to make transactions using the credit card once the consumer has made payments on the account balance and the available credit is restored to the account. If, however, the creditor delays replenishment on the account after crediting the payment to the consumer's account, the consumer could inadvertently exceed the credit limit if the cardholder uses the credit card account for new transactions and such transactions are authorized by the creditor. In addition to the potential assessment of over-the-limit fees, the resulting over-the-limit transaction may also cause the consumer to trigger increased rates due to default on the credit agreement. In those circumstances, it appears that consumers cannot reasonably avoid the injury caused by the over-the-limit fee and rate increase because they will be unaware of the creditor's delay in restoring the consumer's credit line particularly if the payment has been credited to the consumer's account.

Potential costs and benefits. The prohibited practice would not appear to create benefits for consumers and competition that outweigh the injury. While a creditor may reasonably decide to delay replenishing a consumer's available credit, for example, in the case of potential fraud on the account, there does not appear to be any benefit to the consumer from permitting the creditor to assess over-the-limit fees that may be incurred as a result of the delay in replenishment.

Proposal

Proposed § 226.56(j)(2) prohibits a creditor from imposing any over-the-limit fee or charge solely because of the creditor's failure to promptly replenish the consumer's available credit after the creditor has credited the consumer's payment under § 226.10. Proposed comment 56(j)(2)–1 clarifies that the proposed prohibition is not intended to require creditors to immediately replenish the available credit upon crediting a consumer's payment, or to prevent creditors from delaying replenishment where appropriate, for example, in cases of suspected fraud. Nor does the proposed prohibition require creditors to decline all transactions for consumers who have opted in to the creditor's payment of over-the-limit transactions until the available credit has been restored. Rather, the creditor would only be prohibited from assessing any over-the-limit fees or charges caused by the creditor's decision not to replenish the available credit after posting the consumer's payment to the account. Comment is requested regarding whether the rule should provide a safe harbor specifying the number of days following crediting of a consumer's payment by which a creditor must replenish a consumer's available credit.

56(j)(3) Conditioning

Proposed § 226.56(j)(3) would prohibit a creditor from conditioning the amount of available credit provided on the consumer's affirmative consent to the creditor's payment of over-the-limit transactions. The proposed provision addresses concerns that a creditor may seek to tie the amount of credit provided to the consumer affirmatively consenting to the creditor's payment of over-the-limit transactions.

Legal Analysis

Potential injury that is not reasonably avoidable. As the Board has previously stated elsewhere, consumers receive considerable benefits from receiving credit cards that provide a meaningful amount of available credit. For example, credit cards enable consumers to engage in certain types of transactions, such as making purchases by telephone or on-line, or renting a car or hotel room. Given these benefits, some consumers might be compelled to opt in to a creditor's payment of over-the-limit transactions if not doing so may result in the consumer otherwise obtaining a minimal amount of credit or failing to qualify for credit altogether. Thus, it would appear that such consumers would be prevented from exercising a meaningful choice regarding the creditor's payment of over-the-limit transactions. Moreover, the practice of conditioning the amount of credit provided based on whether the consumer opts in to the creditor's payment of over-the-limit transactions would also appear to raise significant concerns under the Equal Credit Opportunity Act. *See* 15 U.S.C. 1691(a)(3).

Potential costs and benefits. There do not appear to be any significant benefits to consumers or competition from conditioning or linking the amount of credit available to the consumer based on the consumer consenting to the creditor's payment of over-the-limit transactions. While some creditors may seek to replace the revenue from over-the-limit fees by charging consumers higher annual percentage rates or fees, overall, consumers will benefit from having a meaningful choice regarding whether to have over-the-limit transactions approved by the creditor.

Proposal

Proposed § 226.56(j)(3) is intended to prevent creditors from effectively circumventing the consumer choice requirement by prohibiting a creditor from conditioning or otherwise linking the amount of credit granted on the consumer opting in to the creditor's payment of over-the-limit transactions. Under the proposed rule, a creditor could not, for example, require a consumer to opt in to the creditor's fee-based over-the-limit service in order to receive a higher credit limit for the account. Similarly, a creditor would be prohibited from denying a consumer's credit card application solely because the consumer did not opt in to the creditor's over-the-limit service. The proposed rule is illustrated by way of example in proposed comment 56(j)–1.

56(j)(4) Over-the-Limit Fees Attributed to Fees or Interest

Proposed § 226.56(j)(4) would prohibit the imposition of any over-the-limit fees or charges if the credit limit is exceeded solely because of the creditor's assessment of accrued interest charges or fees on the consumer's credit card account.

Legal Analysis

Potential injury that is not reasonably avoidable. As discussed above, consumers may incur substantial monetary injury due to the fees assessed in connection with the payment of over-the-limit transactions. In addition to per transaction fees, consumers may also trigger rate increases if the over-the-limit transaction is deemed to be a violation of the credit card contract.

The injury from over-the-limit fees and potential rate increases would not appear to be reasonably avoidable in these circumstances because consumers are, as a general matter, unlikely to be aware of the amount of interest charges or fees that may be added to their account balance when deciding whether or not to engage in a credit card transaction. With respect to accrued interest charges, these additional amounts are typically added to a consumer's account balance at the end

of the billing cycle after the consumer has completed his or her transactions for the cycle and thus are unlikely to have been taken into account when the consumer engages in the transactions.

Potential costs and benefits. Although prohibition of the assessment of over-the-limit fees caused by accrued finance charges and fees may reduce creditor revenues and lead creditors to replace lost revenue by charging consumers higher rates or fees, it appears that the proposal will result in a net benefit to consumers because some consumers are likely to benefit substantially while the adverse effects on others are likely to be small. Because permitting fees and interest charges to trigger over-the-limit fees may have the effect of retroactively reducing a consumer's available credit for prior transactions, prohibiting such a practice would protect consumers against unexpected over-the-limit fees and rate increases which could substantially add to their cost of credit. Moreover, consumers will be able to more accurately manage their credit lines without having to factor additional costs that cannot be easily determined. While some consumers may pay higher fees and initial rates, consumers are likely to benefit overall through more transparent pricing.

Proposal

Proposed § 226.56(j)(4) would prohibit creditors from imposing an over-the-limit fee or charge if a consumer exceeds a credit limit solely because of fees or interest charged by the creditor to the consumer's account during the billing cycle. The proposed prohibition is generally intended to prohibit creditors from assessing over-the-limit fees or charges on consumer credit card accounts unless the credit limit was exceeded solely by transactions or charges that were not initiated by the consumer during the billing cycle.

For purposes of this prohibition, the fees or interest charges that may not trigger the imposition of an over-the-limit fee would be considered charges imposed as part of the plan under § 226.6(b)(3)(i). Thus, the proposed rule would also prohibit the assessment of an over-the-limit fee or charge even if the credit limit was exceeded due to fees for services requested by the consumer if such fees would constitute charges imposed as part of the plan (for example, fees for voluntary debt cancellation or suspension coverage).

The proposed prohibition would not restrict creditors from assessing over-the-limit fees due to accrued finance charges or fees from prior cycles that have subsequently been added to the account balance. Comment is requested regarding the operational issues that may arise from the proposed prohibition.

Notice of Reduction of the Credit Limit

In the July 2009 Regulation Z Interim Final Rule, the Board adopted a provision applicable to credit card accounts under an open-end (not home-secured) plan that addresses notices of changes in a consumer's credit limit. As set forth in the interim final rule, § 226.9(c)(2)(vi) requires a creditor to provide a consumer with 45 days' advance notice that a credit limit is being decreased or will be decreased prior to the imposition of any over-the-limit fee or penalty rate imposed solely as the result of the balance exceeding the newly decreased credit limit.[47] The new provision is intended to protect consumers against costly surprises potentially associated with a reduction in the credit limit, specifically, fees and rate increases, while giving a consumer adequate time to mitigate the effect of the credit line reduction. *See* 74 FR 36077.

Neither § 226.9(c)(2)(vi) nor the restrictions proposed pursuant to the Board's authority under TILA Section 127(k)(5) would limit a creditor's ability to use line reductions to address safety and soundness concerns when a borrower's risk increases. As stated in the July 2009 Regulation Z Interim Final Rule, the Board recognizes that creditors have a legitimate interest in mitigating the risk of a loss when a consumer's creditworthiness deteriorates and that it may be appropriate in some cases for creditors to reduce the credit limit as a risk mitigation tool.

Section 226.57 Special Rules for Marketing Open-End Credit to College Students

Section 304 of the Credit Card Act adds new TILA Section 140(f) to require the public disclosure of contracts or other agreements between card issuers and institutions of higher education for the purpose of marketing a credit card and to impose new restrictions related to marketing open-end credit to college students. 15 U.S.C. 1650(f). The Board proposes to implement these provisions in new § 226.57.

The Board also proposes to implement provisions related to new TILA Section 127(r) in § 226.57. 15 U.S.C. 1637(r). TILA Section 127(r), which was added by Section 305 of the Credit Card Act, requires card issuers to submit an annual report to the Board containing the terms and conditions of business, marketing, promotional agreements, and college affinity card agreements with an institution of higher education, or other related entities, with respect to any college student credit card issued to a college student at such institution.

57(a) Definitions

New TILA Section 140(f) does not provide any definitions while new TILA Section 127(r) provides definitions for terms that are also used in new TILA Section 140(f). *See* 15 U.S.C. 1650(f). To ensure the use of these terms is consistent throughout these sections, the Board proposes to incorporate the definitions set forth in TILA Section 127(r) in § 226.57(a).

Proposed § 226.57(a)(1) would define ''college student credit card'' as a credit card issued under a credit card account under an open-end (not home-secured) consumer credit plan to any college student. This definition is similar to TILA Section 127(r)(1)(B), which defines ''college student credit card account'' as a credit card account under an open-end consumer credit plan established or maintained for or on behalf of any college student. Proposed § 226.57(a)(1) defines ''college student credit card'' rather than ''college student credit card account'' because the statute and regulation use the former term but not the latter. Also, the proposed definition uses the proposed defined term ''credit card account under an open-end (not home-secured) consumer credit plan'' (in proposed § 226.2(a)(15)) for consistency with other sections of the proposed regulations implementing the Credit Card Act. The term would exclude home-equity lines of credit accessed by credit cards and overdraft lines of credit accessed by debit cards, which the Board believes are not typical types of college student credit cards.

TILA Section 127(r)(1)(A) defines ''college affinity card'' as a credit card issued under an open end consumer credit plan in conjunction with an agreement between the issuer and an institution of higher education or an alumni organization or a foundation affiliated with or related to an institution of higher education under which cards are issued to college students having an affinity with the institution, organization or foundation where at least one of three criteria also is met. These three criteria are: (1) The creditor has agreed to donate a portion of the proceeds of the credit card to the institution, organization, or foundation (including a lump-sum or one-time payment of money for access); (2) the

[47] A substantively similar provision was adopted in the January 2009 Regulation Z Rule. *See* § 226.9(c)(2)(v).

creditor has agreed to offer discounted terms to the consumer; or (3) the credit card bears the name, emblem, mascot, or logo of such institution, organization, or foundation, or other words, pictures or symbols readily identified with such institution or affiliated organization. The Board is not proposing a regulatory definition comparable to this definition in the statute; it appears that the definition of ''college student credit card,'' discussed above, is broad enough to encompass any ''college affinity card'' as defined in TILA Section 127(r)(1)(A), and therefore the definition of ''college affinity card'' is unnecessary. However, the Board solicits comment on whether the regulations should contain a definition of ''college affinity card'' as well as a definition of ''college student credit card.''

Proposed comment 57(a)(1)–1 would clarify that a college student credit card includes a college affinity card, as discussed above, and that, in addition, a card may fall within the scope of the definition regardless of the fact that it is not intentionally targeted at or marketed to college students.

Proposed § 226.57(a)(2) would define ''college student'' as an individual who is a full-time or a part-time student attending an institution of higher education. This definition is consistent with the definition of ''college student'' in TILA Section 127(r)(1)(C). The definition is intended to be broad and would apply to students of any age attending an institution of higher education. Furthermore, the term ''college student'' is not limited to students attending an undergraduate program at an institution of higher education. The term applies to all students, including those enrolled in graduate programs or joint degree programs.

TILA Section 127(r)(1)(D) states that the term ''institution of higher education'' has the same meaning as in section 101 and 102 of the Higher Education Act of 1965. 20 U.S.C. 1001 and 1002. Meanwhile, TILA Section 140(a)(3), as added by the Higher Education Opportunity Act of 2008, contains a definition for ''institution of higher education'' that differs slightly from the definition in TILA Section 127(r)(1)(D). Specifically, TILA Section 140(a)(3) states that ''institution of higher education'' has the same meaning as in section 102 of the Higher Education Act of 1965 (20 U.S.C. 1002), without reference to section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001). However, as discussed in the Board's recently adopted amendments regarding private education loans, the Board understands that institutions covered under section 101 of the Higher Education Act of 1965 would also be covered under section 102 of the Higher Education Act of 1965. As a result, the definition of ''institution of higher education'' adopted in § 226.46(b)(2) to implement TILA Section 140(a)(3), as it applies to private education loans references both sections 101 and 102 of the Higher Education Act of 1965.[48]

In order to have a consistent definition of the term for all sections added by the Credit Card Act and to facilitate compliance, the Board proposes to use its authority under TILA Section 105(a) to apply the definition in TILA Section 127(r)(1)(D) to TILA Section 140(f). 15 U.S.C. 1604(a). As a result proposed § 226.57(a)(3) would adopt the definition of ''institution of higher education'' in TILA Section 127(r)(1)(D) and would be applicable not only to the provisions in TILA Section 127(r), but also TILA Section 140(f). This definition would also be consistent with the definition of ''institution of higher education'' in § 226.46(b)(2) for private education loans.

Proposed § 226.57(a)(4) would define ''affiliated organization'' as an alumni organization or foundation affiliated with or related to an institution of higher education, to provide a conveniently shorter term to be used to refer to such organizations and foundations in various provisions of the proposed regulations.

Proposed § 226.57(a)(5) would delineate the types of agreements for which creditors must provide annual reports to the Board, under the defined term ''college credit card agreement.'' The term would be defined to include any business, marketing or promotional agreement between a card issuer and an institution of higher education or an affiliated organization in connection with which college student credit cards are issued to college students currently enrolled at that institution. The definition would not incorporate the concept of a college affinity card agreement, which is used in TILA Section 127(r)(1)(A), as discussed above. The Board believes that the definition of ''college credit card agreement'' as proposed would be broad enough to include agreements concerning college affinity cards; however, the Board requests comment on whether language referring to college affinity card agreements should also be included in the regulations.

As proposed comment 57(a)(5)–1 would clarify, business, marketing and promotional agreements may include a broad range of arrangements between a creditor and an institution of higher education or affiliated organization, including arrangements that do not fall within the concept of a college affinity card agreement as discussed in TILA Section 127(r)(1)(A). For example, TILA Section 127(r)(1)(A) specifies that under a college affinity card agreement, the card issuer has agreed to make a donation to the institution or affiliated organization, the card issuer has agreed to offer discounted terms to the consumer, or the credit card will display pictures, symbols, or words identified with the institution or affiliated organization; even if these conditions are not met, an agreement may qualify as a college credit card agreement, if the agreement is a business, marketing or promotional agreement that contemplates the issuance of college student credit cards to college students currently enrolled at the institution. An agreement may qualify as a college credit card agreement even if marketing of cards under the agreement is targeted at alumni, faculty, staff, and other non-student consumers, as long as cards may also be issued to students in connection with the agreement.

57(b) Public Disclosure of Agreements

The Board proposes to implement new TILA Section 140(f)(1) in § 226.57(b). Consistent with the statute, proposed § 226.57(b) would state that an institution of higher education shall publicly disclose any credit card marketing contract or other agreement made with a card issuer or creditor. The Board also proposes commentary to provide examples of how an institution of higher education may publicly disclose such contracts or agreements, and to clarify that the entire agreement must be disclosed. Proposed comment 57(b)–1 would specify that an institution of higher education may fulfill its duty to publicly disclose any contract or other agreement made with a card issuer or creditor for the purposes of marketing a credit card by posting such contract or agreement on its Web site. Alternatively, the institution of higher education may make such contract or agreement available upon request, provided the procedures for requesting the documents are reasonable and free of cost to the requestor, and the contract or agreement is provided within a reasonable time frame. The list in proposed comment 57(b)–1 is not exhaustive, so an institution of higher education may publicly disclose these contracts or agreements in other ways.

In addition, proposed comment 57(b)–2 would bar institutions of higher

[48] 74 FR 41194 (Aug. 14, 2009).

education from redacting any contracts or agreements they are required to publicly disclose under proposed § 226.57(b). As a result, any clauses in existing contract or agreements addressing the confidentiality of such contracts or agreements would be invalid to the extent they prevent institutions of higher education from publicly disclosing such contracts or agreements in accordance with proposed § 226.57(b). The Board believes that it is important that all provisions of these contracts or agreements be available to college students and other interested parties. If institutions were permitted to redact portions of these contracts or agreements, interested parties may be deprived of a full understanding of these arrangements.

57(c) Prohibited Inducements

Under TILA Section 140(f)(2), no card issuer or creditor may offer to a student at an institution of higher education any tangible item to induce such student to apply for or participate in an open-end consumer credit plan offered by such card issuer or creditor, if such offer is made on the campus of an institution of higher education, near the campus of an institution of higher education, or at an event sponsored by or related to an institution of higher education. The Board proposes to implement this provision in § 226.57(c), which generally would track the statutory language. The Board notes that unlike other statutory provisions the Board proposes to implement in § 226.57, TILA Section 140(f)(2) applies not only to credit card accounts, but also other open-end consumer credit plans, such as lines of credit.

To provide further guidance on the prohibition in § 226.57(c), the Board also proposes several new comments. Proposed comment 57(c)–1 would clarify that a tangible item under § 226.57(c) includes any physical item, such as a gift card, a t-shirt, or a magazine subscription, that a card issuer or creditor offers to induce a college student to apply for or open an open-end consumer credit plan offered by such card issuer or creditor. The proposed comment would also provide some examples of non-physical inducements that would not be considered tangible items, such as discounts, rewards points, or promotional credit terms.

Because offering tangible items to college students is prohibited only if the items are offered to induce the student to apply for or open an open-end consumer credit plan, proposed comment 57(c)–2 would clarify that if a tangible item is offered to a person whether or not that person applies for or opens an open-end consumer credit plan, the item is not an inducement. As an example, proposed comment 57(c)–2 states that refreshments offered to a college student on campus that are not conditioned on whether the student has applied for or agreed to open an open-end consumer credit plan would not be considered inducements that would cause a creditor to violate § 226.57(c).

The prohibition in § 226.57(c) extends to an offer that is made, among other places, near the campus of an institution of higher education. The Board is not aware of any standard for determining a location near a school that is analogous to the prohibition in TILA Section 140(f)(2), but is aware of existing standards for other types of prohibitions. TILA Section 140(f)(2)(B) requires the Board to determine what is considered near the campus of an institution of higher education. Based on the distances used in State and Federal laws for other restricted activities near a school,[49] the Board proposes comment 57(c)–3 to provide that a location that is within 1,000 feet of the border of the campus of an institution of higher education, as defined by the institution of higher education, be considered near the campus of an institution of higher education. The Board solicits comment on other appropriate ways to determine a location that is considered near the campus of an institution of higher education.

Proposed comment 57(c)–4 would clarify that offers of tangible items mailed to a college student at an address on or near the campus of an institution of higher education would be subject to the restrictions in § 226.57(c). The statutory language does not distinguish between different methods of making offers of tangible items, and proposed comment 57(c)–4 would make clear that offers of tangible items made on or near the campus of an institution of higher education for purposes of § 226.57(c) include offers of tangible items that are sent to those locations through the mail.

Furthermore, under proposed § 226.57(c), an offer of a tangible item to induce a college student to apply for or open an open-end consumer credit plan may not be made at an event sponsored by or related to an institution of higher education. In order to give card issuers and creditors guidance on determining whether an event is related to an institution, the Board proposes comment 57(c)–5. Proposed comment 57(c)–5 would provide that an event is related to an institution of higher education if the marketing of such event uses the name, emblem, mascot, or logo of an institution of higher education, or other words, pictures, or symbols identified with an institution of higher education in a way that implies that the institution of higher education endorses or otherwise sponsors the event. The proposed comment was adapted from guidance the Board recently adopted in § 226.48 regarding co-branding restrictions for certain private education loans.

Since the prohibition in § 226.57(c) applies solely to offering a tangible item to a college student at specified locations, a card issuer or creditor would be permitted to offer any person who is not a college student a tangible item to induce such person to apply for or open an open-end consumer credit plan offered by such card issuer or creditor at such locations. The Board believes a card issuer or creditor who opts to have a marketing program on or near the campus of an institution of higher education, or at an event sponsored by or related to an institution of higher education where a tangible item will be offered to induce people to apply for or open an open-end consumer credit plan should have reasonable procedures for determining whether an applicant or participant is a college student before giving the applicant or participant the tangible item.

Proposed comment 57(c)–6 illustrates one way in which a card issuer or creditor might meet this standard. Specifically, the Board provides that a card issuer or creditor may ask whether the applicant is a college student as part of the application process. Proposed comment 57(c)–6 would also provide that the card issuer or creditor may rely on the representations made by the applicant Therefore, if an applicant misrepresents his or her status as a student, the card issuer or creditor would not violate § 226.57(c) by relying on that representation.

57(d) Annual Report to the Board

The Board proposes to implement new TILA Section 127(r)(2) in proposed § 226.57(d). Consistent with the statute, proposed § 226.57(d) would require creditors that are a party to one or more

[49] *See, e.g.,* 18 U.S.C. 922(q)(2) (making it unlawful for an individual to possess an unlicensed firearm in a school zone, defined in 18 U.S.C. 921(a)(25) as within 1,000 feet of the school); the Family Smoking Prevention and Tobacco Control Act (Pub. L. 111–31, June 22, 2009) (requiring regulations to ban outdoor tobacco advertisements within 1,000 feet of a school or playground); and Mass. Gen. Laws ch. 94C, § 32J (requiring mandatory minimum term of imprisonment for drug violations committed within 1,000 feet of a school).

college credit card agreements to register with the Board and to submit annual reports to the Board regarding those agreements. Creditors that were a party to one or more college credit card agreements at any time during the 2009 calendar year would be required to register with the Board by February 1, 2010. The initial report from creditors would be due by February 22, 2010, as required by TILA Section 127(r)(2)(D). Creditors would be required to submit subsequent annual reports by the first business day on or after March 31 of the following year.

Proposed § 226.57(d) would require that annual report include a copy of each college credit card agreement to which the creditor was a party that was in effect during the period covered by the report, as well as certain related information including the total dollar amount of payments pursuant to the agreement from the creditor to the institution (or affiliated organization) during the period covered by the report, and how such amount is determined; the number of credit card accounts opened pursuant to the agreement during the period; and the total number of such credit card accounts that were open at the end of the period.

The annual report would also be required to include a copy of any memorandum of understanding that ''directly or indirectly relates to the college credit card agreement or that controls or directs any obligations or distribution of benefits between any such entities.'' Proposed comment 57(d)(3)–1 would clarify what types of documents would be considered memoranda of understanding for purposes of this requirement, by providing that a memorandum of understanding includes any document that amends the college credit card agreement, or that constitutes a further agreement between the parties as to the interpretation or administration of the agreement, and by providing of examples of documents that would or would not be included.

The Board solicits comment on whether additional items of information should be required to be included in the annual report. New TILA Section 127(r)(2)(A) specifies that the required annual report contain ''the terms and conditions'' of college credit card agreements between the card issuer and institutions of higher education or affiliated organizations. For example, information that may be part of the terms and conditions of a college credit card agreement and that, if so, could be required to be included in the report, could include any terms that differentiate between student and non-student accounts (for example, that provide for difference in payments based on whether an account is a student or non-student account), or that relate to advertising or marketing (such as provisions on mailing lists, online advertising, or on-campus marketing). The report could also be required to specify the terms and conditions of credit card accounts (for example, rates and fees) that may be opened in connection with the college credit card agreement. Inclusion of such information in issuers' annual reports could facilitate the Board's review of the reports and preparation of the Board's report to Congress concerning college credit card agreements, but could also impose additional costs on card issuers in preparing their reports to the Board. The Board requests comment on the costs and benefits of requiring these (or any other) items of information to be included in the annual report.

Section 226.58 Internet Posting of Credit Card Agreements

Section 204 of the Credit Card Act adds new TILA Section 122(d) to require creditors to post agreements for open-end consumer credit card plans on the creditors' Web sites and to submit those agreements to the Board for posting on a publicly-available Web site established and maintained by the Board. 15 U.S.C. 1632(d). The Board proposes to implement these provisions in new § 226.58.

58(a) Applicability

Proposed § 226.58(a) would make proposed § 226.58 applicable to any card issuer that issues a credit card under a credit card account under an open-end (not home-secured) consumer credit plan, as defined in proposed revised § 226.2(a)(15). Thus, consistent with the approach the Board is proposing in implementing other sections of the Credit Card Act, home-equity lines of credit accessible by credit cards and overdraft lines of credit accessed by debit cards would not be covered by proposed § 226.58.

58(b) Definitions

Proposed § 226.58(b)(1) defines ''agreement'' or ''credit card agreement'' as a written document or documents evidencing the terms of the legal obligation or the prospective legal obligation between a card issuer and a consumer for a credit card account under an open-end (not home-secured) consumer credit plan. As proposed, § 226.58(b)(1) states and proposed comment 58(b)(1)–1 further clarifies that the agreement is deemed to include certain information, such as annual percentage rates and fees, even if the issuer does not otherwise technically include this information in the document evidencing the terms of the legal obligation. This information is listed under the defined term ''pricing information'' in § 226.58(b)(4). The Board believes that, to enable consumers to shop for credit cards and compare information about various credit card plans in an effective manner, it is necessary that the credit card agreements posted on the Board's Web site include information such as rates and fees, in addition to other terms and conditions of the agreements. However, the Board solicits comment on the definition of agreement and on whether more or less information should be included. As proposed comment 58(b)(1)–2 would clarify, the agreement would not include documents that may be sent to the consumer along with the credit card or credit card agreement, such as a cover letter, a validation sticker on the card, other information about card security, offers for credit insurance or other optional products, advertisements, and disclosures required under Federal or State law that are not incorporated into the agreement itself.

Proposed § 226.58(b)(2) defines ''business day'' as a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions. This is consistent with the definition of business day used in most other sections of Regulation Z.

Proposed § 226.58(b)(3) states that an issuer ''offers'' or ''offers to the public'' an agreement if the issuer is soliciting or accepting applications for new accounts that would be subject to that agreement. As proposed comment 58(b)(3)–1 would clarify, a card issuer is deemed to offer a credit card agreement to the public even if the issuer solicits, or accepts applications from, only a limited group of persons. For example, an issuer may market affinity cards to students and alumni of a particular educational institution or solicit only high-net-worth individuals for a particular card, but the corresponding card agreements would be considered to be offered to the public. Proposed comment 58(b)(3)–2 would clarify that a card issuer is deemed to offer a credit card agreement to the public even if the terms of the agreement are changed immediately upon opening of an account to terms not offered to the public.

Proposed § 226.58(b)(4) defines the term ''pricing information'' to include: (1) The information under § 226.6(b)(2)(i) through (b)(2)(xii), (b)(3) and (b)(4) that is required to be

disclosed in writing pursuant to § 226.5(a)(1)(ii); (2) the credit limit; and (3) the method used to calculate required minimum payments. This definition makes reference to the provisions of § 226.6(b) as revised by the January 2009 Regulation Z Rule. While the effective date of proposed § 226.58 would be February 22, 2010, the Board is soliciting comment regarding whether the July 1, 2010 mandatory compliance date of revised § 226.6 should be retained, as discussed elsewhere in this proposal. If the July 1, 2010 mandatory compliance date for revised § 226.6(b) is retained, the Board may make technical and conforming changes to proposed § 226.58(b)(4) to account for the difference in mandatory compliance dates. However, the definition of pricing information for purposes of proposed § 226.58 would conform to the requirements of revised § 226.6(b)(2)(i) through (b)(2)(xii), (b)(3) and (b)(4) beginning on February 22, 2010, even if compliance with portions of revised § 226.6(b) is not mandatory until July 1, 2010.

58(c) Registration With Board

Proposed § 226.58(c) would require any card issuer that offered one or more credit card agreements as of December 31, 2009 to register with the Board, in the form and manner prescribed by the Board, no later than February 1, 2010. However, a card issuer that would have qualified for the *de minimis* exception under proposed § 226.58(e) as of December 31, 2009, if proposed § 226.58 had been in effect on that date, would not be required to register.

The Board expects to provide additional details regarding the registration process in a document setting forth technical specifications for the credit card agreement posting requirements, to be posted on the Board's public Web site. The Board anticipates that issuers will register online through the Board's Web site and that registration will capture basic identifying information about each issuer, such as the issuer's name, address, and identifying number (*e.g.,* RSSD ID number or tax identification number), and the name, phone number and e-mail address of a contact person at the issuer. The Board will contact the issuer to confirm that the issuer in fact authorized the registration.

Proposed § 226.58(c)(2) would provide that any issuer that is required to make a submission to the Board under § 226.58(d) that has not previously registered with the Board must register with the Board at least 21 days before the quarterly submission deadline specified in § 226.58(d)(1) on which the card issuer's first submission is due. As proposed comment 58(c)–1 would clarify, this provision would apply, for example, if a new credit card issuer is organized or if an existing issuer that previously qualified for the *de minimis* exception under § 226.58(e) ceased to qualify. For example, a card issuer that previously qualified for the *de minimis* exception ceases to qualify as of September 30. That issuers first submission to the Board is due on October 31, the next quarterly submission deadline. The issuer must register with the Board at least 21 days before October 31.

Proposed § 226.58(c)(3) would require card issuers that have registered with the Board under § 226.58(c)(1) or (c)(2) to provide updated registration information to the Board no later than the first quarterly submission deadline specified in § 226.58(d)(1) after the information changes. For example, as described in proposed comment 58(c)–2, a card issuer that has already registered with the Board changes its address on October 15. The issuer must submit revised registration information advising the Board of the address change no later than October 31, the next quarterly submission deadline specified in § 226.58(d)(1) after the change.

58(d) Submission of Agreements to Board

Proposed § 226.58(d) would require that each card issuer electronically submit the credit card agreements, as defined in proposed § 226.58(b)(1), that the issuer offers, as defined in proposed § 226.58(b)(2), to the Board on a quarterly basis. Consistent with new TILA Section 122(d)(3), the Board will post the credit card agreements it receives on its Web site.

New TILA Section 122(d)(5) provides that the Board may establish exceptions to the requirements that credit card agreements be posted on creditors' Web sites and submitted to the Board for posting on its Web site in any case where the administrative burden outweighs the benefit of increased transparency. In addition, TILA Section 105(a) gives the Board authority to prescribe regulations containing provisions necessary or proper to effectuate the purposes of and to facilitate compliance with TILA. The Board believes that, with respect to credit card agreements that are not currently offered to the public, the administrative burden associated with submission for posting on the Board's Web site would outweigh the benefit of increased transparency. The Board also believes that providing an exception for agreements not currently offered to the public is appropriate both to effectuate the purposes of TILA and to facilitate compliance with TILA.

The Board is aware that the number of credit card agreements currently in effect but no longer offered to the public is extremely large, and the Board believes that requiring issuers to prepare and submit these agreements would impose a significant burden on issuers. The Board also believes that the primary benefit of making credit card agreements available on the Board's Web site is to assist consumers in comparing credit card agreements offered by various issuers when shopping for a new credit card. Including agreements that are no longer offered to the public would not facilitate comparison shopping by consumers because consumers could not apply for cards subject to these agreements. In addition, including agreements no longer offered to the public would significantly increase the number of agreements included on the Board's Web site, possibly to include hundreds of thousands of agreements (or more). This volume of data would render the amount of data provided through the Web site too large to be helpful to most consumers. Thus, the Board is proposing that an issuer only submit to the Board under § 226.58(d) those agreements that the issuer currently offers to the public.

58(d)(1) Quarterly Submissions

Proposed § 226.58(d)(1) would require issuers to make quarterly submissions to the Board, in the form and manner specified by the Board, that would contain: (1) The credit card agreements, as described in Appendix N, that the card issuer offered to the public as of the last business day of the preceding calendar quarter that the card issuer has not previously submitted to the Board; (2) any credit card agreement previously submitted to the Board that was modified or amended during the preceding calendar quarter, as described in proposed § 226.58(d)(3); and (3) notification regarding any credit card agreement previously submitted to the Board that the issuer is withdrawing, as described in proposed § 226.58(d)(4) and (e). Quarterly submissions to the Board would be due no later than the first business day on or after January 31, April 30, July 31, and October 31 of each year.

Proposed comment 58(d)–1 would give the following example: a card issuer has already submitted three credit card agreements to the Board. On October 15, the issuer stops offering agreement A. On November 20, the issuer makes changes to the terms of

agreement B. On December 1, the issuer starts offering a new agreement D. The issuer must submit to the Board no later than the first business day on or after January 31: (1) Notification that the issuer is withdrawing agreement A, because it is no longer offered to the public; (2) the revised version of agreement B; and (3) agreement D.

As proposed comment 58(d)–2 would clarify, under proposed § 226.58(d)(1), an issuer is not required to make any submission to the Board at a particular quarterly submission deadline if, during the previous calendar quarter, the issuer did not take any of the following actions: (1) Offering a new credit card agreement that was not submitted to the Board previously; (2) revising or amending an agreement previously submitted to the Board; and (3) ceasing to offer an agreement previously submitted to the Board. For example, a card issuer offers five agreements to the public as of September 30 and submits these to the Board by October 31, as required by proposed § 226.58(d)(1). Between September 30 and December 31, the issuer continues to offer all five of these agreements to the public without amending or revising them and does not begin offering any new agreements. The issuer is not required to make any submission to the Board by the following January 31.

The Board expects to provide additional details regarding the electronic submission process in the technical specifications document to be posted on the Board's public Web site.

58(d)(2) Timing of First Two Submissions

Proposed § 226.58(d)(2) would specify timing requirements for the first two submissions to the Board following the effective date. As described above, quarterly submissions to the Board generally are due no later than the first business day on or after January 31, April 30, July 31, and October 31 of each year. However, Section 3 of the Credit Card Act provides that new TILA Section 122(d) becomes effective on February 22, 2010, nine months after the date of enactment of the Credit Card Act. Thus, consistent with Section 3 of the Credit Card Act, proposed § 226.58(d)(2) would require issuers to send their initial submissions, containing credit card agreements offered to the public as of December 31, 2009, to the Board no later than February 22, 2010. Proposed § 226.58(d)(2) would provide that the next submission must be sent to the Board no later than August 2, 2010 (the first business day on or after July 31, 2010), and must contain: (1) Any credit card agreements that the card issuer offered to the public as of June 30, 2010, that the card issuer has not previously submitted to the Board; (2) any credit card agreement previously submitted to the Board that was modified or amended after December 31, 2009, and on or before June 30, 2010, as described in proposed § 226.58(d)(3); and (3) notification regarding any credit card agreement previously submitted to the Board that the issuer is withdrawing as of June 30, 2010, as described in proposed § 226.58(d)(4) and (e).

For example, as of December 31, 2009, a card issuer offers three agreements. The issuer is required to submit these agreements to the Board no later than February 22, 2010. On March 10, 2010, the issuer begins offering a new agreement. In general, an issuer that begins offering a new agreement on March 10 of a given year would be required to submit that agreement to the Board no later than April 30 of that year. However, under proposed § 226.58(d)(2), no submission to the Board would be due on April 30, 2010, and the issuer instead would be required to submit the new agreement no later than August 2, 2010.

58(d)(3) Changes To Agreements

Under proposed § 226.58(d)(3), if a credit card agreement has been submitted to the Board, no changes have been made to the agreement, and the card issuer continues to offer the agreement to the public, no additional submission of that agreement is required. For example, as described in proposed comment 58(d)–3, a credit card issuer begins offering an agreement in October and submits the agreement to the Board the following January 31, as required by proposed § 226.58(d)(1). As of March 31, the issuer has not revised or amended the agreement and is still offering the agreement to the public. The issuer is not required to submit anything to the Board regarding that agreement by April 30.

If an issuer makes changes to a credit card agreement previously submitted to the Board (including changes to the provisions of the agreement, the pricing information, or both), proposed § 226.58(d)(3) would require the card issuer to submit the entire revised agreement to the Board by the first quarterly submission deadline after the last day of the calendar quarter in which the change becomes effective. Proposed comment 58(d)–4 would give the following example: an issuer submits an agreement to the Board on October 31. On November 15, the issuer changes the method used to calculate required minimum payments under the agreement. Because an element of the pricing information has changed, the issuer must submit the entire revised agreement to the Board no later than January 31 of the following year.

As proposed, § 226.58(d)(3) would require credit card issuers to resubmit agreements following any change, regardless of whether that change affects the substance of the agreement. The Board recognizes that requiring issuers to resubmit agreements following nonsubstantive changes could impose a substantial burden on issuers with no corresponding benefit to consumers. The Board solicits comment on whether issuers are likely to make technical changes to agreements without simultaneously making substantive changes, whether requiring issuers to resubmit agreements following any change (however minor) would impose a significant burden, and what standard the Board should use to determine what changes merit resubmission of an agreement.

As proposed comment 58(d)–5 would explain, an issuer may not fulfill the requirement to submit the entire revised agreement to the Board by submitting a change-in-terms or similar notice covering only the terms that have changed. Amendments and revisions would be required to be integrated into the text of the agreement (or the single addendum described in proposed Appendix N, if applicable), not provided as separate riders. For example, an issuer changes the purchase APR associated with an agreement the issuer has previously submitted to the Board. The purchase APR for that agreement was included in an addendum of pricing information as described in proposed Appendix N. The issuer may not submit a change-in-terms or similar notice reflecting the change in APR, either alone or accompanied by the original text of the agreement and original addendum of pricing information. Instead, the issuer must revise the addendum of pricing information to reflect the change in APR and submit to the Board the entire text of the agreement and the entire revised addendum, even though no changes have been made to the provisions of the agreement and only one item on the addendum has changed.

The Board believes that permitting issuers to submit change-in-terms notices or riders containing amendments and revisions would make it difficult for consumers to determine what provisions and pricing information are currently offered by issuers. Consumers would be required to sift through change-in-terms notices and riders in an attempt to assemble a

coherent picture of the terms currently offered. The Board believes that issuers are better placed than consumers to assemble this information. While the Board understands that this may somewhat increase the burden on issuers, the Board believes that the corresponding benefit of increased transparency for consumers outweighs this burden.

58(d)(4) Withdrawal of Agreements

Proposed § 226.58(d)(4) would require an issuer to notify the Board if any agreement previously submitted to the Board by that issuer is no longer offered to the public by the first quarterly submission deadline after the last day of the calendar quarter in which the issuer ceased to offer the agreement. For example, as described in proposed comment 58(d)–6, on January 5 an issuer stops offering to the public an agreement it previously submitted to the Board. The issuer must notify the Board that the agreement is being withdrawn by April 30, the first quarterly submission deadline after March 31, the last day of the calendar quarter in which the issuer stopped offering the agreement.

58(e) De Minimis Exception

New TILA Section 122(d)(5) provides that the Board may establish exceptions to the requirements that credit card agreements be posted on creditors' Web sites and submitted to the Board for posting on the Board's Web site in any case where the administrative burden outweighs the benefit of increased transparency, such as where a credit card plan has a *de minimis* number of consumer account holders. The Board believes that a *de minimis* exception to these requirements is appropriate, but believes that it may not be feasible to base such an exception on the number of accounts under a credit card plan. In particular, the Board is not aware of a way to define ''credit card plan'' that would not divide issuer's portfolios into such small units that large numbers of credit card agreements could fall under the *de minimis* exception.

The Board therefore proposes to establish a *de minimis* exception in proposed § 226.58(e) based on an issuer's total number of open accounts. Under proposed § 226.58(e)(1), an issuer would not be required to submit any credit card agreements to the Board under proposed § 226.58(d) if the card issuer has fewer than 10,000 open credit card accounts under open-end (not home-secured) consumer credit plans, as of the last business day of the calendar quarter. For example, as described in proposed comment 58(e)–1, an issuer offers five credit card agreements to the public as of September 30. However, the issuer has only 2,000 open credit card accounts under open-end (not home-secured) consumer credit plans as of September 30. The issuer is not required to submit any agreements to the Board by October 31 because the issuer qualifies for the *de minimis* exception.

Proposed comment 58(e)–2 would clarify that, for purposes of the *de minimis* exception, a credit card account is considered to be open even if the account is inactive, as long as the account has not been closed by the cardholder or the card issuer and the cardholder can obtain extensions of credit on the account. If an account has been closed for new activity (for example, due to default by the cardholder), but the cardholder is still making payments to pay off the outstanding balance, the account need not be considered open. If an account has only temporarily been suspended (for example, due to a report of unauthorized use), the account is considered open.

As proposed comment 58(e)–3 would clarify, whether an issuer qualifies for the *de minimis* exception would be determined as of the last business day of each calendar quarter. For example, as of December 31, an issuer offers three agreements to the public and has 9,500 open credit card accounts under open end (not home secured) consumer credit plans. As of January 30, the issuer still offers three agreements, but has 10,100 open accounts. As of March 31, the issuer still offers three agreements, but has only 9,700 open accounts. Even though the issuer had 10,100 open accounts at one time during the calendar quarter, the issuer qualifies for the *de minimis* exception because the number of open accounts was less than 10,000 as of March 31. The issuer therefore is not required to submit any agreements to the Board under § 226.58(d) by April 30.

The Board believes that the administrative burden on issuers of preparing and submitting such agreements would outweigh the benefit of increased transparency from including those agreements on the Board's Web site, but the Board solicits comment on the 10,000 open accounts threshold for the *de minimis* exception. In addition, the Board recognizes that the proposed *de minimis* exception would not alleviate the administrative burden on large issuers of submitting agreements for credit card plans with a very small number of open accounts. The Board solicits comments on whether the Board should create a *de minimis* exception applicable to a small credit card plan offered by an issuer of any size, and if so how the Board should define ''credit card plan'' for purposes of such an exception.

Proposed § 226.58(e)(2) would specify that if an issuer that previously qualified for the *de minimis* exception ceases to qualify, the card issuer must begin making quarterly submissions to the Board under § 226.58(d) no later than the first quarterly submission deadline after the date as of which the issuer ceased to qualify. As proposed comment 58(e)–4 would clarify, whether an issuer has ceased to qualify for the *de minimis* exception under proposed § 226.58(e)(2) would be determined as of the last business day of the calendar quarter, as indicated in proposed § 226.58(e)(1). For example, as of June 30, an issuer offers three agreements to the public and has 9,500 credit card accounts under open-end (not home-secured) consumer credit plans. The issuer is not required to submit any agreements to the Board under § 226.58(d) because the issuer qualifies for the *de minimis* exception. As of July 15, the issuer still offers the same three agreements, but now has 10,000 open accounts. The issuer is not required to take any action at this time, because whether an issuer qualifies for the *de minimis* exception under proposed § 226.58(e)(1) is determined as of the last business day of the calendar quarter. As of September 30, the issuer still offers the same three agreements and still has 10,000 open accounts. Because the issuer had 10,000 open accounts as of September 30, the issuer ceased to qualify for the *de minimis* exception and must submit the three agreements it offers to the Board by October 31, the next quarterly submission deadline.

Proposed § 226.58(e)(3) would provide that if a card issuer that did not previously qualify comes within the *de minimis* exception, the card issuer may, but is not required to, notify the Board that the card issuer is withdrawing each agreement the card issuer previously submitted to the Board. Until the issuer notifies the Board that each agreement it previously submitted is being withdrawn, the issuer must continue to make quarterly submissions to the Board under § 226.58(d) and to provide updated registration information under § 226.58(c)(3). Proposed comment 58(e)–5 would give the following example: an issuer has 10,001 open accounts and offers three agreements to the public as of December 31. The issuer has registered with the Board and submitted each of the three agreements to the Board as required under § 226.58(c) and

(d). As of March 31, the issuer has only 9,999 open accounts. The issuer has two options. First, the issuer may notify the Board that the issuer is withdrawing each of the three agreements it previously submitted. Once the issuer has notified the Board, the issuer is no longer required to make quarterly submissions to the Board under § 226.58(d) or to provide updated registration information to the Board under § 226.58(c)(3). Alternatively, the issuer may choose not to notify the Board that it is withdrawing its agreements. In this case, the issuer must continue making quarterly submissions to the Board under § 226.58(d) and providing updated registration information to the Board under § 226.58(c)(3). The issuer might choose not to withdraw its agreements if, for example, the issuer believes that it will likely cease to qualify for the *de minimis* exception again in the near future.

58(f) Agreements Posted on Card Issuer's Web Site

In addition to requiring that card issuers submit credit card agreements to the Board for posting on the Board's Web site, new TILA Section 122(d) requires that each issuer post the credit card agreements to which it is a party on its own Web site. The Board proposes to implement this requirement in proposed § 226.58(f).

Proposed § 226.58(f) would set out two requirements. First, under proposed § 226.58(f)(1), each issuer would be required to post on its publicly available Web site the same agreements it is required to submit to the Board under proposed § 226.58(d) (*i.e.*, the agreements the issuer offers to the public). An issuer that is not required to submit agreements to the Board under proposed § 226.58(d) because it qualifies for the *de minimis* exception under proposed § 226.58(e) would not be subject to this requirement.

Second, under proposed § 226.58(f)(2), each issuer would be required to provide each individual cardholder with access to his or her specific credit card agreement, by either: (1) Posting and maintaining the individual cardholder's agreement on the issuer's Web site; or (2) making a copy of each cardholder's agreement available to the cardholder upon that cardholder's request. If a card issuer chooses to make agreements available upon request, the issuer would be required to provide the cardholder with the ability to request a copy of the agreement both: (1) By using the issuer's Web site (such as by clicking on a clearly identified box to make the request); and (2) by calling a toll free telephone number displayed on the Web site and clearly identified as to purpose. Proposed comment 58(f)(2)–1 would clarify that agreements provided upon request may be provided in either electronic or paper form, regardless of the form of the cardholder's request. Whether provided electronically or in paper form, agreements must be provided in a typeface that is clear and legible.

As proposed comment 58(f)–2 would clarify, the requirement to provide access to credit card agreements under proposed § 226.58(f)(2) would apply to all open credit card accounts under open-end (not home-secured) consumer credit plans, regardless of whether such agreements are required to be submitted to the Board pursuant to proposed § 226.58(d). For example, an issuer that is not required to submit agreements to the Board because it qualifies for the *de minimis* exception under § 226.58(e) would still be required to provide cardholders with access to their specific agreements under § 226.58(f)(2). Similarly, an agreement that is no longer offered to the public would not be required to be submitted to the Board under § 226.58(d), but would still need to be provided to the cardholder to whom it applies under § 226.58(f)(2).

As described above, the Board proposes to exercise its authority to create exceptions from the requirements of new TILA Section 122(d) with respect to the submission of certain agreements to the Board for posting on the Board's Web site. However, the Board believes that it would not be appropriate to apply these exceptions to the requirement that issuers provide cardholders with access to their specific credit card agreement through the issuer's Web site. In particular, the Board believes that, for the reasons discussed above, posting credit card agreements that are not currently offered to the public on the Board's Web site would not be beneficial to consumers. However, the Board believes that the benefit of increased transparency of providing an individual cardholder access to his or her specific credit card agreement is substantial regardless of whether the cardholder's agreement continues to be offered by the issuer. The Board believes that this benefit outweighs the administrative burden on issuers of providing such access, and the Board therefore is not proposing to exempt agreements that are not offered to the public from the requirements of proposed § 226.58(f)(2). Similarly, the proposal provides that card issuers with fewer than 10,000 open credit card accounts under open-end (not home-secured) consumer credit plans would not be required to submit agreements to the Board. However, the Board believes that the benefit of increased transparency associated with providing an individual cardholder with access to his or her specific credit card agreement is substantial regardless of the number of the card issuer's open accounts. The Board believes that this benefit of increased transparency for consumers outweighs the administrative burden on issuers of providing such access, and the Board therefore is not proposing to apply the *de minimis* exception to the requirements of proposed § 226.58(f)(2).

The Board is providing issuers with the option to make copies of cardholder agreements available on request because the Board believes that the benefit of increased transparency associated with immediate access to cardholder agreements, as compared to access after a brief waiting period, would not outweigh the administrative burden on issuers of providing immediate access. The Board believes that the administrative burden associated with posting each cardholder's credit card agreement on the issuer's Web site may be substantial for some issuers. In particular, the Board notes that some smaller institutions with limited information technology resources could find a requirement to post all cardholder's agreements to be a significant burden. The Board understands that it is important that all cardholders be able to obtain copies of their credit card agreements promptly, and proposed § 226.58(f)(2) would ensure that this occurs.

If a card issuer chooses to make agreements available upon request under proposed § 226.58(f)(2)(ii), the card issuer would be required to send to the cardholder or otherwise make available to the cardholder a copy of the cardholder's agreement no later than 10 business days after the issuer receives the cardholder's request. As proposed comment 58(f)(2)–3 would clarify, if, for example, an issuer chooses to respond to a cardholder's request by mailing a paper copy of the cardholder's agreement, the issuer would be required to mail the agreement no later than 10 business days after receipt of the cardholder's request. Alternatively, if an issuer chooses to respond to a cardholder's request by posting the cardholder's agreement on the issuer's Web site, the issuer must post the agreement on its Web site no later than 10 business days after receipt of the cardholder's request. The Board believes that requiring issuers to provide cardholder's agreements within 10 business days gives card issuers

adequate time to respond to requests while providing cardholders with prompt access to their credit card agreements. The Board solicits comments regarding whether issuers should have a shorter or longer period in which to respond to cardholder requests.

Proposed § 226.58(f)(3) would state that credit card issuers may provide credit card agreements in electronic form under § 226.58(f)(1) and (f)(2) without regard to the consumer notice and consent requirements of Section 101(c) of the E-Sign Act. Because new TILA Section 122(d) specifies that credit card issuers must provide access to cardholder agreements on the issuer's Web site, the Board believes that the requirements of the E-Sign Act do not apply.

Appendix M1—Repayment Disclosures

As discussed in the section-by-section analysis to proposed § 226.7(b)(12), TILA Section 127(b)(11), as added by Section 1301(a) of the Bankruptcy Act, required creditors, the FTC and the Board to establish and maintain toll-free telephone numbers in certain instances in order to provide consumers with an estimate of the time it will take to repay the consumer's outstanding balance, assuming the consumer makes only minimum payments on the account and the consumer does not make any more draws on the account. 15 U.S.C. 1637(b)(11)(F). The Act required creditors, the FTC and the Board to provide estimates that are based on tables created by the Board that estimate repayment periods for different minimum monthly payment amounts, interest rates, and outstanding balances. In the January 2009 Regulation Z Rule, instead of issuing a table, the Board issued guidance in Appendix M1 to part 226 to card issuers and the FTC for how to calculate this generic repayment estimate. The Board would use the same guidance to calculate the generic repayment estimates given through its toll-free telephone number.

TILA Section 127(b)(11), as added by Section 1301(a) of the Bankruptcy Act, provided that a creditor may use a toll-free telephone number to provide the actual number of months that it will take consumers to repay their outstanding balance instead of providing an estimate based on the Board-created table (''actual repayment disclosure''). 15 U.S.C. 1637(b)(11)(I)–(K). In the January 2009 Regulation Z Rule, the Board implemented that statutory provision and also provided card issuers with the option to provide the actual repayment disclosure on the periodic statement instead of through a toll-free telephone number. In the January 2009 Regulation Z Rule, the Board adopted new Appendix M2 to part 226 to provide guidance to issuers on how to calculate the actual repayment disclosure.

As discussed in more detail in the section-by-section analysis to proposed § 226.7(b)(12), the Credit Card Act substantially revised Section 127(b)(11) of TILA. Specifically, Section 201 of the Credit Card Act amends TILA Section 127(b)(11) to provide that creditors that extend open-end credit must provide the following disclosures on each periodic statement: (1) A ''warning'' statement indicating that making only the minimum payment will increase the interest the consumer pays and the time it takes to repay the consumer's balance; (2) the number of months that it would take to repay the outstanding balance if the consumer pays only the required minimum monthly payments and if no further advances are made; (3) the total cost to the consumer, including interest and principal payments, of paying that balance in full, if the consumer pays only the required minimum monthly payments and if no further advances are made; (4) the monthly payment amount that would be required for the consumer to pay off the outstanding balance in 36 months, if no further advances are made, and the total cost to the consumer, including interest and principal payments, of paying that balance in full if the consumer pays the balance over 36 months; and (5) a toll-free telephone number at which the consumer may receive information about credit counseling and debt management services. For ease of reference, this supplementary information will refer to the above disclosures in the Credit Card Act as ''the repayment disclosures.''

As discussed in more detail in the section-by-section analysis to proposed § 226.7(b)(12), the Board proposes to limit the repayment disclosure requirements to credit card accounts under open-end (not home-secured) consumer credit plans, as that term is defined in proposed § 226.2(a)(15)(ii). The Board proposes to adopt in proposed Appendix M1 to part 226 guidance for calculating the repayment disclosures.

Calculating the minimum payment repayment estimate. The minimum payment repayment estimate would be an estimate of the number of months that it would take to pay the outstanding balance shown on the periodic statement, if the consumer pays only the required minimum monthly payments and if no further advances are made. The guidance in proposed Appendix M1 to part 226 for calculating the minimum payment repayment estimate would be similar to the guidance that the Board adopted in Appendix M2 to part 226 in the January 2009 Regulation Z Rule for calculating the actual repayment disclosure. The Board proposes that credit card issuers generally calculate the minimum payment repayment estimate for a consumer based on the minimum payment formula(s), the APRs and the outstanding balance currently applicable to a consumer's account. For other terms that may impact the calculation of the minimum payment repayment estimate, the Board proposes to allow issuers to make certain assumption about these terms.

1. *Minimum payment formulas*. When calculating the minimum payment repayment estimate, the Board proposes that credit card issuers generally must use the minimum payment formula(s) that apply to a cardholder's account. Proposed Appendix M1 to part 226 provides that in calculating the minimum payment repayment estimate, if more than one minimum payment formula applies to an account, the issuer must apply each minimum payment formula to the portion of the balance to which the formula applies. In providing the minimum payment repayment estimate, an issuer must disclose the longest repayment period calculated. For example, assume that an issuer uses one minimum payment formula to calculate the minimum payment amount for a general revolving feature, and another minimum payment formula to calculate the minimum payment amount for special purchases, such as a ''club plan purchase.'' Also, assume that based on a consumer's balances in these features, the repayment period calculated pursuant to proposed Appendix M1 to part 226 for the general revolving feature is 5 years, while the repayment period calculated for the special purchase feature is 3 years. This issuer must disclose 5 years as the repayment period for the entire balance to the consumer. This proposal differs from the approach adopted in the January 2009 Regulation Z Rule, which permitted card issuers the option to disclose either the longest repayment period calculated or the repayment period calculated for each minimum payment formula, when disclosing the actual repayment disclosures through a toll-free telephone number. The Board believes that allowing card issuers to disclose on the periodic statement the repayment period calculated for each minimum payment formula might create ''information overload'' for consumers and might distract the consumer from

other important information that is contained on the periodic statement.

Under proposed Appendix M1 to part 226, card issuers would be allowed to disregard promotional terms related to payments, such as deferred billing promotional plans and skip payment features. The Board notes that allowing issuers to disregard promotional payment terms on accounts where the promotional payment terms apply only for a limited amount of time eases compliance burden on issuers, without a significant impact on the accuracy of the repayment estimates for consumers.

2. *Annual percentage rates*. Generally, when calculating the minimum payment repayment estimate, the proposal would require credit card issuers to use each of the APRs that currently apply to a consumer's account, based on the portion of the balance to which that rate applies.

TILA Section 127(b)(11), as revised by the Credit Card Act, specifically requires that in calculating the minimum payment repayment estimate, if the interest rate in effect on the date on which the disclosure is made is a temporary rate that will change under a contractual provision applying an index or formula for subsequent interest rate adjustments, the creditor must apply the interest rate in effect on the date on which the disclosure is made for as long as that interest rate will apply under that contractual provision, and then apply an interest rate based on the index or formula in effect on the applicable billing date.

Consistent with TILA Section 127(b)(11), as revised by the Credit Card Act, under proposed Appendix M1 to part 226, the term ''promotional terms'' would be defined as ''terms of a cardholder's account that will expire in a fixed period of time, as set forth by the card issuer.'' The term ''deferred interest or similar plan'' would mean a plan where a consumer will not be obligated to pay interest that accrues on balances or transactions if those balances or transactions are paid in full prior to the expiration of a specified period of time. If any promotional APRs apply to a cardholder's account, other than deferred interest or similar plans, a credit card issuer in calculating the minimum payment repayment estimate would be required to apply the promotional APR(s) until it expires and then must apply the rate that applies after the promotional rate(s) expires. If the rate that applies after the promotional rate(s) expires is a variable rate, a card issuer would be required to calculate that rate based on the applicable index or formula. This variable rate would be considered accurate if it was in effect within the last 30 days before the minimum payment repayment estimate is provided.

For deferred interest or similar plans, if minimum payments under the plan will repay the balances or transactions prior to the expiration of the specified period of time, a card issuer must assume that the consumer will not be obligated to pay the accrued interest. This means, in calculating the minimum payment repayment estimate, the card issuer must apply a zero percent APR to the balance subject to the deferred interest or similar plan. If, however, minimum payments under the deferred interest or similar plan may not repay the balances or transactions in full prior to the expiration of the specified period of time, a credit card issuer must assume that a consumer will not repay the balances or transactions in full prior to the expiration of the specified period and thus the consumer will be obligated to pay the accrued interest. This means, in calculating the minimum payment repayment estimate, the card issuer must apply the APR at which interest is accruing to the balance subject to the deferred interest or similar plan.

For example, assume under a deferred interest plan, a card issuer will not charge interest on a certain purchase if the consumer repays that purchase amount within 12 months. Also, assume that under the account agreement, the minimum payments for the deferred interest plan are calculated as 1/12 of the purchase amount, such that if the consumer makes timely minimum payments each month for 12 months, the purchase amount will be paid off by the end of the deferred interest period. In this case, the card issuer must assume that the consumer will not be obligated to pay the deferred interest. This means, in calculating the minimum payment repayment estimate, the card issuer must apply a zero percent APR to the balance subject to the deferred interest plan. On the other hand, if under the account agreement, the minimum payments for the deferred interest plan may not necessarily repay the purchase balance within the deferred interest period (such as where the minimum payments are calculated as 3 percent of the outstanding balance), a credit card issuer must assume that a consumer will not repay the balances or transactions in full by the specified date and thus the consumer will be obligated to pay the deferred interest. This means, in calculating the minimum payment repayment estimate, the card issuer must apply the APR at which deferred interest is accruing to the balance subject to the deferred interest plan.

This proposed approach with respect to deferred interest or similar plans is consistent with the assumption that only minimum payments are made in repaying the balance on the account.

3. *Outstanding balance*. When calculating the minimum payment repayment estimate, the Board proposes that credit card issuers must use the outstanding balance on a consumer's account as of the closing date of the last billing cycle. Issuers would not be required to take into account any transactions consumers may have made since the last billing cycle. The Board believes that this proposed approach would make it easier for consumers to understand the minimum payment repayment estimate, because the outstanding balance used to calculate the minimum payment repayment estimate would be the same as the outstanding balance shown on the periodic statement. Under the proposal, issuers would be allowed to round the outstanding balance to the nearest whole dollar to calculate the minimum payment repayment estimate.

4. *Other terms*. As discussed above, the Board proposes in Appendix M1 to part 226 that issuers must calculate the minimum payment repayment estimate for a consumer based on the minimum payment formulas(s), the APRs and the outstanding balance currently applicable to a consumer's account. For other terms that may impact the calculation of the minimum payment repayment estimate, the Board proposes to allow issuers to make certain assumptions about these terms.

a. *Balance computation method*. The Board proposes to allow issuers to use the average daily balance method for purposes of calculating the minimum payment repayment estimate. The average daily balance method is commonly used by issuers to compute the balance on credit card accounts. Nonetheless, requiring use of the average daily balance method makes other assumptions necessary, including the length of the billing cycle, and when payments are made. The Board proposes to allow an issuer to assume a monthly or daily periodic rate applies to the account. If a daily periodic rate is used, the issuer would be allowed to assume either (1) a year is 365 days long, and all months are 30.41667 days long, or (2) a year is 360 days long, and all months are 30 days long. Both sets of assumptions about the length of the year and months would yield the same repayment estimates. The Board also proposes to allow issuers to assume that payments are credited on the last day of the month.

b. *Grace period.* In proposed Appendix M1 to part 226, the Board proposes to allow issuers to assume that no grace period exists. The required disclosures about the effect of making minimum payments are based on the assumption that the consumer will be ''revolving'' or carrying a balance. Thus, it seems reasonable to assume that the account is already in a revolving condition at the time the minimum payment repayment estimate is disclosed on the periodic statement, and that no grace period applies. This proposed assumption about the grace period is also consistent with the proposed rule to exempt issuers from providing the minimum payment repayment estimate to consumers that have paid their balances in full for two consecutive months.

c. *Residual interest.* When the consumer's account balance at the end of a billing cycle is less than the required minimum payment, the Board proposes to allow an issuer to assume that no additional transactions occurred after the end of the billing cycle, that the account balance will be paid in full, and that no additional finance charges will be applied to the account between the date the statement was issued and the date of the final payment. These assumptions are necessary to have a finite solution to the repayment period calculation. Without these assumptions, the repayment period could be infinite.

d. *Minimum payments are made each month.* In proposed Appendix M1 to part 226, issuers would be allowed to assume that minimum payments are made each month and any debt cancellation or suspension agreements or skip payment features do not apply to a consumer's account. The Board believes that this assumption will ease compliance burden on issuers, without a significant impact on the accuracy of the repayment estimates for consumers.

e. *APR will not change.* TILA Section 127(b)(11), as revised by the Credit Card Act, provides that in calculating the minimum payment repayment estimate, a creditor must apply the interest rate or rates in effect on the date on which the disclosure is made until the date on which the balance would be paid in full. Nonetheless, if the interest rate in effect on the date on which the disclosure is made is a temporary rate that will change under a contractual provision applying an index or formula for subsequent interest rate adjustment, the creditor must apply the interest rate in effect on the date on which the disclosure is made for as long as that interest rate will apply under that contractual provision, and then apply an interest rate based on the index or formula in effect on the applicable billing date. As discussed above, if any promotional APRs apply to a cardholder's account, other than deferred interest or similar plans, a credit card issuer in calculating the minimum payment repayment estimate would be required to apply the promotional APR(s) until it expires and then must apply the rate that applies after the promotional rate(s) expires. If the rate that applies after the promotional rate(s) expires is a variable rate, a card issuer would be required to calculate that rate based on the applicable index or formula. This variable rate would be considered accurate if it was in effect within the last 30 days before the minimum payment repayment estimate is provided. For deferred interest or similar plans, if minimum payments under the plan will repay the balances or transactions in full prior to the expiration of the specified period of time, a card issuer must assume that the consumer will not be obligated to pay the accrued interest. This means, in calculating the minimum payment repayment estimate, the card issuer must apply a zero percent APR to the balance subject to the deferred interest or similar plan. If, however, minimum payments under the deferred interest or similar plan may not repay the balances or transactions in full by the expiration of the specified period of time, a credit card issuer must assume that a consumer will not repay the balances or transactions in full prior to the expiration of the specified period of time and thus the consumer will be obligated to pay the accrued interest. This means, in calculating the minimum payment repayment estimate, the card issuer must apply the APR at which interest is accruing (or deferred interest is accruing) to the balance subject to the deferred interest or interest waiver plan.

Consistent with TILA Section 127(b)(11), as revised by the Credit Card Act, the Board proposes to allow issuers to assume that the APR on the account will not change either through the operation of a variable rate or the change to a rate, except with respect to promotional APRs as discussed above. For example, if a penalty APR currently applies to a consumer's account, an issuer would be allowed to assume that the penalty APR will apply to the consumer's account indefinitely, even if the consumer may potentially return to a non-penalty APR in the future under the account agreement.

f. *Payment allocation.* In proposed Appendix M1 to part 226, the Board proposes to allow issuers to assume that payments are allocated to lower APR balances before higher APR balances when multiple APRs apply to an account. As discussed in the section-by-section analysis to proposed § 226.53, the proposed rule would permit issuers to allocated minimum payment amounts as they choose; however, issuers would be restricted in how they may allocate payments above the minimum payment amount. The Board assumes that issuers are likely to allocate the minimum payment amount to lower APR balances before higher APR balances, and issuers may assume that is the case in calculating the minimum payment repayment estimate.

g. *Account not past due and the account balance does not exceed the credit limit.* The proposed rule would allow issuers to assume that the consumer's account is not past due and the account balance is not over the credit limit. The Board believes that this assumption will ease compliance burden on issuers, without a significant impact on the accuracy of the repayment estimates for consumers.

h. *Rounding assumed payments, current balance and interest charges to the nearest cent.* Under proposed Appendix M1 to part 226, when calculating the minimum payment repayment estimate, an issuer would be permitted to round to the nearest cent the assumed payments, current balance and interest charges for each month, as shown in proposed Appendix M2 to part 226.

5. *Tolerances.* The Board proposes to provide that the minimum payment repayment estimate calculated by an issuer will be considered accurate if it is not more than 2 months above or below the minimum payment repayment estimate determined in accordance with the guidance in proposed Appendix M1 to part 226, prior to rounding. This proposed tolerance would prevent small variations in the calculation of the minimum payment repayment estimate from causing a disclosure to be inaccurate. Take, for example, a minimum payment formula of the greater of 2 percent or $20 and two separate amortization calculations that, at the end of 28 months, arrived at remaining balances of $20 and $20.01 respectively. The $20 remaining balance would be paid off in the 29th month, resulting in the disclosure of a 2-year repayment period due to the Board's proposed rounding rule set forth in proposed § 226.7(b)(12)(i)(B). The $20.01 remaining balance would be paid off in the 30th month, resulting in the disclosure of a 3-year repayment period due to the Board's proposed rounding rule. Thus, in the example above, an issuer would be in compliance with the

guidance in proposed Appendix M1 to part 226 by disclosing 3 years, instead of 2 years, because the issuer's estimate is within the 2 months' tolerance, prior to rounding. In addition, the proposed rule also provides that even if an issuer's estimate is more than 2 months above or below the minimum payment repayment estimate calculated using the guidance in proposed Appendix M1 to part 226, so long as the issuer discloses the correct number of years to the consumer based on the rounding rule set forth in proposed § 226.7(b)(12)(i)(B), the issuer would be in compliance with the guidance in proposed Appendix M1 to part 226. For example, assume the minimum payment repayment estimate calculated using the guidance in proposed Appendix M1 to part 226 is 32 months (2 years, 8 months), and the minimum payment repayment estimate calculated by the issuer is 38 months (3 years, 2 months). Under the proposed rounding rule set forth in proposed § 226.7(b)(12)(i)(B), both of these estimates would be rounded and disclosed to the consumer as 3 years. Thus, if the issuer disclosed 3 years to the consumer, the issuer would be in compliance with the guidance in proposed Appendix M1 to part 226 even through the minimum payment repayment estimate calculated by the issuer is outside the 2 months' tolerance amount.

The Board recognizes that the minimum payment repayment estimates, the minimum payment total cost estimates, the estimated monthly payments for repayment in 36 months, and the total cost estimates for repayment in 36 months, as calculated in proposed Appendix M1 to part 226, are estimates. The Board would expect that issuers would not be liable under Federal or State unfair or deceptive practices laws for providing inaccurate or misleading information, when issuers provide to consumers these disclosures calculated according to guidance provided in proposed Appendix M1 to part 226, as required by TILA.

Calculating the minimum payment total cost estimate. Under proposed Appendix M1 to part 226, when calculating the minimum payment total cost estimate, a credit card issuer would be required to total the dollar amount of the interest and principal that the consumer would pay if he or she made minimum payments for the length of time calculated as the minimum payment repayment estimate using the guidance in proposed Appendix M1 to part 226. Under the proposal, the minimum payment total cost estimate would be deemed to be accurate if it is based on a minimum payment repayment estimate that is within the tolerance guidance set forth in proposed Appendix M1 to part 226, as discussed above. For example, assume the minimum payment repayment estimate calculated using the guidance in proposed Appendix M1 to part 226 is 28 months (2 years, 4 months), and the minimum payment repayment estimate calculated by the issuer is 30 months (2 years, 6 months). The minimum payment total cost estimate will be deemed accurate even if it is based on the 30 month estimate for length of repayment, because the issuer's minimum payment repayment estimate is within the 2 months' tolerance, prior to rounding. In addition, assume the minimum payment repayment estimate calculated using the guidance in proposed Appendix M1 to part 226 is 32 months (2 years, 8 months), and the minimum payment repayment estimate calculated by the issuer is 38 months (3 years, 2 months). Under the proposed rounding rule set forth in proposed § 226.7(b)(12)(i)(B), both of these estimates would be rounded and disclosed to the consumer as 3 years. If the issuer based the minimum payment total cost estimate on 38 months (or any other minimum payment repayment estimate that would be rounded to 3 years), the minimum payment total cost estimate would be deemed to be accurate.

Calculating the estimated monthly payment for repayment in 36 months. Under proposed Appendix M1 to part 226, when calculating the estimated monthly payment for repayment in 36 months, a credit card issuer would be required to calculate the estimated monthly payment amount that would be required to pay off the outstanding balance shown on the statement within 36 months, assuming the consumer paid the same amount each month for 36 months.

In calculating the estimated monthly payment for repayment in 36 months, the Board proposes to require an issuer to use a weighted APR that is based on the APRs that apply to a cardholder's account and the portion of the balance to which the rate applies, as shown in proposed Appendix M2 to part 226. The Board believes that requiring use of a weighted APR to calculate the estimated monthly payment for repayment in 36 month when multiple APRs apply to an account will ease compliance burden on issuers by significantly simplifying the calculation of the estimated monthly payment, without a significant impact on the accuracy of the estimated monthly payments for consumers.

Proposed Appendix M1 to part 226 would provide guidance on how to calculate the weighted APR if promotional APRs apply. If any promotional terms related to APRs apply to a cardholder's account, other than deferred interest or similar plans, in calculating the weighted APR, the issuer must calculate a weighted average of the promotional rate and the rate that will apply after the promotional rate expires based on the percentage of 36 months each rate will apply, as shown in proposed Appendix M2 to part 226.

Under proposed Appendix M1 to part 226, for deferred interest or similar plans, if minimum payments under the plan will repay the balances or transactions in full prior to the expiration of the specified period of time, a card issuer must assume that the consumer will not be obligated to pay the accrued interest. This means, in calculating the weighted APR, the card issuer must apply a zero percent APR to the balance subject to the deferred interest or similar plan. If, however, minimum payments under the deferred interest or similar plan may not repay the balances or transactions in full prior to the expiration of the specified period of time, a credit card issuer in calculating the weighted APR must assume that a consumer will not repay the balances or transactions in full prior to the expiration of the specified period and thus the consumer will be obligated to pay the accrued interest. This means, in calculating the weighted APR, the card issuer must apply the APR at which interest is accruing to the balance subject to the deferred interest or similar plan. To simplify the calculation of the repayment estimates, this proposed approach focuses on whether minimum payments will repay the balances or transactions in full prior to the expiration of the specified period of time instead of whether the estimated monthly payment for repayment in 36 months will repay the balances or transaction prior to the expiration of the specified period. The Board believes that if minimum payments under the deferred interest or similar plan will not repay the balances or transactions in full prior to the expiration of the specified period of time, it is not likely that the estimated monthly payment for repayment in 36 months will repay the balances or transactions in full prior to the expiration of the specified period, given that (1) under proposed § 226.53, card issuers generally may not allocate payments in excess of the minimum payment to deferred interest or similar balances before other balances on which interest is being charged except in the last two months before a deferred interest or similar period is set to expire,

and (2) deferred interest or similar periods typically are shorter than 3 years.

The Board requests comment on whether the Board should adopt specific tolerances for calculation and disclosure of the estimated monthly payment for repayment in 36 months, and if so, what those tolerances should be.

Calculating the total cost estimate for repayment in 36 months. Under proposed Appendix M1 to part 226, when calculating the total cost estimate for repayment in 36 months, a credit card issuer would be required to total the dollar amount of the interest and principal that the consumer would pay if he or she made the estimated monthly payment for repayment in 36 months calculated under proposed Appendix M1 to part 226 each month for 36 months. The Board requests comment on whether the Board should adopt specific tolerances for calculation and disclosure of the total cost estimate for repayment in 36 months, and if so, what those tolerances should be.

Calculating savings estimate for repayment in 36 months. Under proposed Appendix M1 to part 226, when calculating the savings estimate for repayment in 36 months, a credit card issuer would be required to subtract the total cost estimate for repayment in 36 months calculated under paragraph (e) of Appendix M1 (rounded to the nearest whole dollar as set forth in proposed § 226.7(b)(12)(i)(F)(*3*)) from the minimum payment total cost estimate calculated under paragraph (c) of Appendix M1 (rounded to the nearest whole dollar as set forth in proposed § 226.7(b)(12)(i)(C)). The Board requests comment on whether the Board should adopt specific tolerances for calculation and disclosure of the savings estimate for repayment in 36 months, and if so, what those tolerances should be.

Appendix M2—Sample Calculations of Repayment Disclosures

In proposed Appendix M2, the Board proposes to provide sample calculations for the minimum payment repayment estimate, the total cost repayment estimate, the estimated monthly payment for repayment in 36 months, the total cost estimate for repayment in 36 months, and the savings estimate for repayment in 36 months discussed in proposed Appendix M1 to part 226.

Appendix N—Specifications for Internet Posting of Credit Card Agreements

Proposed Appendix N would provide additional details regarding the content of agreements submitted to the Board under proposed § 226.58(d) and posting of agreements offered to the public on the card issuer's Web site and availability of agreements for all open accounts under § 226.58(f).

Agreements Submitted to the Board Under § 226.58(d)

Under proposed Appendix N, each agreement submitted to the Board must contain the provisions of the agreement and the pricing information in effect as of the last business day of the preceding calendar quarter.

Proposed Appendix N also would specify that information that is not uniform for all cardholders under an agreement, but that instead may vary from one cardholder to another depending upon a cardholder's creditworthiness, State of residence, or other factors, such as the pricing information, must be set forth in an addendum to the agreement. The addendum would be required to provide the information either by setting forth all the possible variations (such as purchase APRs of 6.9 percent, 8.9 percent, 10.9 percent, or 12.9 percent), or by providing a range (such as purchase APR ranging from 6.9 percent to 12.9 percent).

Proposed Appendix N also would clarify that an issuer would not be required to submit with an agreement any disclosures required by State or Federal law such as affiliate marketing notices, privacy policies, or disclosures under the E-Sign Act, except to the extent that those disclosures are included in the provisions of the agreement or the pricing information. Similarly, issuers would not be required to submit solicitation materials or periodic statements.

As described in proposed Appendix N, agreements submitted to the Board would not contain any personally identifiable information (such as name, address, telephone number, or account number) relating to any cardholder.

Finally, proposed Appendix N would clarify that issuers may not provide provisions of the agreement or pricing information in the form of change-in-terms notices or riders (other than the single addendum described above, if applicable). Changes in provisions or pricing information must be integrated into the body of the agreement (or into the single addendum described above, if applicable). For example, it would be impermissible for an issuer to submit to the Board an agreement in the form of a terms and conditions document dated January 1, 2005, four subsequent change in terms notices, and 2 addenda showing variations in pricing information. Instead, the issuer must submit a document that integrates the changes made by each of the change in terms notices into the body of the original terms and conditions document and a single addendum displaying variations in pricing information as described above.

The Board believes that permitting issuers to submit agreements that include change-in-terms notices or riders containing amendments and revisions would be confusing for consumers and would greatly lessen the usefulness of agreements posted on the Board's Web site. Consumers would be required to sift through change-in-terms notices and riders in an attempt to assemble a coherent picture of the terms currently offered. The Board believes that issuers are better placed than consumers to assemble this information. While the Board understands that this may somewhat increase the burden on issuers, the Board believes that the corresponding benefit of increased transparency for consumers outweighs this burden.

Posting of Agreements Offered to the Public on Card Issuer's Web Site Under § 226.58(f)(1)

Proposed Appendix N would clarify that, with respect to posting on the issuer's Web site the agreements the issuer is required to submit to the Board under proposed § 226.58(f)(1), the agreements need not conform to the electronic format required for submission to the Board under proposed § 226.58(d). For example, assume the Board requires that agreements submitted to the Board under proposed § 226.58(d) be submitted in plain text format. When posting the agreements on its own Web site under § 226.58(f)(1), an issuer may post the agreements in plain text format, in PDF format, in HTML format or in some other electronic format, provided the format is readily usable by the general public.

Proposed Appendix N specifies that, under proposed § 226.58(f)(1), the content of the agreements posted on the issuer's Web site must be the same as the content of the agreements submitted to the Board, as described in the first part of proposed Appendix N. Under proposed Appendix N, an issuer would be required to update the agreements posted on its Web site under § 226.58(f)(1) at least as frequently as the quarterly schedule required for submission of agreements to the Board under § 226.58(d). If the issuer chooses to update the agreements on its Web site more frequently, the agreements posted on the issuer's Web site would be permitted to contain the provisions of the agreement and the pricing information in effect as of a date other

than the last business day of the preceding calendar quarter.

Proposed Appendix N also would specify that the agreements must be posted on the issuer's Web site in a location that is prominent and easily accessible by the public and must be presented in a clear and legible typeface.

Availability of Agreements for All Open Accounts Under § 226.58(f)(2)

With respect to cardholder agreements posted on the issuer's Web site under proposed § 226.58(f)(2), proposed Appendix N would specify that such agreements may be posted in any electronic format that is readily usable by the general public and must be placed in a location that is prominent and easily accessible to the cardholder.

With respect to any agreement provided under § 226.58(f)(2), whether posted on the card issuer's Web site under § 226.58(f)(2)(i) or made available upon the cardholder's request under § 226.58(f)(2)(ii), proposed Appendix N would provide that the agreement generally must conform to the content requirements for agreements submitted to the Board. However, the agreement would be required to set forth the specific provisions and pricing information applicable to the particular cardholder. The agreement also would be permitted to contain personally identifiable information relating to the cardholder, such as name address, telephone number, or account number, provided that the issuer takes appropriate measures to make the agreement accessible only to the cardholder or other authorized person. Issuers would be permitted to provide pricing information in the text of the agreement or in a single attached addendum. All agreements would be required to be presented in a clear and legible typeface.

Agreements provided under § 226.58(f)(2) would be required under proposed Appendix N to include provisions and pricing information that is complete and accurate as of a date no more than 60 days prior to the date on which the agreement is posted on the card issuer's Web site under § 226.58(f)(2)(i) or the date the cardholder's request is received under § 226.58(f)(2)(ii). For example, an issuer posts cardholder agreements on its Web site under § 226.58(f)(2)(i). The agreement posted on the Web site for a particular cardholder on May 1 must contain the provisions and pricing information applicable to that cardholder as of March 2 or later. The Board believes that 60 days gives issuers a reasonable amount of time to update provisions and pricing information, while providing cardholders with card agreements that are current and accurate. However, the Board solicits comments on whether this period should be shorter or longer.

Finally, proposed Appendix N would clarify that issuers may not provide provisions of the agreement or pricing information in the form of change-in-terms notices or riders (other than the single addendum described above, if applicable). Changes in provisions or pricing information must be integrated into the text of the agreement (or into the single addendum described above, if applicable). For example, it would be not be permissible for an issuer to send to a cardholder under § 226.58(f)(2)(ii) an agreement consisting of a terms and conditions document dated January 1, 2005, and four subsequent change-in-terms notices. Instead, the issuer would be required to send to the cardholder a single document that integrates the changes made by each of the change-in-terms notices into the body of the terms and conditions document.

As described above, the Board believes that requiring consumers to sift through change in-terms notices and riders in an attempt to assemble the agreement to which they are currently subject would be burdensome for consumers. The Board believes that issuers are better placed than consumers to assemble this information. While the Board understands that this may somewhat increase the burden on issuers, the Board believes that the corresponding benefit of increased transparency for consumers would outweigh this burden.

VI. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) requires an agency to perform an initial and final regulatory flexibility analysis on the impact a rule is expected to have on small entities.

Prior to proposing this rule, the Board conducted initial and final regulatory flexibility analyses and ultimately concluded that the rules in the Board's January 2009 Regulation Z Rule and July 2009 Regulation Z Interim Final Rule would have a significant economic impact on a substantial number of small entities. *See* 72 FR 33033–33034 (June 14, 2007); 74 FR 5390–5392; 74 FR 36092–36093. As discussed in I. Background and Implementation of the Credit Card Act and V. Section-by-Section Analysis, several of the provisions of the Credit Card Act are similar to provisions in the Board's January 2009 Regulation Z Rule and July 2009 Regulation Z Interim Final Rule. To the extent that the provisions in the proposed rule are substantially similar to provisions in those rules, the Board continues to rely on the regulatory flexibility analyses conducted for the Board's January 2009 Regulation Z Rule and July 2009 Regulation Z Interim Final Rule. The Credit Card Act, however, also addresses practices or mandates disclosures that were not addressed in the Board's January 2009 Regulation Z Rules and July 2009 Regulation Z Interim Final Rule. The Board anticipates that these proposed provisions would impose additional requirements and burden on small entities. Therefore, based on its prior analyses and for the reasons stated below, the Board believes that this proposed rule would have a significant economic impact on a substantial number of small entities. Accordingly, the Board has prepared the following initial regulatory flexibility analysis pursuant to section 604 of the RFA. A final regulatory flexibility analysis will be conducted after consideration of comments received during the public comment period.

1. *Statement of the need for, and objectives of, the proposed rule.* The proposed rule implements a number of new substantive and disclosure provisions required by the Credit Card Act, which establishes fair and transparent practices relating to the extension of open-end consumer credit plans. The supplementary information above describes in detail the reasons, objectives, and legal basis for each component of the proposed rule.

2. *Small entities affected by the proposed rule.* All creditors that offer open-end credit plans are subject to the proposed rule, although several provisions apply only to credit card accounts under an open-end (not home-secured) plan. In addition, institutions of higher education are subject to proposed § 226.57(b), regarding public disclosure of agreements for purposes of marketing a credit card. The Board is relying on its analysis in the January 2009 Regulation Z Rule, in which the Board provided data on the number of entities which may be affected because they offer open-end credit plans. The Board acknowledges, however, that the total number of small entities likely to be affected by the proposed rule is unknown, because the open-end credit provisions of the Credit Card Act and Regulation Z have broad applicability to individuals and businesses that extend even small amounts of consumer credit. In addition, the total number of institutions of higher education likely to be affected by the proposed rule is unknown because the number of

institutions of higher education that are small entities and have a credit card marketing contract or agreement with a card issuer or creditor cannot be determined. (For a detailed description of the Board's analysis of small entities subject to the January 2009 Regulation Z Rule, *see* 74 FR 5391.) The Board invites comment on the effect of the proposed rule on small entities.

3. *Recordkeeping, reporting, and compliance requirements*. The proposed rule does not impose any new recordkeeping requirements. The proposed rule would, however, impose new reporting and compliance requirements. The reporting and compliance requirements of this proposed rule are described above in V. Section-by-Section Analysis. The Board notes that the precise costs to small entities to conform their open-end credit disclosures to the proposed rule and the costs of updating their systems to comply with the rule are difficult to predict. These costs will depend on a number of factors that are unknown to the Board, including, among other things, the specifications of the current systems used by such entities to prepare and provide disclosures and administer open-end accounts, the complexity of the terms of the open-end credit products that they offer, and the range of such product offerings. The Board seeks information and comment on any costs, compliance requirements, or changes in operating procedures arising from the application of the proposed rule to small entities.

Proposals Regarding Consumer Credit Card Accounts

This subsection summarizes several of the proposed amendments to Regulation Z and their likely impact on small entities that are card issuers. More information regarding these and other proposed changes can be found in V. Section-by-Section Analysis.

Proposed § 226.7(b)(11) would generally require the payment due date for credit card accounts under an open-end (not home-secured) consumer credit plan be the same day of the month for each billing cycle. Small entities that are card issuers may be required to update their systems to comply with this provision.

Proposed § 226.7(b)(12) would generally require card issuers that are small entities to include on each periodic statement certain disclosures regarding repayment, such as a minimum payment warning statement, a minimum payment repayment estimate, and the monthly payment based on repayment in 36 months. Compliance with this provision would require card issuers that are small entities to calculate certain minimum payment estimates for each account. The Board, however, seeks to reduce the burden on small entities by proposing model forms which can be used to ease compliance with the proposed rule.

Proposed § 226.9(g)(3) would require card issuers that are small entities to provide notice regarding an increase in rate based on a consumer's failure to make a minimum periodic payment within 60 days from the due date and disclose that the increase will cease to apply if the small entity is a card issuer and receives six consecutive required minimum period payments on or before the payment due date. The Board anticipates that small entities subject to § 226.9(g), with little additional burden, will incorporate the proposed disclosure requirement with the disclosure already required under § 226.9(g).

Proposed § 226.10(e) would limit fees related to certain methods of payment for credit card accounts under an open-end (not home-secured) consumer credit plan, with the exception of payments involving expedited service by a customer service representative. Proposed § 226.10(e) may reduce revenue that some small entities derive from fees associated with certain payment methods.

Proposed § 226.52 would generally limit the imposition of fees by card issuers during the first year after account opening. This provision may reduce revenue that some entities derive from fees.

Proposed § 226.54 would prohibit a card issuer from imposing certain finance charges as a result of the loss of a grace period on a credit card account, except in certain circumstances. This provision may reduce revenue that some small entities derive from finance charges.

Proposed § 226.55(a) would generally prohibit small entities that are card issuers from increasing an annual percentage rate or any fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) on a credit card account unless specifically permitted by one of the exceptions in § 226.55(b). This provision may reduce interest revenue and other revenue that certain small entities derive from fees and charges.

Proposed § 226.55(b)(3) would require small entities that are card issuers to disclose, prior to the commencement of a specified period of time, an increased annual percentage rate that would apply after the period as a condition for an exception to § 226.55(a). However, § 226.9(c)(2)(v)(B) as adopted in the July 2009 Regulation Z Interim Final Rule already requires card issuers to disclose this information so the Board does not anticipate any significant additional burden on small entities.

Proposed § 226.55(b)(5) would require small entities that are card issuers to disclose, prior to commencement of the arrangement, the terms of a workout and temporary hardship arrangement as a condition for an exception to § 226.55(a). However, § 226.9(c)(2)(v)(D) and (g)(4)(i) as adopted in the July 2009 Regulation Z Interim Final Rule already require card issuers to disclose this information so the Board does not anticipate any significant additional burden on small entities.

Proposed § 226.56 would prohibit small entities that are card issuers from imposing fees or charges for an over-the-limit transaction unless the card issuer provides the consumer with notice and obtains the consumer's affirmative consent, or opt-in. Compliance with this provision may impose additional costs on small entities in order to provide notice and obtain consent, if the small entity elects to impose fees or charges for over-the-limit transactions. Proposed § 226.56 may reduce revenue that certain small entities derive from fees and charges related to over-the-limit transaction. In addition, proposed § 226.56 may require some small entities to alter their systems in order to comply with the provision. The cost of such change will depend on the size of the institution and the composition of its portfolio.

Proposed § 226.58 would require small entities that are card issuers to post agreements for open-end consumer credit card plans on the card issuer's Web site and to submit those agreements to the Board for posting in a publicly-available on-line repository established and maintained by the Board. The cost of compliance will depend on the size of the institution and the composition of its portfolio. Proposed § 226.58(e), however, provides a *de minimis* exception, which would reduce the economic impact and compliance burden on small entities. Under proposed § 226.58(e), a card issuer would not be required to submit an agreement to the Board if the card issuer has fewer than 10,000 open accounts under open-end consumer credit card plans subject to § 226.5a as of the last business day of the calendar quarter.

Accordingly, the Board believes that, in the aggregate, the provisions of its proposed rule would have a significant economic impact on a substantial number of small entities.

4. *Other Federal rules*. Other than the January 2009 FTC Act Rule and similar

rules adopted by other Agencies, the Board has not identified any Federal rules that duplicate, overlap, or conflict with the proposed revisions to TILA. As discussed in the supplementary information to this proposed rule, the Board intends to withdraw its January 2009 FTC Act Rule when finalizing this proposal.

5. *Significant alternatives to the proposed revisions*. The provisions of the proposed rule would implement the statutory requirements of the Credit Card Act that go into effect on February 22, 2010. The Board has sought to avoid imposing additional burden, while effectuating the statute in a manner that is beneficial to consumers. The Board welcomes comment on any significant alternatives, consistent with the Credit Card Act, which would minimize impact of the proposed rule on small entities.

VII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR Part 1320 Appendix A.1), the Board reviewed the proposed rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The collection of information that is required by this proposed rule is found in 12 CFR part 226. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless the information collection displays a currently valid OMB control number. The OMB control number is 7100–0199.[50]

This information collection is required to provide benefits for consumers and is mandatory (15 U.S.C. 1601 *et seq.*). The respondents/recordkeepers are creditors and other entities subject to Regulation Z, including for-profit financial institutions, small businesses, and institutions of higher education. TILA and Regulation Z are intended to ensure effective disclosure of the costs and terms of credit to consumers. For open-end credit, creditors are required to, among other things, disclose information about the initial costs and terms and to provide periodic statements of account activity, notices of changes in terms, and statements of rights concerning billing error procedures. Regulation Z requires specific types of disclosures for credit and charge card accounts and home-equity plans. For closed-end loans, such as mortgage and installment loans, cost disclosures are required to be provided prior to consummation. Special disclosures are required in connection with certain products, such as reverse mortgages, certain variable-rate loans, and certain mortgages with rates and fees above specified thresholds. TILA and Regulation Z also contain rules concerning credit advertising. Creditors are required to retain evidence of compliance for twenty-four months (§ 226.25), but Regulation Z does not specify the types of records that must be retained.

Under the PRA, the Federal Reserve accounts for the paperwork burden associated with Regulation Z for the State member banks and other creditors supervised by the Federal Reserve that engage in lending covered by Regulation Z and, therefore, are respondents under the PRA. Appendix I of Regulation Z defines the Federal Reserve-regulated institutions as: State member banks, branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act. Other Federal agencies account for the paperwork burden on other entities subject to Regulation Z. To ease the burden and cost of complying with Regulation Z (particularly for small entities), the Federal Reserve provides model forms, which are appended to the regulation.

As discussed in I. Background and Implementation of the Credit Card Act and V. Section-by-Section Analysis, several of the provisions of the Credit Card Act are similar to provisions in the Board's January 2009 Regulation Z Rules. To the extent that the provisions in the proposed rule are substantially similar to provisions in the January 2009 Regulation Z Rule, the Board continues to rely on the substance of its PRA analysis in the January 2009 Regulation Z Rule. *See* 74 FR 5392–5393. The Credit Card Act, however, also addresses practices or mandates disclosures that were not addressed in the Board's January 2009 Regulation Z Rules. The Board anticipates increased burden caused by additional disclosure requirements in the proposed rule and therefore, revises its prior PRA analysis accordingly.

Under proposed § 226.7(b)(12), creditors are generally required to include on each periodic statement certain disclosures regarding repayment, such as a minimum payment warning statement, a minimum payment repayment estimate, and the monthly payment based on repayment in 36 months. As mentioned in the preamble, in an effort to reduce burden the Board is proposing guidance in Appendix M1 on how to calculate repayment estimates. Appendix M2 to part 226 provides sample calculations of repayment estimates using guidance in Appendix M1. The Board estimates that 1,138 respondents would take, on average, 80 hours (two business weeks) to update their systems to comply with the proposed disclosure requirements in § 226.7(b)(12). This one-time revision would increase the burden by 91,040 hours. The Board does not anticipate any additional burden on a continuing basis.

Under proposed § 226.9(g)(3), if a rate is increased based on a consumer's failure to make a minimum periodic payment within 60 days from the due date, a creditor is required to provide notice containing a statement of the reason for the increase and that the increase will cease to apply if the creditor receives six consecutive required minimum period payments on or before the payment due date. The Board anticipates that creditors, with little additional burden, will incorporate the proposed disclosure requirement with the disclosure already required under § 226.9(g). The Board estimates that 1,138 respondents would take, on average, 8 hours to update their systems to comply with the proposed disclosure requirements in § 226.9(g)(3) and estimates the one-time burden to be 9,104 hours.

Under proposed § 226.55(b)(3), a card issuer must disclose, prior to the commencement of a specified period of time, an increased annual percentage rate that would apply after the period as a condition for an exception to § 226.55(a). However, § 226.9(c)(2)(v)(B) as adopted in the July 2009 Regulation Z Interim Final Rule already requires card issuers to disclose this information so the Board does not anticipate any additional burden.

Under proposed § 226.55(b)(5), a card issuer must disclose, prior to commencement of the arrangement, the terms of a workout and temporary hardship arrangement as a condition for an exception to § 226.55(a). However, § 226.9(c)(2)(v)(D) and (g)(4)(i) as adopted in the July 2009 Regulation Z Interim Final Rule already require card issuers to disclose this information so the Board does not anticipate any additional burden.

Under proposed § 226.57(b), an institution of higher education is required to publicly disclose any contract or other agreement made with

[50] The information collection will be re-titled—Reporting, Recordkeeping and Disclosure Requirements associated with Regulation Z (Truth in Lending) and Regulation AA (Unfair or Deceptive Acts or Practices).

a card issuer or creditor for the purpose of marketing a credit card. Since the regulation does not specify a required method for public disclosure the Board estimates that 4,276 respondents [51] would take, on average, 8 hours to comply with the proposed disclosure requirements and estimates the annual burden to be 34,208 hours.

Under proposed § 226.57(d), creditors that are a party to one or more college credit card agreements would be required to register with the Board and to submit annual reports to the Board regarding those agreements. Creditor registration requirements would comprise primarily of contact information. In addition, creditors would be required to provide specific information related to the agreements. The Board estimates that 2,200 creditors [52] would take, on average, 160 hours (one month) to comply with the proposed disclosure requirements in § 226.57(d) and estimates the one-time annual burden to be 352,000 hours. To avoid double counting the burden estimate for creditor registration and updates to all agreements is accounted for under proposed § 226.58.

Under proposed § 226.58, a creditor is required to post agreements for open-end consumer credit card plans on the creditor's Web site and to submit those agreements to the Board for posting in a publicly-available on-line repository established and maintained by the Board. Creditors would be required to register with the Board and submit to the Board all agreements for open-end consumer credit card plans. The Board estimates that 2,200 creditors [53] would take, on average, 30 minutes to register their contact information and estimates the one-time annual burden to be 1,100 hours. In addition, the Board estimates that 2,200 creditors would take, on average, 40 hours (one business week) to comply with the proposed disclosure requirements in § 226.58 and estimates the annual burden to be 88,000 hours. On a continuing basis, the Board estimates creditors would take, on average, 8 hours (quarterly) to update agreements and estimates the annual burden to be 70,400 hours.

Based on these adjustments to the Board's prior estimates and the Board's PRA analysis in the January 2009 Regulation Z Rule, the proposed rule would impose a one-time increase in the total annual burden under Regulation Z for all respondents regulated by the Federal Reserve by 575,452 hours, from 1,008,962 to 1,584,414 hours. The total one-time burden increase represents averages for all respondents regulated by the Federal Reserve. The Federal Reserve expects that the amount of time required to implement each of the proposed changes for a given financial institution or entity may vary based on the size and complexity of the respondent. In addition, the Federal Reserve estimates that, on a continuing basis, the proposed revisions to the rules would increase the total annual burden on a continuing basis from 1,008,962 to 1,079,362 hours. The total annual burden for the Regulation Z information collection is estimated to increase from 1,008,962 to 1,654,814 hours.[54]

The other Federal financial agencies: Office of the Comptroller of the Currency (OCC), Office of Thrift Supervision (OTS), the Federal Deposit Insurance Corporation (FDIC), and the National Credit Union Administration (NCUA) are responsible for estimating and reporting to OMB the total paperwork burden for the domestically chartered commercial banks, thrifts, and Federal credit unions and U.S. branches and agencies of foreign banks for which they have primary administrative enforcement jurisdiction under TILA Section 108(a), 15. U.S.C. 1607(a). These agencies are permitted, but are not required, to use the Board's burden estimation methodology. Using the Board's method, the total current estimated annual burden for the approximately 17,200 domestically chartered commercial banks, thrifts, and Federal credit unions and U.S. branches and agencies of foreign banks supervised by the Federal Reserve, OCC, OTS, FDIC, and NCUA under TILA would be approximately 13,568,725 hours. The proposed rule would impose a one-time increase in the estimated annual burden for such institutions by 4,274,200 hours to 17,842,925 hours. On a continuing basis the proposed rule would impose an increase in the estimated annual burden by 137,600 to 13,706,325 hours. The above estimates represent an average across all respondents; the Board expects variations between institutions based on their size, complexity, and practices.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the Board's functions; including whether the information has practical utility; (2) the accuracy of the Board's estimate of the burden of the proposed information collection, including the cost of compliance; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology. Comments on the collection of information should be sent to Michelle Shore, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 95–A, Board of Governors of the Federal Reserve System, Washington, DC 20551, with copies of such comments sent to the Office of Management and Budget, Paperwork Reduction Project (7100–0199), Washington, DC 20503.

List of Subjects in 12 CFR Part 226

Advertising, Consumer protection, Federal Reserve System, Reporting and recordkeeping requirements, Truth in Lending.

Text of Interim Final Revisions

For the reasons set forth in the preamble, the Board proposes to amend Regulation Z, 12 CFR part 226, as set forth below:

PART 226—TRUTH IN LENDING (REGULATION Z)

1. The authority citation for part 226 continues to read as follows:

Authority: 12 U.S.C. 3806; 15 U.S.C. 1604, 1637(c)(5), and 1639(l); Public Law 111–24 § 2, 123 Stat. 1734.

Subpart A—General

2. Section 226.1 is revised to read as follows:

§ 226.1 Authority, purpose, coverage, organization, enforcement, and liability.

(a) *Authority.* This regulation, known as Regulation Z, is issued by the Board of Governors of the Federal Reserve System to implement the Federal Truth in Lending Act, which is contained in title I of the Consumer Credit Protection Act, as amended (15 U.S.C. 1601 *et seq.*). This regulation also implements title XII, section 1204 of the Competitive

[51] The number of institutions of higher learning that granted college degrees in 2005. *See* Upcoming Statistical Abstract of the United States: 2008. (available at *http://www.census.gov/Press-Release/www/2007/cb07ff-11.pdf*).

[52] The number of creditors that are a party to one or more college credit card agreements is unknown.

[53] Creditors with credit card activity. Under proposed § 226.58, the Board will assume burden for creditors regulated by the: Office of the Comptroller of the Currency (OCC), Office of Thrift Supervision (OTS), Federal Deposit Insurance Corporation (FDIC), National Credit Union Administration (NCUA), and Federal Trade Commission.

[54] The burden estimate for this rulemaking does not include the burden addressing changes to implement provisions of Closed-End Mortgages (Docket No. R–1366) or the Home-Equity Lines of Credit (Docket No. R–1367), as announced in separate proposed rulemakings. *See* 74 FR 43232 and 74 FR 43428.

Equality Banking Act of 1987 (Pub. L. 100–86, 101 Stat. 552). Information-collection requirements contained in this regulation have been approved by the Office of Management and Budget under the provisions of 44 U.S.C. 3501 *et seq.* and have been assigned OMB No. 7100–0199.

(b) *Purpose.* The purpose of this regulation is to promote the informed use of consumer credit by requiring disclosures about its terms and cost. The regulation also gives consumers the right to cancel certain credit transactions that involve a lien on a consumer's principal dwelling, regulates certain credit card practices, and provides a means for fair and timely resolution of credit billing disputes. The regulation does not govern charges for consumer credit. The regulation requires a maximum interest rate to be stated in variable-rate contracts secured by the consumer's dwelling. It also imposes limitations on home-equity plans that are subject to the requirements of § 226.5b and mortgages that are subject to the requirements of § 226.32. The regulation prohibits certain acts or practices in connection with credit secured by a consumer's principal dwelling. The regulation also regulates certain practices of creditors who extend private education loans as defined in § 226.46(b)(5).

(c) *Coverage.* (1) In general, this regulation applies to each individual or business that offers or extends credit when four conditions are met:

(i) The credit is offered or extended to consumers;

(ii) The offering or extension of credit is done regularly; [1]

(iii) The credit is subject to a finance charge or is payable by a written agreement in more than four installments; and

(iv) The credit is primarily for personal, family, or household purposes.

(2) If a credit card is involved, however, certain provisions apply even if the credit is not subject to a finance charge, or is not payable by a written agreement in more than four installments, or if the credit card is to be used for business purposes.

(3) In addition, certain requirements of § 226.5b apply to persons who are not creditors but who provide applications for home-equity plans to consumers.

(4) Furthermore, certain requirements of § 226.57 apply to institutions of higher education.

(d) *Organization.* The regulation is divided into subparts and appendices as follows:

(1) Subpart A contains general information. It sets forth:

(i) The authority, purpose, coverage, and organization of the regulation;

(ii) The definitions of basic terms;

(iii) The transactions that are exempt from coverage; and (iv) the method of determining the finance charge.

(2) Subpart B contains the rules for open-end credit. It requires that account-opening disclosures and periodic statements be provided, as well as additional disclosures for credit and charge card applications and solicitations and for home-equity plans subject to the requirements of § 226.5a and § 226.5b, respectively. It also describes special rules that apply to credit card transactions, treatment of payments and credit balances, procedures for resolving credit billing errors, annual percentage rate calculations, rescission requirements, and advertising.

(3) Subpart C relates to closed-end credit. It contains rules on disclosures, treatment of credit balances, annual percentages rate calculations, rescission requirements, and advertising.

(4) Subpart D contains rules on oral disclosures, disclosures in languages other than English, record retention, effect on State laws, State exemptions, and rate limitations.

(5) Subpart E contains special rules for certain mortgage transactions. Section 226.32 requires certain disclosures and provides limitations for loans that have rates and fees above specified amounts. Section 226.33 requires disclosures, including the total annual loan cost rate, for reverse mortgage transactions. Section 226.34 prohibits specific acts and practices in connection with mortgage transactions that are subject to § 226.32. Section 226.35 prohibits specific acts and practices in connection with higher-priced mortgage loans, as defined in § 226.35(a). Section 226.36 prohibits specific acts and practices in connection with credit secured by a consumer's principal dwelling.

(6) Subpart F relates to private education loans. It contains rules on disclosures, limitations on changes in terms after approval, the right to cancel the loan, and limitations on co-branding in the marketing of private education loans.

(7) Subpart G relates to credit card accounts under an open-end (not home-secured) consumer credit plan (except for § 226.57(c), which applies to all open-end credit plans). Section 226.51 contains rules on evaluation of a consumer's ability to make the required payments under the terms of an account. Section 226.52 limits the fees that can be charged to an open-end (not home-secured) consumer credit plan during the first year after account opening. Section 226.53 contains rules on allocation of payments in excess of the minimum payment. Section 226.54 sets forth certain limitations on the imposition of finance charges as the result of a loss of a grace period. Section 226.55 contains limitations on increases in annual percentage rates, fees, and charges for credit card accounts. Section 226.56 prohibits the assessment of fees or charges for over-the-limit transactions unless the consumer affirmatively consents to the creditor's paying of over-the-limit transactions. Section 226.57 sets forth rules for marketing of open-end credit to college students. Section 226.58 sets for requirements for the Internet posting of credit card accounts under an open-end (not home-secured) consumer credit plan.

(8) Several appendices contain information such as the procedures for determinations about State laws, State exemptions and issuance of staff interpretations, special rules for certain kinds of credit plans, a list of enforcement agencies, and the rules for computing annual percentage rates in closed-end credit transactions and total-annual-loan-cost rates for reverse mortgage transactions.

(e) *Enforcement and liability.* Section 108 of the act contains the administrative enforcement provisions. Sections 112, 113, 130, 131, and 134 contain provisions relating to liability for failure to comply with the requirements of the act and the regulation. Section 1204(c) of title XII of the Competitive Equality Banking Act of 1987, Public Law 100–86, 101 Stat. 552, incorporates by reference administrative enforcement and civil liability provisions of sections 108 and 130 of the act.

3. Section 226.2 is revised to read as follows:

§ 226.2 Definitions and rules of construction.

(a) *Definitions.* For purposes of this regulation, the following definitions apply:

(1) *Act* means the Truth in Lending Act (15 U.S.C. 1601 *et seq.*).

(2) *Advertisement* means a commercial message in any medium that promotes, directly or indirectly, a credit transaction.

(3) [Reserved] [2]

(4) *Billing cycle* or *cycle* means the interval between the days or dates of regular periodic statements. These intervals shall be equal and no longer

[1] [Reserved]

[2] [Reserved]

than a quarter of a year. An interval will be considered equal if the number of days in the cycle does not vary more than four days from the regular day or date of the periodic statement.

(5) *Board* means the Board of Governors of the Federal Reserve System.

(6) *Business day* means a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions. However, for purposes of rescission under §§ 226.15 and 226.23, and for purposes of §§ 226.19(a)(1)(ii), 226.19(a)(2), 226.31, and 226.46(d)(4), the term means all calendar days except Sundays and the legal public holidays specified in 5 U.S.C. 6103(a), such as New Year's Day, the Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.

(7) *Card issuer* means a person that issues a credit card or that person's agent with respect to the card.

(8) *Cardholder* means a natural person to whom a credit card is issued for consumer credit purposes, or a natural person who has agreed with the card issuer to pay consumer credit obligations arising from the issuance of credit card to another natural person. For purposes of § 226.12(a) and (b), the term includes any person to whom a credit card is issued for any purpose, including business, commercial or agricultural use, or a person who has agreed with the card issuer to pay obligations arising from the issuance of such a credit card to another person.

(9) *Cash price* means the price at which a creditor, in the ordinary course of business, offers to sell for cash property or service that is the subject of the transaction. At the creditor's option, the term may include the price of accessories, services related to the sale, service contracts and taxes and fees for license, title, and registration. The term does not include any finance charge.

(10) *Closed-end credit* means consumer credit other than ''open-end credit'' as defined in this section.

(11) *Consumer* means a cardholder or natural person to whom consumer credit is offered or extended. However, for purposes of rescission under §§ 226.15 and 226.23, the term also includes a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person's ownership interest in the dwelling is or will be subject to the security interest.

(12) *Consumer credit* means credit offered or extended to a consumer primarily for personal, family, or household purposes.

(13) *Consummation* means the time that a consumer becomes contractually obligated on a credit transaction.

(14) *Credit* means the right to defer payment of debt or to incur debt and defer its payment.

(15)(i) *Credit card* means any card, plate, or other single credit device that may be used from time to time to obtain credit.

(ii) *Credit card account under an open-end (not home-secured) consumer credit plan* means any credit account accessed by a credit card, except:

(A) A credit card that accesses a home-equity plan subject to the requirements of § 226.5b; or

(B) An overdraft line of credit accessed by a debit card.

(iii) *Charge card* means a credit card on an account for which no periodic rate is used to compute a finance charge.

(16) *Credit sale* means a sale in which the seller is a creditor. The term includes a bailment or lease (unless terminable without penalty at any time by the consumer) under which the consumer—

(i) Agrees to pay as compensation for use a sum substantially equivalent to, or in excess of, the total value of the property and service involved; and

(ii) Will become (or has the option to become), for no additional consideration or for nominal consideration, the owner of the property upon compliance with the agreement.

(17) *Creditor* means:

(i) A person who regularly extends consumer credit [3] that is subject to a finance charge or is payable by written agreement in more than four installments (not including a down payment), and to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no note or contract.

(ii) For purposes of §§ 226.4(c)(8) (Discounts), 226.9(d) (Finance charge imposed at time of transaction), and 226.12(e) (Prompt notification of returns and crediting of refunds), a person that honors a credit card.

(iii) For purposes of subpart B, any card issuer that extends either open-end credit or credit that is not subject to a finance charge and is not payable by written agreement in more than four installments.

(iv) For purposes of subpart B (except for the credit and charge card disclosures contained in §§ 226.5a and 226.9(e) and (f), the finance charge disclosures contained in § 226.6(a)(1) and (b)(3)(i) and § 226.7(a)(4) through (7) and (b)(4) through (6) and the right of rescission set forth in § 226.15) and subpart C, any card issuer that extends closed-end credit that is subject to a finance charge or is payable by written agreement in more than four installments.

(v) A person regularly extends consumer credit only if it extended credit (other than credit subject to the requirements of § 226.32) more than 25 times (or more than 5 times for transactions secured by a dwelling) in the preceding calendar year. If a person did not meet these numerical standards in the preceding calendar year, the numerical standards shall be applied to the current calendar year. A person regularly extends consumer credit if, in any 12-month period, the person originates more than one credit extension that is subject to the requirements of § 226.32 or one or more such credit extensions through a mortgage broker.

(18) *Downpayment* means an amount, including the value of property used as a trade-in, paid to a seller to reduce the cash price of goods or services purchased in a credit sale transaction. A deferred portion of a downpayment may be treated as part of the downpayment if it is payable not later than the due date of the second otherwise regularly scheduled payment and is not subject to a finance charge.

(19) *Dwelling* means a residential structure that contains one to four units, whether or not that structure is attached to real property. The term includes an individual condominium unit, cooperative unit, mobile home, and trailer, if it is used as a residence.

(20) *Open-end credit* means consumer credit extended by a creditor under a plan in which:

(i) The creditor reasonably contemplates repeated transactions;

(ii) The creditor may impose a finance charge from time to time on an outstanding unpaid balance; and

(iii) The amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.

(21) *Periodic rate* means a rate of finance charge that is or may be imposed by a creditor on a balance for a day, week, month, or other subdivision of a year.

(22) *Person* means a natural person or an organization, including a corporation, partnership, proprietorship, association, cooperative, estate, trust, or government unit.

(23) *Prepaid finance charge* means any finance charge paid separately in

[3] [Reserved]

cash or by check before or at consummation of a transaction, or withheld from the proceeds of the credit at any time.

(24) *Residential mortgage transaction* means a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained in the consumer's principal dwelling to finance the acquisition or initial construction of that dwelling.

(25) *Security interest* means an interest in property that secures performance of a consumer credit obligation and that is recognized by State or Federal law. It does not include incidental interests such as interests in proceeds, accessions, additions, fixtures, insurance proceeds (whether or not the creditor is a loss payee or beneficiary), premium rebates, or interests in after-acquired property. For purposes of disclosures under §§ 226.6 and 226.18, the term does not include an interest that arises solely by operation of law. However, for purposes of the right of rescission under §§ 226.15 and 226.23, the term does include interests that arise solely by operation of law.

(26) *State* means any State, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(b) *Rules of construction.* For purposes of this regulation, the following rules of construction apply:

(1) Where appropriate, the singular form of a word includes the plural form and plural includes singular.

(2) Where the words *obligation* and *transaction* are used in the regulation, they refer to a consumer credit obligation or transaction, depending upon the context. Where the work *credit* is used in the regulation, it means *consumer credit* unless the context clearly indicates otherwise.

(3) Unless defined in this regulation, the words used have the meanings given to them by State law or contract.

(4) Footnotes have the same legal effect as the text of the regulation.

(5) Where the word *amount* is used in this regulation to describe disclosure requirements, it refers to a numerical amount.

4. Section 226.3 is revised to read as follows:

§ 226.3 Exempt transactions.

This regulation does not apply to the following: [4]

(a) *Business, commercial, agricultural, or organizational credit.*

(1) An extension of credit primarily for a business, commercial or agricultural purpose.

(2) An extension of credit to other than a natural person, including credit to government agencies or instrumentalities.

(b) *Credit over $25,000 not secured by real property or a dwelling.* An extension of credit in which the amount financed exceeds $25,000 or in which there is an express written commitment to extend credit in excess of $25,000, unless the extension of credit is:

(1) Secured by real property, or by personal property used or expected to be used as the principal dwelling of the consumer; or

(2) A private education loan as defined in § 226.46(b)(5).

(c) *Public utility credit.* An extension of credit that involves public utility services provided through pipe, wire, other connected facilities, or radio or similar transmission (including extensions of such facilities), if the charges for service, delayed payment, or any discounts for prompt payment are filed with or regulated by any government unit. The financing of durable goods or home improvements by a public utility is not exempt.

(d) *Securities or commodities accounts.* Transactions in securities or commodities accounts in which credit is extended by a broker-dealer registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission.

(e) *Home fuel budget plans.* An installment agreement for the purchase of home fuels in which no finance charge is imposed.

(f) *Student loan programs.* Loans made, insured, or guaranteed pursuant to a program authorized by title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 *et seq.*).

(g) *Employer-sponsored retirement plans.* An extension of credit to a participant in an employer-sponsored retirement plan qualified under Section 401(a) of the Internal Revenue Code, a tax-sheltered annuity under Section 403(b) of the Internal Revenue Code, or an eligible governmental deferred compensation plan under Section 457(b) of the Internal Revenue Code (26 U.S.C. 401(a); 26 U.S.C. 403(b); 26 U.S.C. 457(b)), provided that the extension of credit is comprised of fully vested funds from such participant's account and is made in compliance with the Internal Revenue Code (26 U.S.C. 1 *et seq.*).

5. Section 226.4 is revised to read as follows:

§ 226.4 Finance charge.

(a) *Definition.* The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.

(1) *Charges by third parties.* The finance charge includes fees and amounts charged by someone other than the creditor, unless otherwise excluded under this section, if the creditor:

(i) Requires the use of a third party as a condition of or an incident to the extension of credit, even if the consumer can choose the third party; or

(ii) Retains a portion of the third-party charge, to the extent of the portion retained.

(2) *Special rule; closing agent charges.* Fees charged by a third party that conducts the loan closing (such as a settlement agent, attorney, or escrow or title company) are finance charges only if the creditor—

(i) Requires the particular services for which the consumer is charged;

(ii) Requires the imposition of the charge; or

(iii) Retains a portion of the third-party charge, to the extent of the portion retained.

(3) *Special rule; mortgage broker fees.* Fees charged by a mortgage broker (including fees paid by the consumer directly to the broker or to the creditor for delivery to the broker) are finance charges even if the creditor does not require the consumer to use a mortgage broker and even if the creditor does not retain any portion of the charge.

(b) *Examples of finance charges.* The finance charge includes the following types of charges, except for charges specifically excluded by paragraphs (c) through (e) of this section:

(1) Interest, time price differential, and any amount payable under an add-on or discount system of additional charges.

(2) Service, transaction, activity, and carrying charges, including any charge imposed on a checking or other transaction account to the extent that the charge exceeds the charge for a similar account without a credit feature.

(3) Points, loan fees, assumption fees, finder's fees, and similar charges.

(4) Appraisal, investigation, and credit report fees.

(5) Premiums or other charges for any guarantee or insurance protecting the creditor against the consumer's default or other credit loss.

[4] [Reserved]

(6) Charges imposed on a creditor by another person for purchasing or accepting a consumer's obligation, if the consumer is required to pay the charges in cash, as an addition to the obligation, or as a deduction from the proceeds of the obligation.

(7) Premiums or other charges for credit life, accident, health, or loss-of-income insurance, written in connection with a credit transaction.

(8) Premiums or other charges for insurance against loss of or damage to property, or against liability arising out of the ownership or use of property, written in connection with a credit transaction.

(9) Discounts for the purpose of inducing payment by a means other than the use of credit.

(10) Charges or premiums paid for debt cancellation or debt suspension coverage written in connection with a credit transaction, whether or not the coverage is insurance under applicable law.

(c) *Charges excluded from the finance charge.* The following charges are not finance charges:

(1) Application fees charged to all applicants for credit, whether or not credit is actually extended.

(2) Charges for actual unanticipated late payment, for exceeding a credit limit, or for delinquency, default, or a similar occurrence.

(3) Charges imposed by a financial institution for paying items that overdraw an account, unless the payment of such items and the imposition of the charge were previously agreed upon in writing.

(4) Fees charged for participation in a credit plan, whether assessed on an annual or other periodic basis.

(5) Seller's points.

(6) Interest forfeited as a result of an interest reduction required by law on a time deposit used as security for an extension of credit.

(7) *Real-estate related fees.* The following fees in a transaction secured by real property or in a residential mortgage transaction, if the fees are bona fide and reasonable in amount:

(i) Fees for title examination, abstract of title, title insurance, property survey, and similar purposes.

(ii) Fees for preparing loan-related documents, such as deeds, mortgages, and reconveyance or settlement documents.

(iii) Notary and credit-report fees.

(iv) Property appraisal fees or fees for inspections to assess the value or condition of the property if the service is performed prior to closing, including fees related to pest-infestation or flood-hazard determinations.

(v) Amounts required to be paid into escrow or trustee accounts if the amounts would not otherwise be included in the finance charge.

(8) Discounts offered to induce payment for a purchase by cash, check, or other means, as provided in section 167(b) of the Act.

(d) *Insurance and debt cancellation and debt suspension coverage.*

(1) *Voluntary credit insurance premiums.* Premiums for credit life, accident, health, or loss-of-income insurance may be excluded from the finance charge if the following conditions are met:

(i) The insurance coverage is not required by the creditor, and this fact is disclosed in writing.

(ii) The premium for the initial term of insurance coverage is disclosed in writing. If the term of insurance is less than the term of the transaction, the term of insurance also shall be disclosed. The premium may be disclosed on a unit-cost basis only in open-end credit transactions, closed-end credit transactions by mail or telephone under § 226.17(g), and certain closed-end credit transactions involving an insurance plan that limits the total amount of indebtedness subject to coverage.

(iii) The consumer signs or initials an affirmative written request for the insurance after receiving the disclosures specified in this paragraph, except as provided in paragraph (d)(4) of this section. Any consumer in the transaction may sign or initial the request.

(2) *Property insurance premiums.* Premiums for insurance against loss of or damage to property, or against liability arising out of the ownership or use of property, including single interest insurance if the insurer waives all right of subrogation against the consumer,[5] may be excluded from the finance charge if the following conditions are met:

(i) The insurance coverage may be obtained from a person of the consumer's choice,[6] and this fact is disclosed. (A creditor may reserve the right to refuse to accept, for reasonable cause, an insurer offered by the consumer.)

(ii) If the coverage is obtained from or through the creditor, the premium for the initial term of insurance coverage shall be disclosed. If the term of insurance is less than the term of the transaction, the term of insurance shall also be disclosed. The premium may be disclosed on a unit-cost basis only in open-end credit transactions, closed-end credit transactions by mail or telephone under § 226.17(g), and certain closed-end credit transactions involving an insurance plan that limits the total amount of indebtedness subject to coverage.

(3) *Voluntary debt cancellation or debt suspension fees.* Charges or premiums paid for debt cancellation coverage for amounts exceeding the value of the collateral securing the obligation or for debt cancellation or debt suspension coverage in the event of the loss of life, health, or income or in case of accident may be excluded from the finance charge, whether or not the coverage is insurance, if the following conditions are met:

(i) The debt cancellation or debt suspension agreement or coverage is not required by the creditor, and this fact is disclosed in writing;

(ii) The fee or premium for the initial term of coverage is disclosed in writing. If the term of coverage is less than the term of the credit transaction, the term of coverage also shall be disclosed. The fee or premium may be disclosed on a unit-cost basis only in open-end credit transactions, closed-end credit transactions by mail or telephone under § 226.17(g), and certain closed-end credit transactions involving a debt cancellation agreement that limits the total amount of indebtedness subject to coverage;

(iii) The following are disclosed, as applicable, for debt suspension coverage: That the obligation to pay loan principal and interest is only suspended, and that interest will continue to accrue during the period of suspension.

(iv) The consumer signs or initials an affirmative written request for coverage after receiving the disclosures specified in this paragraph, except as provided in paragraph (d)(4) of this section. Any consumer in the transaction may sign or initial the request.

(4) *Telephone purchases.* If a consumer purchases credit insurance or debt cancellation or debt suspension coverage for an open-end (not home-secured) plan by telephone, the creditor must make the disclosures under paragraphs (d)(1)(i) and (ii) or (d)(3)(i) through (iii) of this section, as applicable, orally. In such a case, the creditor shall:

(i) Maintain evidence that the consumer, after being provided the disclosures orally, affirmatively elected to purchase the insurance or coverage; and

(ii) Mail the disclosures under paragraphs (d)(1)(i) and (ii) or (d)(3)(i) through (iii) of this section, as

[5] [Reserved]

[6] [Reserved]

applicable, within three business days after the telephone purchase.

(e) *Certain security interest charges.* If itemized and disclosed, the following charges may be excluded from the finance charge:

(1) Taxes and fees prescribed by law that actually are or will be paid to public officials for determining the existence of or for perfecting, releasing, or satisfying a security interest.

(2) The premium for insurance in lieu of perfecting a security interest to the extent that the premium does not exceed the fees described in paragraph (e)(1) of this section that otherwise would be payable.

(3) *Taxes on security instruments.* Any tax levied on security instruments or on documents evidencing indebtedness if the payment of such taxes is a requirement for recording the instrument securing the evidence of indebtedness.

(f) *Prohibited offsets.* Interest, dividends, or other income received or to be received by the consumer on deposits or investments shall not be deducted in computing the finance charge.

Subpart B—Open-End Credit

6. Section 226.5 is revised to read as follows:

§ 226.5 General disclosure requirements.

(a) *Form of disclosures.* (1) *General.* (i) The creditor shall make the disclosures required by this subpart clearly and conspicuously.

(ii) The creditor shall make the disclosures required by this subpart in writing,[7] in a form that the consumer may keep,[8] except that:

(A) The following disclosures need not be written: Disclosures under § 226.6(b)(3) of charges that are imposed as part of an open-end (not home-secured) plan that are not required to be disclosed under § 226.6(b)(2) and related disclosures under § 226.9(c)(2)(iii)(B) of charges; disclosures under § 226.9(c)(2)(vi); disclosures under § 226.9(d) when a finance charge is imposed at the time of the transaction; and disclosures under § 226.56(b)(1)(i).

(B) The following disclosures need not be in a retainable form: Disclosures that need not be written under paragraph (a)(1)(ii)(A) of this section; disclosures for credit and charge card applications and solicitations under § 226.5a; home-equity disclosures under § 226.5b(d); the alternative summary billing-rights statement under § 226.9(a)(2); the credit and charge card renewal disclosures required under § 226.9(e); and the payment requirements under § 226.10(b), except as provided in § 226.7(b)(13).

(iii) The disclosures required by this subpart may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*). The disclosures required by §§ 226.5a, 226.5b, and 226.16 may be provided to the consumer in electronic form without regard to the consumer consent or other provisions of the E-Sign Act in the circumstances set forth in those sections.

(2) *Terminology.* (i) Terminology used in providing the disclosures required by this subpart shall be consistent.

(ii) For home-equity plans subject to § 226.5b, the terms *finance charge* and *annual percentage rate,* when required to be disclosed with a corresponding amount or percentage rate, shall be more conspicuous than any other required disclosure.[9] The terms need not be more conspicuous when used for periodic statement disclosures under § 226.7(a)(4) and for advertisements under § 226.16.

(iii) If disclosures are required to be presented in a tabular format pursuant to paragraph (a)(3) of this section, the term *penalty APR* shall be used, as applicable. The term *penalty APR* need not be used in reference to the annual percentage rate that applies with the loss of a promotional rate, assuming the annual percentage rate that applies is not greater than the annual percentage rate that would have applied at the end of the promotional period; or if the annual percentage rate that applies with the loss of a promotional rate is a variable rate, the annual percentage rate is calculated using the same index and margin as would have been used to calculate the annual percentage rate that would have applied at the end of the promotional period. If credit insurance or debt cancellation or debt suspension coverage is required as part of the plan, the term *required* shall be used and the program shall be identified by its name. If an annual percentage rate is required to be presented in a tabular format pursuant to paragraph (a)(3)(i) or (a)(3)(iii) of this section, the term *fixed,* or a similar term, may not be used to describe such rate unless the creditor also specifies a time period that the rate will be fixed and the rate will not increase during that period, or if no such time period is provided, the rate will not increase while the plan is open.

(3) *Specific formats.* (i) Certain disclosures for credit and charge card applications and solicitations must be provided in a tabular format in accordance with the requirements of § 226.5a(a)(2).

(ii) Certain disclosures for home-equity plans must precede other disclosures and must be given in accordance with the requirements of § 226.5b(a).

(iii) Certain account-opening disclosures must be provided in a tabular format in accordance with the requirements of § 226.6(b)(1).

(iv) Certain disclosures provided on periodic statements must be grouped together in accordance with the requirements of § 226.7(b)(6) and (b)(13).

(v) Certain disclosures provided on periodic statements must be given in accordance with the requirements of § 226.7(b)(12).

(vi) Certain disclosures accompanying checks that access a credit card account must be provided in a tabular format in accordance with the requirements of § 226.9(b)(3).

(vii) Certain disclosures provided in a change-in-terms notice must be provided in a tabular format in accordance with the requirements of § 226.9(c)(2)(iv)(C).

(viii) Certain disclosures provided when a rate is increased due to delinquency, default or as a penalty must be provided in a tabular format in accordance with the requirements of § 226.9(g)(3)(ii).

(b) *Time of disclosures.* (1) *Account-opening disclosures.* (i) *General rule.* The creditor shall furnish account-opening disclosures required by § 226.6 before the first transaction is made under the plan.

(ii) *Charges imposed as part of an open-end (not home-secured) plan.* Charges that are imposed as part of an open-end (not home-secured) plan and are not required to be disclosed under § 226.6(b)(2) may be disclosed after account opening but before the consumer agrees to pay or becomes obligated to pay for the charge, provided they are disclosed at a time and in a manner that a consumer would be likely to notice them. This provision does not apply to charges imposed as part of a home-equity plan subject to the requirements of § 226.5b.

(iii) *Telephone purchases.* Disclosures required by § 226.6 may be provided as soon as reasonably practicable after the first transaction if:

(A) The first transaction occurs when a consumer contacts a merchant by

[7] [Reserved]

[8] [Reserved]

[9] [Reserved]

telephone to purchase goods and at the same time the consumer accepts an offer to finance the purchase by establishing an open-end plan with the merchant or third-party creditor;

(B) The merchant or third-party creditor permits consumers to return any goods financed under the plan and provides consumers with a sufficient time to reject the plan and return the goods free of cost after the merchant or third-party creditor has provided the written disclosures required by § 226.6; and

(C) The consumer's right to reject the plan and return the goods is disclosed to the consumer as a part of the offer to finance the purchase.

(iv) *Membership fees.* (A) *General.* In general, a creditor may not collect any fee before account-opening disclosures are provided. A creditor may collect, or obtain the consumer's agreement to pay, membership fees, including application fees excludable from the finance charge under § 226.4(c)(1), before providing account-opening disclosures if, after receiving the disclosures, the consumer may reject the plan and have no obligation to pay these fees (including application fees) or any other fee or charge. A membership fee for purposes of this paragraph has the same meaning as a fee for the issuance or availability of credit described in § 226.5a(b)(2). If the consumer rejects the plan, the creditor must promptly refund the membership fee if it has been paid, or take other action necessary to ensure the consumer is not obligated to pay that fee or any other fee or charge.

(B) *Home-equity plans.* Creditors offering home-equity plans subject to the requirements of § 226.5b are not subject to the requirements of paragraph (b)(1)(iv)(A) of this section.

(v) *Application fees.* A creditor may collect an application fee excludable from the finance charge under § 226.4(c)(1) before providing account-opening disclosures. However, if a consumer rejects the plan after receiving account-opening disclosures, the consumer must have no obligation to pay such an application fee, or if the fee was paid, it must be refunded. *See* § 226.5(b)(1)(iv).

(2) *Periodic statements.* (i) The creditor shall mail or deliver a periodic statement as required by § 226.7 for each billing cycle at the end of which an account has a debit or credit balance of more than $1 or on which a finance charge has been imposed. A periodic statement need not be sent for an account if the creditor deems it uncollectible, if delinquency collection proceedings have been instituted, if the creditor has charged off the account in accordance with loan-loss provisions and will not charge any additional fees or interest on the account, or if furnishing the statement would violate Federal law.

(ii) Creditors must adopt reasonable procedures designed to ensure that periodic statements are mailed or delivered at least 21 days prior to the payment due date and the date on which any grace period expires.[10] A creditor that fails to meet this requirement shall not treat a payment as late for any purpose or collect any finance or other charge imposed as a result of such failure. For purposes of this paragraph, ''grace period'' means a period within which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate.

(iii) The timing requirement under this paragraph (b)(2) does not apply if the creditor is unable to meet the requirement because of an act of God, war, civil disorder, natural disaster, or strike.

(3) *Credit and charge card application and solicitation disclosures.* The card issuer shall furnish the disclosures for credit and charge card applications and solicitations in accordance with the timing requirements of § 226.5a.

(4) *Home-equity plans.* Disclosures for home-equity plans shall be made in accordance with the timing requirements of § 226.5b(b).

(c) *Basis of disclosures and use of estimates.* Disclosures shall reflect the terms of the legal obligation between the parties. If any information necessary for accurate disclosure is unknown to the creditor, it shall make the disclosure based on the best information reasonably available and shall state clearly that the disclosure is an estimate.

(d) *Multiple creditors; multiple consumers.* If the credit plan involves more than one creditor, only one set of disclosures shall be given, and the creditors shall agree among themselves which creditor must comply with the requirements that this regulation imposes on any or all of them. If there is more than one consumer, the disclosures may be made to any consumer who is primarily liable on the account. If the right of rescission under § 226.15 is applicable, however, the disclosures required by §§ 226.6 and 226.15(b) shall be made to each consumer having the right to rescind.

(e) *Effect of subsequent events.* If a disclosure becomes inaccurate because of an event that occurs after the creditor mails or delivers the disclosures, the resulting inaccuracy is not a violation of this regulation, although new disclosures may be required under § 226.9(c).

7. Section 226.5a is revised to read as follows:

§ 226.5a Credit and charge card applications and solicitations.

(a) *General rules.* The card issuer shall provide the disclosures required under this section on or with a solicitation or an application to open a credit or charge card account.

(1) *Definition of solicitation.* For purposes of this section, the term *solicitation* means an offer by the card issuer to open a credit or charge card account that does not require the consumer to complete an application. A ''firm offer of credit'' as defined in section 603(l) of the Fair Credit Reporting Act (15 U.S.C. 1681a(l)) for a credit or charge card is a solicitation for purposes of this section.

(2) *Form of disclosures; tabular format.*

(i) The disclosures in paragraphs (b)(1) through (5) (except for (b)(1)(iv)(B)) and (b)(7) through (15) of this section made pursuant to paragraph (c), (d)(2), (e)(1) or (f) of this section generally shall be in the form of a table with headings, content, and format substantially similar to any of the applicable tables found in G–10 in appendix G to this part.

(ii) The table described in paragraph (a)(2)(i) of this section shall contain only the information required or permitted by this section. Other information may be presented on or with an application or solicitation, provided such information appears outside the required table.

(iii) Disclosures required by paragraphs (b)(1)(iv)(B) and (b)(6) of this section must be placed directly beneath the table.

(iv) When a tabular format is required, any annual percentage rate required to be disclosed pursuant to paragraph (b)(1) of this section, any introductory rate required to be disclosed pursuant to paragraph (b)(1)(ii) of this section, any rate that will apply after a premium initial rate expires required to be disclosed under paragraph (b)(1)(iii) of this section, and any fee or percentage amounts required to be disclosed pursuant to paragraphs (b)(2), (b)(4), (b)(8) through (b)(13) of this section must be disclosed in bold text. However, bold text shall not be used for: Any maximum limits on fee amounts disclosed in the table that do not relate to fees that vary by State; the amount of any periodic fee disclosed pursuant to paragraph (b)(2) of this section that is

[10] [Reserved]

not an annualized amount; and other annual percentage rates or fee amounts disclosed in the table.

(v) For an application or a solicitation that is accessed by the consumer in electronic form, the disclosures required under this section may be provided to the consumer in electronic form on or with the application or solicitation.

(vi)(A) Except as provided in paragraph (a)(2)(vi)(B) of this section, the table described in paragraph (a)(2)(i) of this section must be provided in a prominent location on or with an application or a solicitation.

(B) If the table described in paragraph (a)(2)(i) of this section is provided electronically, it must be provided in close proximity to the application or solicitation.

(3) *Fees based on a percentage.* If the amount of any fee required to be disclosed under this section is determined on the basis of a percentage of another amount, the percentage used and the identification of the amount against which the percentage is applied may be disclosed instead of the amount of the fee.

(4) *Fees that vary by State.* Card issuers that impose fees referred to in paragraphs (b)(8) through (12) of this section that vary by State may, at the issuer's option, disclosed in the table required by paragraph (a)(2) of this section, the specific fee applicable to the consumer's account, or the range of the fees, if the disclosure includes a statement that the amount of the fee varies by State and refers the consumer to a disclosure provided with the table where the amount of the fee applicable to the consumer's account is disclosed. A card issuer may not list fees for multiple states in the table.

(5) *Exceptions.* This section does not apply to:

(i) Home-equity plans accessible by a credit or charge card that are subject to the requirements of § 226.5b;

(ii) Overdraft lines of credit tied to asset accounts accessed by check-guarantee cards or by debit cards;

(iii) Lines of credit accessed by check-guarantee cards or by debit cards that can be used only at automated teller machines;

(iv) Lines of credit accessed solely by account numbers;

(v) Additions of a credit or charge card to an existing open-end plan;

(vi) General purpose applications unless the application, or material accompanying it, indicates that it can be used to open a credit or charge card account; or

(vii) Consumer-initiated requests for applications.

(b) *Required disclosures.* The card issuer shall disclose the items in this paragraph on or with an application or a solicitation in accordance with the requirements of paragraphs (c), (d), (e)(1) or (f) of this section. A credit card issuer shall disclose all applicable items in this paragraph except for paragraph (b)(7) of this section. A charge card issuer shall disclose the applicable items in paragraphs (b)(2), (4), (7) through (12), and (15) of this section.

(1) *Annual percentage rate.* Each periodic rate that may be used to compute the finance charge on an outstanding balance for purchases, a cash advance, or a balance transfer, expressed as an annual percentage rate (as determined by § 226.14(b)). When more than one rate applies for a category of transactions, the range of balances to which each rate is applicable shall also be disclosed. The annual percentage rate for purchases disclosed pursuant to this paragraph shall be in at least 16-point type, except for the following: Oral disclosures of the annual percentage rate for purchases; or a penalty rate that may apply upon the occurrence of one or more specific events.

(i) *Variable rate information.* If a rate disclosed under paragraph (b)(1) of this section is a variable rate, the card issuer shall also disclose the fact that the rate may vary and how the rate is determined. In describing how the applicable rate will be determined, the card issuer must identify the type of index or formula that is used in setting the rate. The value of the index and the amount of the margin that are used to calculate the variable rate shall not be disclosed in the table. A disclosure of any applicable limitations on rate increases or decreases shall not be included in the table.

(ii) *Discounted initial rate.* If the initial rate is an introductory rate, as that term is defined in § 226.16(g)(2)(ii), the card issuer must disclose in the table the introductory rate, the time period during which the introductory rate will remain in effect, and must use the term ''introductory'' or ''intro'' in immediate proximity to the introductory rate. The card issuer also must disclose the rate that would otherwise apply to the account pursuant to paragraph (b)(1) of this section. Where the rate is not tied to an index or formula, the card issuer must disclose the rate that will apply after the introductory rate expires. In a variable-rate account, the card issuer must disclose a rate based on the applicable index or formula in accordance with the accuracy requirements set forth in paragraphs (c), (d), or (e) of this section, as applicable.

(iii) *Premium initial rate.* If the initial rate is temporary and is higher than the rate that will apply after the temporary rate expires, the card issuer must disclose the premium initial rate pursuant to paragraph (b)(1) of this section and the time period during which the premium initial rate will remain in effect. Consistent with paragraph (b)(1) of this section, the premium initial rate for purchases must be in at least 16-point type. The issuer must also disclose in the table the rate that will apply after the premium initial rate expires in at least 16-point type.

(iv) *Penalty rates.* (A) *In general.* Except as provided in paragraph (b)(1)(iv)(B), if a rate may increase as a penalty for one or more events specified in the account agreement, such as a late payment or an extension of credit that exceeds the credit limit, the card issuer must disclose pursuant to paragraph (b)(1) of this section the increased rate that may apply, a brief description of the event or events that may result in the increased rate, and a brief description of how long the increased rate will remain in effect.

(B) *Introductory rates.* If the issuer discloses an introductory rate, as that term is defined in § 226.16(g)(2)(ii), in the table or in any written or electronic promotional materials accompanying applications or solicitations subject to paragraph (c) or (e) of this section, the issuer must briefly disclose directly beneath the table the circumstances, if any, under which the introductory rate may be revoked, and the type of rate that will apply after the introductory rate is revoked.

(v) *Rates that depend on consumer's creditworthiness.* If a rate cannot be determined at the time disclosures are given because the rate depends, at least in part, on a later determination of the consumer's creditworthiness, the card issuer must disclose the specific rates or the range of rates that could apply and a statement that the rate for which the consumer may qualify at account opening will depend on the consumer's creditworthiness, and other factors if applicable. If the rate that depends, at least in part, on a later determination of the consumer's creditworthiness is a penalty rate, as described in paragraph (b)(1)(iv) of this section, the card issuer at its option may disclose the highest rate that could apply, instead of disclosing the specific rates or the range of rates that could apply.

(vi) *APRs that vary by State.* Issuers imposing annual percentage rates that vary by State may, at the issuer's option, disclose in the table (A) the specific annual percentage rate applicable to the consumer's account, or (B) the range of

the annual percentage rates, if the disclosure includes a statement that the annual percentage rate varies by State and refers the consumer to a disclosure provided with the table where the annual percentage rate applicable to the consumer's account is disclosed. A card issuer may not list annual percentage rates for multiple states in the table.

(2) *Fees for issuance or availability.* (i) Any annual or other periodic fee that may be imposed for the issuance or availability of a credit or charge card, including any fee based on account activity or inactivity; how frequently it will be imposed; and the annualized amount of the fee.

(ii) Any non-periodic fee that relates to opening an account. A card issuer must disclose that the fee is a one-time fee.

(3) *Fixed finance charge; minimum interest charge.* Any fixed finance charge and a brief description of the charge. Any minimum interest charge if it exceeds $1.00 that could be imposed during a billing cycle, and a brief description of the charge. The $1.00 threshold amount shall be adjusted periodically by the Board to reflect changes in the Consumer Price Index. The Board shall calculate each year a price level adjusted minimum interest charge using the Consumer Price Index in effect on the June 1 of that year. When the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current minimum interest charge threshold has risen by a whole dollar, the minimum interest charge will be increased by $1.00. The issuer may, at its option, disclose in the table minimum interest charges below this threshold.

(4) *Transaction charges.* Any transaction charge imposed by the card issuer for the use of the card for purchases.

(5) *Grace period.* The date by which or the period within which any credit extended for purchases may be repaid without incurring a finance charge due to a periodic interest rate and any conditions on the availability of the grace period. If no grace period is provided, that fact must be disclosed. If the length of the grace period varies, the card issuer may disclose the range of days, the minimum number of days, or the average number of days in the grace period, if the disclosure is identified as a range, minimum, or average. In disclosing in the tabular format a grace period that applies to all types of purchases, the phrase ''How to Avoid Paying Interest on Purchases'' shall be used as the heading for the row describing the grace period. If a grace period is not offered on all types of purchases, in disclosing this fact in the tabular format, the phrase ''Paying Interest'' shall be used as the heading for the row describing this fact.

(6) *Balance computation method.* The name of the balance computation method listed in paragraph (g) of this section that is used to determine the balance for purchases on which the finance charge is computed, or an explanation of the method used if it is not listed. In determining which balance computation method to disclose, the card issuer shall assume that credit extended for purchases will not be repaid within the grace period, if any.

(7) *Statement on charge card payments.* A statement that charges incurred by use of the charge card are due when the periodic statement is received.

(8) *Cash advance fee.* Any fee imposed for an extension of credit in the form of cash or its equivalent.

(9) *Late payment fee.* Any fee imposed for a late payment.

(10) *Over-the-limit fee.* Any fee imposed for exceeding a credit limit.

(11) *Balance transfer fee.* Any fee imposed to transfer an outstanding balance.

(12) *Returned-payment fee.* Any fee imposed by the card issuer for a returned payment.

(13) *Required insurance, debt cancellation or debt suspension coverage.* (i) A fee for insurance described in § 226.4(b)(7) or debt cancellation or suspension coverage described in § 226.4(b)(10), if the insurance or debt cancellation or suspension coverage is required as part of the plan; and

(ii) A cross reference to any additional information provided about the insurance or coverage accompanying the application or solicitation, as applicable.

(14) *Available credit.* If a card issuer requires fees for the issuance or availability of credit described in paragraph (b)(2) of this section, or requires a security deposit for such credit, and the total amount of those required fees and/or security deposit that will be imposed and charged to the account when the account is opened is 15 percent or more of the minimum credit limit for the card, a card issuer must disclose the available credit remaining after these fees or security deposit are debited to the account, assuming that the consumer receives the minimum credit limit. In determining whether the 15 percent threshold test is met, the issuer must only consider fees for issuance or availability of credit, or a security deposit, that are required. If fees for issuance or availability are optional, these fees should not be considered in determining whether the disclosure must be given. Nonetheless, if the 15 percent threshold test is met, the issuer in providing the disclosure must disclose the amount of available credit calculated by excluding those optional fees, and the available credit including those optional fees. This paragraph does not apply with respect to fees or security deposits that are not debited to the account.

(15) *Web site reference.* A reference to the Web site established by the Board and a statement that consumers may obtain on the Web site information about shopping for and using credit cards.

(c) *Direct mail and electronic applications and solicitations.* (1) *General.* The card issuer shall disclose the applicable items in paragraph (b) of this section on or with an application or solicitation that is mailed to consumers or provided to consumers in electronic form.

(2) *Accuracy.* (i) Disclosures in direct mail applications and solicitations must be accurate as of the time the disclosures are mailed. An accurate variable annual percentage rate is one in effect within 60 days before mailing.

(ii) Disclosures provided in electronic form must be accurate as of the time they are sent, in the case of disclosures sent to a consumer's e-mail address, or as of the time they are viewed by the public, in the case of disclosures made available at a location such as a card issuer's Web site. An accurate variable annual percentage rate provided in electronic form is one in effect within 30 days before it is sent to a consumer's e-mail address, or viewed by the public, as applicable.

(d) *Telephone applications and solicitations.* (1) *Oral disclosure.* The card issuer shall disclose orally the information in paragraphs (b)(1) through (7) and (b)(14) of this section, to the extent applicable, in a telephone application or solicitation initiated by the card issuer.

(2) *Alternative disclosure.* The oral disclosure under paragraph (d)(1) of this section need not be given if the card issuer either:

(i)(A) Does not impose a fee described in paragraph (b)(2) of this section; or

(B) Imposes such a fee but provides the consumer with a right to reject the plan consistent with § 226.5(b)(1)(iv); and

(ii) The card issuer discloses in writing within 30 days after the consumer requests the card (but in no event later than the delivery of the card) the following:

(A) The applicable information in paragraph (b) of this section; and

(B) As applicable, the fact that the consumer has the right to reject the plan and not be obligated to pay fees described in paragraph (b)(2) or any other fees or charges until the consumer has used the account or made a payment on the account after receiving a billing statement.

(3) *Accuracy.* (i) The oral disclosures under paragraph (d)(1) of this section must be accurate as of the time they are given.

(ii) The alternative disclosures under paragraph (d)(2) of this section generally must be accurate as of the time they are mailed or delivered. A variable annual percentage rate is one that is accurate if it was:

(A) In effect at the time the disclosures are mailed or delivered; or

(B) In effect as of a specified date (which rate is then updated from time to time, but no less frequently than each calendar month).

(e) *Applications and solicitations made available to general public.* The card issuer shall provide disclosures, to the extent applicable, on or with an application or solicitation that is made available to the general public, including one contained in a catalog, magazine, or other generally available publication. The disclosures shall be provided in accordance with paragraph (e)(1) or (e)(2) of this section.

(1) *Disclosure of required credit information.* The card issuer may disclose in a prominent location on the application or solicitation the following:

(i) The applicable information in paragraph (b) of this section;

(ii) The date the required information was printed, including a statement that the required information was accurate as of that date and is subject to change after that date; and

(iii) A statement that the consumer should contact the card issuer for any change in the required information since it was printed, and a toll-free telephone number or a mailing address for that purpose.

(2) *No disclosure of credit information.* If none of the items in paragraph (b) of this section is provided on or with the application or solicitation, the card issuer may state in a prominent location on the application or solicitation the following:

(i) There are costs associated with the use of the card; and

(ii) The consumer may contact the card issuer to request specific information about the costs, along with a toll-free telephone number and a mailing address for that purpose.

(3) *Prompt response to requests for information.* Upon receiving a request for any of the information referred to in this paragraph, the card issuer shall promptly and fully disclose the information requested.

(4) *Accuracy.* The disclosures given pursuant to paragraph (e)(1) of this section must be accurate as of the date of printing. A variable annual percentage rate is accurate if it was in effect within 30 days before printing.

(f) *In-person applications and solicitations.* A card issuer shall disclose the information in paragraph (b) of this section, to the extent applicable, on or with an application or solicitation that is initiated by the card issuer and given to the consumer in person. A card issuer complies with the requirements of this paragraph if the issuer provides disclosures in accordance with paragraph (c)(1) or (e)(1) of this section.

(g) *Balance computation methods defined.* The following methods may be described by name. Methods that differ due to variations such as the allocation of payments, whether the finance charge begins to accrue on the transaction date or the date of posting the transaction, the existence or length of a grace period, and whether the balance is adjusted by charges such as late payment fees, annual fees and unpaid finance charges do not constitute separate balance computation methods.

(1)(i) *Average daily balance (including new purchases).* This balance is figured by adding the outstanding balance (including new purchases and deducting payments and credits) for each day in the billing cycle, and then dividing by the number of days in the billing cycle.

(ii) *Average daily balance (excluding new purchases).* This balance is figured by adding the outstanding balance (excluding new purchases and deducting payments and credits) for each day in the billing cycle, and then dividing by the number of days in the billing cycle.

(2) *Adjusted balance.* This balance is figured by deducting payments and credits made during the billing cycle from the outstanding balance at the beginning of the billing cycle.

(3) *Previous balance.* This balance is the outstanding balance at the beginning of the billing cycle.

(4) *Daily balance.* For each day in the billing cycle, this balance is figured by taking the beginning balance each day, adding any new purchases, and subtracting any payment and credits.

8. In § 226.6, revise paragraph (b) to read as follows:

§ 226.6 Account-opening disclosures.

* * * * *

(b) *Rules affecting open-end (not home-secured) plans.* The requirements of paragraph (b) of this section apply to plans other than home-equity plans subject to the requirements of § 226.5b.

(1) *Form of disclosures; tabular format for open-end (not home-secured) plans.* Creditors must provide the account-opening disclosures specified in paragraph (b)(2)(i) through (b)(2)(v) (except for (b)(2)(i)(D)(*2*)) and (b)(2)(vii) through (b)(2)(xiv) of this section in the form of a table with the headings, content, and format substantially similar to any of the applicable tables in G–17 in appendix G.

(i) *Highlighting.* In the table, any annual percentage rate required to be disclosed pursuant to paragraph (b)(2)(i) of this section; any introductory rate permitted to be disclosed pursuant to paragraph (b)(2)(i)(B) or required to be disclosed under paragraph (b)(2)(i)(F) of this section, any rate that will apply after a premium initial rate expires permitted to be disclosed pursuant to paragraph (b)(2)(i)(C) or required to be disclosed pursuant to paragraph (b)(2)(i)(F), and any fee or percentage amounts required to be disclosed pursuant to paragraphs (b)(2)(ii), (b)(2)(iv), (b)(2)(vii) through (b)(2)(xii) of this section must be disclosed in bold text. However, bold text shall not be used for: Any maximum limits on fee amounts disclosed in the table that do not relate to fees that vary by State; the amount of any periodic fee disclosed pursuant to paragraph (b)(2) of this section that is not an annualized amount; and other annual percentage rates or fee amounts disclosed in the table.

(ii) *Location.* Only the information required or permitted by paragraphs (b)(2)(i) through (b)(2)(v) (except for (b)(2)(i)(D)(*2*)) and (b)(2)(vii) through (b)(2)(xiv) of this section shall be in the table. Disclosures required by paragraphs (b)(2)(i)(D)(*2*), (b)(2)(vi) and (b)(2)(xv) of this section shall be placed directly below the table. Disclosures required by paragraphs (b)(3) through (b)(5) of this section that are not otherwise required to be in the table and other information may be presented with the account agreement or account-opening disclosure statement, provided such information appears outside the required table.

(iii) *Fees that vary by State.* Creditors that impose fees referred to in paragraphs (b)(2)(vii) through (b)(2)(xi) of this section that vary by State and that provide the disclosures required by paragraph (b) of this section in person at the time the open-end (not home-

secured) plan is established in connection with financing the purchase of goods or services may, at the creditor's option, disclose in the account-opening table (A) the specific fee applicable to the consumer's account, or (B) the range of the fees, if the disclosure includes a statement that the amount of the fee varies by State and refers the consumer to the account agreement or other disclosure provided with the account-opening table where the amount of the fee applicable to the consumer's account is disclosed. A creditor may not list fees for multiple states in the account-opening summary table.

(iv) *Fees based on a percentage.* If the amount of any fee required to be disclosed under this section is determined on the basis of a percentage of another amount, the percentage used and the identification of the amount against which the percentage is applied may be disclosed instead of the amount of the fee.

(2) *Required disclosures for account-opening table for open-end (not home-secured) plans.* A creditor shall disclose the items in this section, to the extent applicable:

(i) *Annual percentage rate.* Each periodic rate that may be used to compute the finance charge on an outstanding balance for purchases, a cash advance, or a balance transfer, expressed as an annual percentage rate (as determined by § 226.14(b)). When more than one rate applies for a category of transactions, the range of balances to which each rate is applicable shall also be disclosed. The annual percentage rate for purchases disclosed pursuant to this paragraph shall be in at least 16-point type, except for the following: A penalty rate that may apply upon the occurrence of one or more specific events.

(A) *Variable-rate information.* If a rate disclosed under paragraph (b)(2)(i) of this section is a variable rate, the creditor shall also disclose the fact that the rate may vary and how the rate is determined. In describing how the applicable rate will be determined, the creditor must identify the type of index or formula that is used in setting the rate. The value of the index and the amount of the margin that are used to calculate the variable rate shall not be disclosed in the table. A disclosure of any applicable limitations on rate increases or decreases shall not be included in the table.

(B) *Discounted initial rates.* If the initial rate is an introductory rate, as that term is defined in § 226.16(g)(2)(ii), the creditor must disclose the rate that would otherwise apply to the account pursuant to paragraph (b)(2)(i) of this section. Where the rate is not tied to an index or formula, the creditor must disclose the rate that will apply after the introductory rate expires. In a variable-rate account, the card issuer must disclose a rate based on the applicable index or formula in accordance with the accuracy requirements of paragraph (b)(4)(ii)(G) of this section. Except as provided in paragraph (b)(2)(i)(F) of this section, the creditor is not required to, but may disclose in the table the introductory rate along with the rate that would otherwise apply to the account if the creditor also discloses the time period during which the introductory rate will remain in effect, and uses the term ''introductory'' or ''intro'' in immediate proximity to the introductory rate.

(C) *Premium initial rate.* If the initial rate is temporary and is higher than the rate that will apply after the temporary rate expires, the creditor must disclose the premium initial rate pursuant to paragraph (b)(2)(i) of this section. Consistent with paragraph (b)(2)(i) of this section, the premium initial rate for purchases must be in at least 16-point type. Except as provided in paragraph (b)(2)(i)(F) of this section, the creditor is not required to, but may disclose in the table the rate that will apply after the premium initial rate expires if the creditor also discloses the time period during which the premium initial rate will remain in effect. If the creditor also discloses in the table the rate that will apply after the premium initial rate for purchases expires, that rate also must be in at least 16-point type.

(D) *Penalty rates.* (*1*) *In general.* Except as provided in paragraph (b)(2)(i)(D)(*2*) of this section, if a rate may increase as a penalty for one or more events specified in the account agreement, such as a late payment or an extension of credit that exceeds the credit limit, the creditor must disclose pursuant to paragraph (b)(2)(i) of this section the increased rate that may apply, a brief description of the event or events that may result in the increased rate, and a brief description of how long the increased rate will remain in effect. If more than one penalty rate may apply, the creditor at its option may disclose the highest rate that could apply, instead of disclosing the specific rates or the range of rates that could apply.

(*2*) *Introductory rates.* If the creditor discloses in the table an introductory rate, as that term is defined in § 226.16(g)(2)(ii), creditors must briefly disclose directly beneath the table the circumstances under which the introductory rate may be revoked, and the rate that will apply after the introductory rate is revoked.

(E) *Point of sale where APRs vary by State or based on creditworthiness.* Creditors imposing annual percentage rates that vary by State or based on the consumer's creditworthiness and providing the disclosures required by paragraph (b) of this section in person at the time the open-end (not home-secured) plan is established in connection with financing the purchase of goods or services may, at the creditor's option, disclose pursuant to paragraph (b)(2)(i) of this section in the account-opening table:

(*1*) The specific annual percentage rate applicable to the consumer's account; or

(*2*) The range of the annual percentage rates, if the disclosure includes a statement that the annual percentage rate varies by State or will be determined based on the consumer's creditworthiness and refers the consumer to the account agreement or other disclosure provided with the account-opening table where the annual percentage rate applicable to the consumer's account is disclosed. A creditor may not list annual percentage rates for multiple states in the account-opening table.

(F) *Credit card accounts under an open-end (not home-secured) consumer credit plan.* Notwithstanding paragraphs (b)(2)(i)(B) and (b)(2)(i)(C) of this section, for credit card accounts under an open-end (not home-secured) plan, issuers must disclose in the table required by paragraph (b)(1) of this section, any introductory rate that would apply to the account, consistent with the requirements of paragraph (b)(2)(i)(B) of this section, and any rate that would apply upon the expiration of a premium initial rate, consistent with the requirements of paragraph (b)(2)(i)(C) of this section.

(ii) *Fees for issuance or availability.* (A) Any annual or other periodic fee that may be imposed for the issuance or availability of an open-end plan, including any fee based on account activity or inactivity; how frequently it will be imposed; and the annualized amount of the fee.

(B) Any non-periodic fee that relates to opening the plan. A creditor must disclose that the fee is a one-time fee.

(iii) *Fixed finance charge; minimum interest charge.* Any fixed finance charge and a brief description of the charge. Any minimum interest charge if it exceeds $1.00 that could be imposed during a billing cycle, and a brief description of the charge. The $1.00 threshold amount shall be adjusted periodically by the Board to reflect changes in the Consumer Price Index. The Board shall calculate each year a

price level adjusted minimum interest charge using the Consumer Price Index in effect on the June 1 of that year. When the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current minimum interest charge threshold has risen by a whole dollar, the minimum interest charge will be increased by $1.00. The creditor may, at its option, disclose in the table minimum interest charges below this threshold.

(iv) *Transaction charges.* Any transaction charge imposed by the creditor for use of the open-end plan for purchases.

(v) *Grace period.* The date by which or the period within which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate and any conditions on the availability of the grace period. If no grace period is provided, that fact must be disclosed. If the length of the grace period varies, the creditor may disclose the range of days, the minimum number of days, or the average number of the days in the grace period, if the disclosure is identified as a range, minimum, or average. In disclosing in the tabular format a grace period that applies to all features on the account, the phrase ''How to Avoid Paying Interest'' shall be used as the heading for the row describing the grace period. If a grace period is not offered on all features of the account, in disclosing this fact in the tabular format, the phrase ''Paying Interest'' shall be used as the heading for the row describing this fact.

(vi) *Balance computation method.* The name of the balance computation method listed in § 226.5a(g) that is used to determine the balance on which the finance charge is computed for each feature, or an explanation of the method used if it is not listed, along with a statement that an explanation of the method(s) required by paragraph (b)(4)(i)(D) of this section is provided with the account-opening disclosures. In determining which balance computation method to disclose, the creditor shall assume that credit extended will not be repaid within any grace period, if any.

(vii) *Cash advance fee.* Any fee imposed for an extension of credit in the form of cash or its equivalent.

(viii) *Late payment fee.* Any fee imposed for a late payment.

(ix) *Over-the-limit fee.* Any fee imposed for exceeding a credit limit.

(x) *Balance transfer fee.* Any fee imposed to transfer an outstanding balance.

(xi) *Returned-payment fee.* Any fee imposed by the creditor for a returned payment.

(xii) *Required insurance, debt cancellation or debt suspension coverage.* (A) A fee for insurance described in § 226.4(b)(7) or debt cancellation or suspension coverage described in § 226.4(b)(10), if the insurance, or debt cancellation or suspension coverage is required as part of the plan; and

(B) A cross reference to any additional information provided about the insurance or coverage, as applicable.

(xiii) *Available credit.* If a creditor requires fees for the issuance or availability of credit described in paragraph (b)(2)(ii) of this section, or requires a security deposit for such credit, and the total amount of those required fees and/or security deposit that will be imposed and charged to the account when the account is opened is 15 percent or more of the minimum credit limit for the plan, a creditor must disclose the available credit remaining after these fees or security deposit are debited to the account. The determination whether the 15 percent threshold is met must be based on the minimum credit limit for the plan. However, the disclosure provided under this paragraph must be based on the actual initial credit limit provided on the account. In determining whether the 15 percent threshold test is met, the creditor must only consider fees for issuance or availability of credit, or a security deposit, that are required. If fees for issuance or availability are optional, these fees should not be considered in determining whether the disclosure must be given. Nonetheless, if the 15 percent threshold test is met, the creditor in providing the disclosure must disclose the amount of available credit calculated by excluding those optional fees, and the available credit including those optional fees. The creditor shall also disclose that the consumer has the right to reject the plan and not be obligated to pay those fees or any other fee or charges until the consumer has used the account or made a payment on the account after receiving a periodic statement. This paragraph does not apply with respect to fees or security deposits that are not debited to the account.

(xiv) *Web site reference.* For issuers of credit cards that are not charge cards, a reference to the Web site established by the Board and a statement that consumers may obtain on the Web site information about shopping for and using credit cards.

(xv) *Billing error rights reference.* A statement that information about consumers' right to dispute transactions is included in the account-opening disclosures.

(3) *Disclosure of charges imposed as part of open-end (not home-secured) plans.* A creditor shall disclose, to the extent applicable:

(i) For charges imposed as part of an open-end (not home-secured) plan, the circumstances under which the charge may be imposed, including the amount of the charge or an explanation of how the charge is determined. For finance charges, a statement of when the charge begins to accrue and an explanation of whether or not any time period exists within which any credit that has been extended may be repaid without incurring the charge. If such a time period is provided, a creditor may, at its option and without disclosure, elect not to impose a finance charge when payment is received after the time period expires.

(ii) Charges imposed as part of the plan are:

(A) Finance charges identified under § 226.4(a) and § 226.4(b).

(B) Charges resulting from the consumer's failure to use the plan as agreed, except amounts payable for collection activity after default, attorney's fees whether or not automatically imposed, and post-judgment interest rates permitted by law.

(C) Taxes imposed on the credit transaction by a State or other governmental body, such as documentary stamp taxes on cash advances.

(D) Charges for which the payment, or nonpayment, affect the consumer's access to the plan, the duration of the plan, the amount of credit extended, the period for which credit is extended, or the timing or method of billing or payment.

(E) Charges imposed for terminating a plan.

(F) Charges for voluntary credit insurance, debt cancellation or debt suspension.

(iii) Charges that are not imposed as part of the plan include:

(A) Charges imposed on a cardholder by an institution other than the card issuer for the use of the other institution's ATM in a shared or interchange system.

(B) A charge for a package of services that includes an open-end credit feature, if the fee is required whether or not the open-end credit feature is included and the non-credit services are not merely incidental to the credit feature.

(C) Charges under § 226.4(e) disclosed as specified.

(4) *Disclosure of rates for open-end (not home-secured) plans.* A creditor shall disclose, to the extent applicable:

(i) For each periodic rate that may be used to calculate interest:

(A) *Rates.* The rate, expressed as a periodic rate and a corresponding annual percentage rate.

(B) *Range of balances.* The range of balances to which the rate is applicable; however, a creditor is not required to adjust the range of balances disclosure to reflect the balance below which only a minimum charge applies.

(C) *Type of transaction.* The type of transaction to which the rate applies, if different rates apply to different types of transactions.

(D) *Balance computation method.* An explanation of the method used to determine the balance to which the rate is applied.

(ii) *Variable-rate accounts.* For interest rate changes that are tied to increases in an index or formula (variable-rate accounts) specifically set forth in the account agreement:

(A) The fact that the annual percentage rate may increase.

(B) How the rate is determined, including the margin.

(C) The circumstances under which the rate may increase.

(D) The frequency with which the rate may increase.

(E) Any limitation on the amount the rate may change.

(F) The effect(s) of an increase.

(G) A rate is accurate if it is a rate as of a specified date and this rate was in effect within the last 30 days before the disclosures are provided.

(iii) *Rate changes not due to index or formula.* For interest rate changes that are specifically set forth in the account agreement and not tied to increases in an index or formula:

(A) The initial rate (expressed as a periodic rate and a corresponding annual percentage rate) required under paragraph (b)(4)(i)(A) of this section.

(B) How long the initial rate will remain in effect and the specific events that cause the initial rate to change.

(C) The rate (expressed as a periodic rate and a corresponding annual percentage rate) that will apply when the initial rate is no longer in effect and any limitation on the time period the new rate will remain in effect.

(D) The balances to which the new rate will apply.

(E) The balances to which the current rate at the time of the change will apply.

(5) *Additional disclosures for open-end (not home-secured) plans.* A creditor shall disclose, to the extent applicable:

(i) *Voluntary credit insurance, debt cancellation or debt suspension.* The disclosures in §§ 226.4(d)(1)(i) and (d)(1)(ii) and (d)(3)(i) through (d)(3)(iii) if the creditor offers optional credit insurance or debt cancellation or debt suspension coverage that is identified in § 226.4(b)(7) or (b)(10).

(ii) *Security interests.* The fact that the creditor has or will acquire a security interest in the property purchased under the plan, or in other property identified by item or type.

(iii) *Statement of billing rights.* A statement that outlines the consumer's rights and the creditor's responsibilities under §§ 226.12(c) and 226.13 and that is substantially similar to the statement found in Model Form G–3(A) in appendix G to this part.

9. Section 226.7 is amended by revising paragraph (b), removing paragraphs (c), (d), (e), (f), (g), (h), (i), (j), and (k), and removing and reserving footnotes 14 and 15 to read as follows:

§ 226.7 Periodic statement.

* * * * *

(b) *Rules affecting open-end (not home-secured) plans.* The requirements of paragraph (b) of this section apply only to plans other than home-equity plans subject to the requirements of § 226.5b.

(1) *Previous balance.* The account balance outstanding at the beginning of the billing cycle.

(2) *Identification of transactions.* An identification of each credit transaction in accordance with § 226.8.

(3) *Credits.* Any credit to the account during the billing cycle, including the amount and the date of crediting. The date need not be provided if a delay in crediting does not result in any finance or other charge.

(4) *Periodic rates.* (i) Except as provided in paragraph (b)(4)(ii) of this section, each periodic rate that may be used to compute the interest charge expressed as an annual percentage rate and using the term, *Annual Percentage Rate,* along with the range of balances to which it is applicable. If no interest charge is imposed when the outstanding balance is less than a certain amount, the creditor is not required to disclose that fact, or the balance below which no interest charge will be imposed. The types of transactions to which the periodic rates apply shall also be disclosed. For variable-rate plans, the fact that the annual percentage rate may vary.

(ii) *Exception.* A promotional rate, as that term is defined in § 226.16(g)(2)(i) is required to be disclosed only in periods in which the offered rate is actually applied.

(5) *Balance on which finance charge computed.* The amount of the balance to which a periodic rate was applied and an explanation of how that balance was determined, using the term *Balance Subject to Interest Rate.* When a balance is determined without first deducting all credits and payments made during the billing cycle, the fact and the amount of the credits and payments shall be disclosed. As an alternative to providing an explanation of how the balance was determined, a creditor that uses a balance computation method identified in § 226.5a(g) may, at the creditor's option, identify the name of the balance computation method and provide a toll-free telephone number where consumers may obtain from the creditor more information about the balance computation method and how resulting interest charges were determined. If the method used is not identified in § 226.5a(g), the creditor shall provide a brief explanation of the method used.

(6) *Charges imposed.* (i) The amounts of any charges imposed as part of a plan as stated in § 226.6(b)(3), grouped together, in proximity to transactions identified under paragraph (b)(2) of this section, substantially similar to Sample G–18(A) in appendix G to this part.

(ii) *Interest.* Finance charges attributable to periodic interest rates, using the term *Interest Charge,* must be grouped together under the heading *Interest Charged,* itemized and totaled by type of transaction, and a total of finance charges attributable to periodic interest rates, using the term *Total Interest,* must be disclosed for the statement period and calendar year to date, using a format substantially similar to Sample G–18(A) in appendix G to this part.

(iii) *Fees.* Charges imposed as part of the plan other than charges attributable to periodic interest rates must be grouped together under the heading *Fees,* identified consistent with the feature or type, and itemized, and a total of charges, using the term *Fees,* must be disclosed for the statement period and calendar year to date, using a format substantially similar to Sample G–18(A) in appendix G.

(7) *Change-in-terms and increased penalty rate summary for open-end (not home-secured) plans.* Creditors that provide a change-in-terms notice required by § 226.9(c), or a rate increase notice required by § 226.9(g), on or with the periodic statement, must disclose the information in § 226.9(c)(2)(iv)(A) and (c)(2)(iv)(B) (if applicable) or § 226.9(g)(3)(i) on the periodic statement in accordance with the format requirements in § 226.9(c)(2)(iv)(C), and § 226.9(g)(3)(ii). *See* Forms G–18(F) and G–18(G) in appendix G to this part.

(8) *Grace period.* The date by which or the time period within which the new balance or any portion of the new balance must be paid to avoid additional finance charges. If such a time period is provided, a creditor may, at its option and without disclosure, impose no finance charge if payment is received after the time period's expiration.

(9) *Address for notice of billing errors.* The address to be used for notice of billing errors. Alternatively, the address may be provided on the billing rights statement permitted by § 226.9(a)(2).

(10) *Closing date of billing cycle; new balance.* The closing date of the billing cycle and the account balance outstanding on that date. The new balance must be disclosed in accordance with the format requirements of paragraph (b)(13) of this section.

(11) *Due date; late payment costs.* (i) Except as provided in paragraph (b)(11)(ii) of this section and in accordance with the format requirements in paragraph (b)(13) of this section, for a credit card account under an open-end (not home-secured) consumer credit plan, a card issuer must provide on each periodic statement:

(A) The due date for a payment. The due date disclosed pursuant to this paragraph shall be the same day of the month for each billing cycle.

(B) The amount of any late payment fee and any increased periodic rate(s) (expressed as an annual percentage rate(s)) that may be imposed on the account as a result of a late payment. If a range of late payment fees may be assessed, the card issuer may state the range of fees, or the highest fee and at the issuer's option with the highest fee an indication that the fee imposed could be lower. If the rate may be increased for more than one feature or balance, the card issuer may state the range of rates or the highest rate that could apply and at the issuer's option an indication that the rate imposed could be lower.

(ii) *Exception.* The requirements of paragraph (b)(11)(i)(B) of this section do not apply to periodic statements provided solely for charge card accounts.

(12) *Repayment disclosures.* (i) *In general.* Except as provided in paragraphs (b)(12)(ii) and (b)(12)(v), for a credit card account under an open-end (not home-secured) consumer credit plan, a card issuer must provide the following disclosures on each periodic statement:

(A) The following statement with a bold heading: ''Minimum Payment Warning: If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance;''

(B) The minimum payment repayment estimate, as described in Appendix M1 to this part. If the minimum payment repayment estimate is less than 2 years, the card issuers must disclose the estimate in months. Otherwise, the estimate must be disclosed in years and rounded to the nearest whole year;

(C) The minimum payment total cost estimate, as described in Appendix M1 to this part. The minimum payment total cost estimate must be rounded to the nearest whole dollar;

(D) A statement that the minimum payment repayment estimate and the minimum payment total cost estimate are based on the current outstanding balance shown on the periodic statement. A statement that the minimum payment repayment estimate and the minimum payment total cost estimate are based on the assumption that only minimum payments are made and no other amounts are added to the balance;

(E) A toll-free telephone number where the consumer may obtain from the card issuer information about credit counseling services consistent with paragraph (b)(12)(iv) of this section; and

(F) Except if the minimum payment repayment estimate that is disclosed on the periodic statement pursuant to paragraph (b)(12)(i)(B) of this section is three years or less, the following disclosures:

(*1*) The estimated monthly payment for repayment in 36 months, as described in Appendix M1 to this part. The estimated monthly payment for repayment in 36 months must be rounded to the nearest whole dollar;

(*2*) A statement that the card issuer estimates that the consumer will repay the outstanding balance shown on the periodic statement in 3 years if the consumer pays the estimated monthly payment each month for 3 years;

(*3*) The total cost estimate for repayment in 36 months, as described in Appendix M1 to this part. The total cost estimate for repayment in 36 months must be rounded to the nearest whole dollar; and

(*4*) The savings estimate for repayment in 36 months, as described in Appendix M1 to this part. The savings estimate for repayment in 36 months must be rounded to the nearest whole dollar.

(ii) *Negative or no amortization.* If negative or no amortization occurs when calculating the minimum payment repayment estimate as described in Appendix M1 of this part, a card issuer must provide the following disclosures on the periodic statement instead of the disclosures set forth in paragraph (b)(12)(i) of this section:

(A) The following statement: ''Minimum Payment Warning: Even if you make no more charges using this card, if you make only the minimum payment each month we estimate you will never pay off the balance shown on this statement because your payment will be less than the interest charged each month;''

(B) The following statement: ''If you make more than the minimum payment each period, you will pay less in interest and pay off your balance sooner;''

(C) The estimated monthly payment for repayment in 36 months, as described in Appendix M1 to this part. The estimated monthly payment for repayment in 36 months must be rounded to the nearest whole dollar;

(D) A statement that the card issuer estimates that the consumer will repay the outstanding balance shown on the periodic statement in 3 years if the consumer pays the estimated monthly payment each month for 3 years; and

(E) A toll-free telephone number where the consumer may obtain from the card issuer information about credit counseling services consistent with paragraph (b)(12)(iv) of this section.

(iii) *Format requirements.* A card issuer must provide the disclosures required by paragraph (b)(12)(i) or (b)(12)(ii) of this section in accordance with the format requirements of paragraph (b)(13) of this section, and in a format substantially similar to Samples G–18(C)(1), G–18(C)(2) and G–18(C)(3) in Appendix G to this part, as applicable.

(iv) *Provision of information about credit counseling services.* A card issuer must provide the following information about credit counseling services through the toll-free telephone number disclosed pursuant to paragraphs (b)(12)(i) or (b)(12)(ii) of this section:

(A) The name, street address, telephone number, and Web site address for at least three organizations that have been approved by the United States Trustee or a bankruptcy administrator pursuant to 11 U.S.C. 111(a)(1) to provide credit counseling services in the State in which the billing address for the account is located or the State specified by the consumer.

(B) Upon the request of the consumer and to the extent available from the United States Trustee or a bankruptcy administrator, the name, street address, telephone number, and Web site address for at least one organization that satisfies the requirements in paragraph (b)(12)(iv)(A) of this section and provides credit counseling services in a

language other than English that is specified by the consumer.

(v) *Exemptions*. Paragraph (b)(12) of this section does not apply to:

(A) Charge card accounts that require payment of outstanding balances in full at the end of each billing cycle;

(B) A billing cycle immediately following two consecutive billing cycles in which the consumer paid the entire balance in full, had a zero outstanding balance or had a credit balance; and

(C) A billing cycle where paying the minimum payment due for that billing cycle will pay the entire outstanding balance on the account for that billing cycle.

(13) *Format requirements*. The due date required by paragraph (b)(11) of this section shall be disclosed on the front of the first page of the periodic statement. The amount of the late payment fee and the annual percentage rate(s) required by paragraph (b)(11) of this section shall be stated in close proximity to the due date. The ending balance required by paragraph (b)(10) of this section and the disclosures required by paragraph (b)(12) of this section shall be disclosed closely proximate to the minimum payment due. The due date, late payment fee and annual percentage rate, ending balance, minimum payment due, and disclosures required by paragraph (b)(12) of this section shall be grouped together. Sample G–18(D) in Appendix G to this part sets forth an example of how these terms may be grouped.

(14) *Deferred interest or similar transactions*. For accounts with an outstanding balance subject to a deferred interest or similar program, the date by which that outstanding balance must be paid in full in order to avoid the obligation to pay finance charges on such balance must be disclosed on the front of the periodic statement for two billing cycles immediately preceding the billing cycle in which such date occurs. The disclosure provided pursuant to this paragraph must be substantially similar to Sample G–18(H) in Appendix G to this part.

10. Section 226.8 is revised to read as follows:

§ 226.8 Identifying transactions on periodic statements.

The creditor shall identify credit transactions on or with the first periodic statement that reflects the transaction by furnishing the following information, as applicable.[16]

(a) *Sale credit*. (1) Except as provided in paragraph (a)(2) of this section, for each credit transaction involving the sale of property or services, the creditor must disclose the amount and date of the transaction, and either:

(i) A brief identification[17] of the property or services purchased, for creditors and sellers that are the same or related;[18] or

(ii) The seller's name; and the city and State or foreign country where the transaction took place.[19] The creditor may omit the address or provide any suitable designation that helps the consumer to identify the transaction when the transaction took place at a location that is not fixed; took place in the consumer's home; or was a mail, Internet, or telephone order.

(2) Creditors need not comply with paragraph (a)(1) of this section if an actual copy of the receipt or other credit document is provided with the first periodic statement reflecting the transaction, and the amount of the transaction and either the date of the transaction to the consumer's account or the date of debiting the transaction are disclosed on the copy or on the periodic statement.

(b) *Nonsale credit*. For each credit transaction not involving the sale of property or services, the creditor must disclose a brief identification of the transaction;[20] the amount of the transaction; and at least one of the following dates: The date of the transaction, the date the transaction was debited to the consumer's account, or, if the consumer signed the credit document, the date appearing on the document. If an actual copy of the receipt or other credit document is provided and that copy shows the amount and at least one of the specified dates, the brief identification may be omitted.

(c) *Alternative creditor procedures; consumer inquiries for clarification or documentation*. The following procedures apply to creditors that treat an inquiry for clarification or documentation as a notice of a billing error, including correcting the account in accordance with § 226.13(e):

(1) Failure to disclose the information required by paragraphs (a) and (b) of this section is not a failure to comply with the regulation, provided that the creditor also maintains procedures reasonably designed to obtain and provide the information. This applies to transactions that take place outside a State, as defined in § 226.2(a)(26), whether or not the creditor maintains procedures reasonably adapted to obtain the required information.

(2) As an alternative to the brief identification for sale or nonsale credit, the creditor may disclose a number or symbol that also appears on the receipt or other credit document given to the consumer, if the number or symbol reasonably identifies that transaction with that creditor.

11. Section 226.9 is amended by revising paragraphs (a), (b), (c)(2), (e), (g), and (h) and to read as follows:

§ 226.9 Subsequent disclosure requirements.

(a) *Furnishing statement of billing rights*. (1) *Annual statement*. The creditor shall mail or deliver the billing rights statement required by § 226.6(a)(5) and (b)(5)(iii) at least once per calendar year, at intervals of not less than 6 months nor more than 18 months, either to all consumers or to each consumer entitled to receive a periodic statement under § 226.5(b)(2) for any one billing cycle.

(2) *Alternative summary statement*. As an alternative to paragraph (a)(1) of this section, the creditor may mail or deliver, on or with each periodic statement, a statement substantially similar to Model Form G–4 or Model Form G–4(A) in appendix G to this part, as applicable. Creditors offering home-equity plans subject to the requirements of § 226.5b may use either Model Form, at their option.

(b) *Disclosures for supplemental credit access devices and additional features*. (1) If a creditor, within 30 days after mailing or delivering the account-opening disclosures under § 226.6(a)(1) or (b)(3)(ii)(A), as applicable, adds a credit feature to the consumer's account or mails or delivers to the consumer a credit access device, including but not limited to checks that access a credit card account, for which the finance charge terms are the same as those previously disclosed, no additional disclosures are necessary. Except as provided in paragraph (b)(3) of this section, after 30 days, if the creditor adds a credit feature or furnishes a credit access device (other than as a renewal, resupply, or the original issuance of a credit card) on the same finance charge terms, the creditor shall disclose, before the consumer uses the feature or device for the first time, that it is for use in obtaining credit under the terms previously disclosed.

(2) Except as provided in paragraph (b)(3) of this section, whenever a credit feature is added or a credit access device is mailed or delivered, and the finance charge terms for the feature or device differ from disclosures

[16] [Reserved]

[17] [Reserved]

[18] [Reserved]

[19] [Reserved]

[20] [Reserved]

previously given, the disclosures required by § 226.6(a)(1) or (b)(3)(ii)(A), as applicable, that are applicable to the added feature or device shall be given before the consumer uses the feature or device for the first time.

(3) *Checks that access a credit card account.*

(i) *Disclosures.* For open-end plans not subject to the requirements of § 226.5b, if checks that can be used to access a credit card account are provided more than 30 days after account-opening disclosures under § 226.6(b) are mailed or delivered, or are provided within 30 days of the account-opening disclosures and the finance charge terms for the checks differ from the finance charge terms previously disclosed, the creditor shall disclose on the front of the page containing the checks the following terms in the form of a table with the headings, content, and form substantially similar to Sample G–19 in appendix G to this part:

(A) If a promotional rate, as that term is defined in § 226.16(g)(2)(i) applies to the checks:

(*1*) The promotional rate and the time period during which the promotional rate will remain in effect;

(*2*) The type of rate that will apply (such as whether the purchase or cash advance rate applies) after the promotional rate expires, and the annual percentage rate that will apply after the promotional rate expires. For a variable-rate account, a creditor must disclose an annual percentage rate based on the applicable index or formula in accordance with the accuracy requirements set forth in paragraph (b)(3)(ii) of this section; and

(*3*) The date, if any, by which the consumer must use the checks in order to qualify for the promotional rate. If the creditor will honor checks used after such date but will apply an annual percentage rate other than the promotional rate, the creditor must disclose this fact and the type of annual percentage rate that will apply if the consumer uses the checks after such date.

(B) If no promotional rate applies to the checks:

(*1*) The type of rate that will apply to the checks and the applicable annual percentage rate. For a variable-rate account, a creditor must disclose an annual percentage rate based on the applicable index or formula in accordance with the accuracy requirements set forth in paragraph (b)(3)(ii) of this section.

(*2*) [Reserved]

(C) Any transaction fees applicable to the checks disclosed under § 226.6(b)(2)(iv); and

(D) Whether or not a grace period is given within which any credit extended by use of the checks may be repaid without incurring a finance charge due to a periodic interest rate. When disclosing whether there is a grace period, the phrase ''How to Avoid Paying Interest on Check Transactions'' shall be used as the row heading when a grace period applies to credit extended by the use of the checks. When disclosing the fact that no grace period exists for credit extended by use of the checks, the phrase ''Paying Interest'' shall be used as the row heading.

(ii) *Accuracy.* The disclosures in paragraph (b)(3)(i) of this section must be accurate as of the time the disclosures are mailed or delivered. A variable annual percentage rate is accurate if it was in effect within 60 days of when the disclosures are mailed or delivered.

(c)* * *

(2) *Rules affecting open-end (not home-secured) plans.* (i) *Changes where written advance notice is required.* For plans other than home-equity plans subject to the requirements of § 226.5b, except as provided in paragraphs (c)(2)(iii) and (c)(2)(v) of this section, when a significant change in account terms as described in paragraph (c)(2)(ii) of this section is made to a term required to be disclosed under § 226.6(b)(3), (b)(4) or (b)(5) is changed or the required minimum periodic payment is increased, a creditor must provide a written notice of the change at least 45 days prior to the effective date of the change to each consumer who may be affected. The 45-day timing requirement does not apply if the consumer has agreed to a particular change; the notice shall be given, however, before the effective date of the change. Increases in the rate applicable to a consumer's account due to delinquency, default or as a penalty described in paragraph (g) of this section that are not due to a change in the contractual terms of the consumer's account must be disclosed pursuant to paragraph (g) of this section instead of paragraph (c)(2) of this section.

(ii) *Significant changes in account terms.* For purposes of this section, a ''significant change in account terms'' means a change to a term required to be disclosed under § 226.6(b)(1) and (b)(2) or an increase in the required minimum periodic payment.

(iii) *Charges not covered by § 226.6(b)(1) and (b)(2).* Except as provided in paragraph (c)(2)(vi) of this section, if a creditor increases any component of a charge, or introduces a new charge, required to be disclosed under § 226.6(b)(3) that is not a significant change in account terms as described in paragraph (c)(2)(ii) of this section, a creditor may either, at its option:

(A) Comply with the requirements of paragraph (c)(2)(i) of this section; or

(B) Provide notice of the amount of the charge before the consumer agrees to or becomes obligated to pay the charge, at a time and in a manner that a consumer would be likely to notice the disclosure of the charge. The notice may be provided orally or in writing.

(iv) *Disclosure requirements.* (A) *Significant changes in account terms.* If a creditor makes a significant change in account terms as described in paragraph (c)(2)(ii) of this section, the notice provided pursuant to paragraph (c)(2)(i) of this section must provide the following information:

(*1*) A summary of the changes made to terms required by § 226.6(b)(1) and (b)(2) and a summary of any increase in the required minimum periodic payment;

(*2*) A statement that changes are being made to the account;

(*3*) For accounts other than credit card accounts under an open-end (not home-secured) consumer credit plan subject to § 226.9(c)(2)(iv)(B), a statement indicating the consumer has the right to opt out of these changes, if applicable, and a reference to additional information describing the opt-out right provided in the notice, if applicable;

(*4*) The date the changes will become effective;

(*5*) If applicable, a statement that the consumer may find additional information about the summarized changes, and other changes to the account, in the notice;

(*6*) If the creditor is changing a rate on the account, other than a penalty rate, a statement that if a penalty rate currently applies to the consumer's account, the new rate described in the notice will not apply to the consumer's account until the consumer's account balances are no longer subject to the penalty rate; and

(*7*) If the change in terms being disclosed is an increase in an annual percentage rate, the balances to which the increased rate will be applied. If applicable, a statement identifying the balances to which the current rate will continue to apply as of the effective date of the change in terms.

(B) *Credit card accounts under an open-end (not home-secured) consumer credit plan.* In addition to the information in paragraph (c)(2)(iv)(A) of this section, if a card issuer makes a significant change in account terms on a credit card account under an open-end (not home-secured) consumer credit

plan, the creditor must generally provide the following information on the notice provided pursuant to paragraph (c)(2)(i) of this section. This information is not required to be provided in the case of an increase in the required minimum periodic payment, an increase in an annual percentage rate applicable to a consumer's account, a change in the balance computation method applicable to consumer's account necessary to comply with § 226.54, or when the change results from the creditor not receiving the consumer's required minimum periodic payment within 60 days after the due date for that payment:

(*1*) A statement that the consumer has the right to reject the change or changes prior to the effective date of the changes, unless the consumer fails to make a required minimum periodic payment within 60 days after the due date for that payment;

(*2*) Instructions for rejecting the change or changes, and a toll-free telephone number that the consumer may use to notify the creditor of the rejection; and

(*3*) If applicable, a statement that if the consumer rejects the change or changes, the consumer's ability to use the account for further advances will be terminated or suspended.

(C) *Format requirements.* (*1*) *Tabular format.* The summary of changes described in paragraph (c)(2)(iv)(A)(*1*) of this section must be in a tabular format (except for a summary of any increase in the required minimum periodic payment), with headings and format substantially similar to any of the account-opening tables found in G–17 in appendix G to this part. The table must disclose the changed term and information relevant to the change, if that relevant information is required by § 226.6(b)(1) and (b)(2). The new terms shall be described in the same level of detail as required when disclosing the terms under § 226.6(b)(2).

(*2*) *Notice included with periodic statement.* If a notice required by paragraph (c)(2)(i) of this section is included on or with a periodic statement, the information described in paragraph (c)(2)(iv)(A)(*1*) of this section must be disclosed on the front of any page of the statement. The summary of changes described in paragraph (c)(1)(iv)(A)(*1*) of this section must immediately follow the information described in paragraph (c)(2)(iv)(A)(*2*) through (c)(2)(iv)(A)(7) and, if applicable, paragraph (c)(2)(iv)(B) of this section, and be substantially similar to the format shown in Sample G–20 or G–21 in appendix G to this part.

(*3*) *Notice provided separately from periodic statement.* If a notice required by paragraph (c)(2)(i) of this section is not included on or with a periodic statement, the information described in paragraph (c)(2)(iv)(A)(*1*) of this section must, at the creditor's option, be disclosed on the front of the first page of the notice or segregated on a separate page from other information given with the notice. The summary of changes required to be in a table pursuant to paragraph (c)(2)(iv)(A)(*1*) of this section may be on more than one page, and may use both the front and reverse sides, so long as the table begins on the front of the first page of the notice and there is a reference on the first page indicating that the table continues on the following page. The summary of changes described in paragraph (c)(2)(iv)(A)(*1*) of this section must immediately follow the information described in paragraph (c)(1)(iv)(A)(*2*) through (c)(1)(iv)(A)(*7*) and, if applicable, paragraph (c)(2)(iv)(B), of this section, substantially similar to the format shown in Sample G–20 or G–21 in appendix G to this part.

(v) *Notice not required.* For open-end plans (other than home equity plans subject to the requirements of § 226.5b) a creditor is not required to provide notice under this section:

(A) When the change involves charges for documentary evidence; a reduction of any component of a finance or other charge; suspension of future credit privileges (except as provided in paragraph (c)(2)(vi) of this section) or termination of an account or plan; when the change results from an agreement involving a court proceeding; when the change is an extension of the grace period; or if the change is applicable only to a check or checks that access a credit card account and the changed terms are disclosed on or with the checks in accordance with § 226.9(b)(3);

(B) When the change is an increase in an annual percentage rate upon the expiration of a specified period of time, provided that:

(*1*) Prior to commencement of that period, the creditor disclosed in writing to the consumer, in a clear and conspicuous manner, the length of the period and the annual percentage rate that would apply after expiration of the period;

(*2*) The disclosure of the length of the period and the annual percentage rate that would apply after expiration of the period are set forth in close proximity and in equal prominence to the disclosure of the rate that applies during the specified period of time; and

(*3*) The annual percentage rate that applies after that period does not exceed the rate disclosed pursuant to paragraph (c)(2)(v)(B)(*1*) of this paragraph or, if the rate disclosed pursuant to paragraph (c)(2)(v)(B)(*1*) of this section was a variable rate, the rate following any such increase is a variable rate determined by the same formula (index and margin) that was used to calculate the variable rate disclosed pursuant to paragraph (c)(2)(v)(B)(*1*);

(C) When the change is an increase in a variable annual percentage rate in accordance with a credit card or other account agreement that provides for changes in the rate according to operation of an index that is not under the control of the creditor and is available to the general public; or

(D) When the change is an increase in an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) due to the completion of a workout or temporary hardship arrangement by the consumer or the consumer's failure to comply with the terms of such an arrangement, provided that:

(*1*) The annual percentage rate or fee or charge applicable to a category of transactions following any such increase does not exceed the rate or fee or charge that applied to that category of transactions prior to commencement of the arrangement or, if the rate that applied to a category of transactions prior to the commencement of the workout or temporary hardship arrangement was a variable rate, the rate following any such increase is a variable rate determined by the same formula (index and margin) that applied to the category of transactions prior to commencement of the workout or temporary hardship arrangement; and

(*2*) The creditor has provided the consumer, prior to the commencement of such arrangement, with a clear and conspicuous written disclosure of the terms of the arrangement (including any increases due to such completion or failure).

(vi) *Reduction of the credit limit.* For open-end plans that are not subject to the requirements of § 226.5b, if a creditor decreases the credit limit on an account, advance notice of the decrease must be provided before an over-the-limit fee or a penalty rate can be imposed solely as a result of the consumer exceeding the newly decreased credit limit. Notice shall be provided in writing or orally at least 45 days prior to imposing the over-the-limit fee or penalty rate and shall state that the credit limit on the account has been or will be decreased.

* * * * *

(e) *Disclosures upon renewal of credit or charge card.* (1) *Notice prior to*

renewal. A card issuer that imposes any annual or other periodic fee to renew a credit or charge card account of the type subject to § 226.5a, including any fee based on account activity or inactivity or any card issuer that has changed or amended any term of a cardholder's account required to be disclosed under § 226.6(b)(1) and (b)(2) that has not previously been disclosed to the consumer, shall mail or deliver written notice of the renewal to the cardholder. If the card issuer imposes any annual or other periodic fee for renewal, the notice shall be provided at least 30 days or one billing cycle, whichever is less, before the mailing or the delivery of the periodic statement on which any renewal fee is initially charged to the account. If the card issuer has changed or amended any term required to be disclosed under § 226.(b)(1) and (b)(2) and such changed or amended term has not previously been disclosed to the consumer, the notice shall be provided at least 30 days prior to the scheduled renewal date of the consumer's credit or charge card. The notice shall contain the following information:

(i) The disclosures contained in § 226.5a(b)(1) through (b)(7) that would apply if the account were renewed; [20a] and

(ii) How and when the cardholder may terminate credit availability under the account to avoid paying the renewal fee, if applicable.

(2) *Notification on periodic statements.* The disclosures required by this paragraph may be made on or with a periodic statement. If any of the disclosures are provided on the back of a periodic statement, the card issuer shall include a reference to those disclosures on the front of the statement.

(g) *Increase in rates due to delinquency or default or as a penalty.* (1) *Increases subject to this section.* For plans other than home-equity plans subject to the requirements of § 226.5b, except as provided in paragraph (g)(4) of this section, a creditor must provide a written notice to each consumer who may be affected when:

(i) A rate is increased due to the consumer's delinquency or default; or

(ii) A rate is increased as a penalty for one or more events specified in the account agreement, such as making a late payment or obtaining an extension of credit that exceeds the credit limit.

(2) *Timing of written notice.* Whenever any notice is required to be given pursuant to paragraph (g)(1) of this section, the creditor shall provide written notice of the increase in rates at least 45 days prior to the effective date of the increase. The notice must be provided after the occurrence of the events described in paragraphs (g)(1)(i) and (g)(1)(ii) of this section that trigger the imposition of the rate increase.

(3)(i) *Disclosure requirements for rate increases.* (A) *General.* If a creditor is increasing the rate due to delinquency or default or as a penalty, the creditor must provide the following information on the notice sent pursuant to paragraph (g)(1) of this section:

(*1*) A statement that the delinquency or default rate or penalty rate, as applicable, has been triggered;

(*2*) The date on which the delinquency or default rate or penalty rate will apply;

(*3*) The circumstances under which the delinquency or default rate or penalty rate, as applicable, will cease to apply to the consumer's account, or that the delinquency or default rate or penalty rate will remain in effect for a potentially indefinite time period;

(*4*) A statement indicating to which balances the delinquency or default rate or penalty rate will be applied; and

(*5*) If applicable, a description of any balances to which the current rate will continue to apply as of the effective date of the rate increase, unless a consumer fails to make a minimum periodic payment within 60 days from the due date for that payment.

(B) *Rate increases resulting from failure to make minimum periodic payment within 60 days from due date.* For a credit card account under an open-end (not home-secured) consumer credit plan, if the rate increase required to be disclosed pursuant to paragraph (g)(1) of this section is an increase pursuant to § 226.55(b)(4) based on the consumer's failure to make a minimum periodic payment within 60 days from the due date for that payment, the notice provided pursuant to paragraph (g)(1) of this section must also contain the following information:

(*1*) A statement of the reason for the increase; and

(*2*) That the increase will cease to apply if the creditor receives six consecutive required minimum periodic payments on or before the payment due date, beginning with the first payment due following the effective date of the increase.

(ii) *Format requirements.* (A) If a notice required by paragraph (g)(1) of this section is included on or with a periodic statement, the information described in paragraph (g)(3)(i) of this section must be in the form of a table and provided on the front of any page of the periodic statement, above the notice described in paragraph (c)(2)(iv) of this section if that notice is provided on the same statement.

(B) If a notice required by paragraph (g)(1) of this section is not included on or with a periodic statement, the information described in paragraph (g)(3)(i) of this section must be disclosed on the front of the first page of the notice. Only information related to the increase in the rate to a penalty rate may be included with the notice, except that this notice may be combined with a notice described in paragraph (c)(2)(iv) or (g)(4) of this section.

(4) *Exception for decrease in credit limit.* A creditor is not required to provide, prior to increasing the rate for obtaining an extension of credit that exceeds the credit limit, a notice pursuant to paragraph (g)(1) of this section, provided that:

(i) The creditor provides at least 45 days in advance of imposing the penalty rate a notice, in writing, that includes:

(A) A statement that the credit limit on the account has been or will be decreased.

(B) A statement indicating the date on which the penalty rate will apply, if the outstanding balance exceeds the credit limit as of that date;

(C) A statement that the penalty rate will not be imposed on the date specified in paragraph (g)(4)(i)(B) of this section, if the outstanding balance does not exceed the credit limit as of that date;

(D) The circumstances under which the penalty rate, if applied, will cease to apply to the account, or that the penalty rate, if applied, will remain in effect for a potentially indefinite time period;

(E) A statement indicating to which balances the penalty rate may be applied; and

(F) If applicable, a description of any balances to which the current rate will continue to apply as of the effective date of the rate increase, unless the consumer fails to make a minimum periodic payment within 60 days from the due date for that payment; and

(ii) The creditor does not increase the rate applicable to the consumer's account to the penalty rate if the outstanding balance does not exceed the credit limit on the date set forth in the notice and described in paragraph 9(g)(4)(i)(B) of this section.

(iii) (A) If a notice provided pursuant to paragraph (g)(4)(i) of this section is included on or with a periodic statement, the information described in paragraph (g)(4)(i) of this section must be in the form of a table and provided on the front of any page of the periodic statement; or

(B) If a notice required by paragraph (g)(4)(i) of this section is not included

[20a] [Reserved]

on or with a periodic statement, the information described in paragraph (g)(4)(i) of this section must be disclosed on the front of the first page of the notice. Only information related to the reduction in credit limit may be included with the notice, except that this notice may be combined with a notice described in paragraph (c)(2)(iv) or (g)(1) of this section.

(h) *Consumer rejection of certain significant changes in terms.* (1) *Right to reject.* If paragraph (c)(2)(iv)(B) of this section requires disclosure of the consumer's right to reject a significant change to an account term, the consumer may reject that change by notifying the creditor of the rejection before the effective date of the change.

(2) *Effect of rejection.* If a creditor is notified of a rejection of a significant change to an account term as provided in paragraph (h)(1) of this section, the creditor must not:

(i) Apply the change to the account;

(ii) Impose a fee or charge or treat the account as in default solely as a result of the rejection; or

(iii) Require repayment of the balance on the account using a method that is less beneficial to the consumer than one of the methods listed in § 226.55(c)(2).

(3) *Exception.* Section 226.9(h) does not apply when the creditor has not received the consumer's required minimum periodic payment within 60 days after the due date for that payment.

12. Section 226.10 is revised to read as follows:

§ 226.10 Payments.

(a) *General rule.* A creditor shall credit a payment to the consumer's account as of the date of receipt, except when a delay in crediting does not result in a finance or other charge or except as provided in paragraph (b) of this section.

(b) *Specific requirements for payments.* (1) *General rule.* A creditor may specify reasonable requirements for payments that enable most consumers to make conforming payments.

(2) *Examples of reasonable requirements for payments.* Reasonable requirements for making payment may include:

(i) Requiring that payments be accompanied by the account number or payment stub;

(ii) Setting reasonable cut-off times for payments to be received by mail, by electronic means, by telephone, and in person (except as provided in paragraph (b)(3) of this section), provided that such cut-off times shall be no earlier than 5 p.m. on the payment due date at the location specified by the creditor for the receipt of such payments;

(iii) Specifying that only checks or money orders should be sent by mail;

(iv) Specifying that payment is to be made in U.S. dollars; or

(v) Specifying one particular address for receiving payments, such as a post office box.

(3) *In-person payments on credit card accounts.* (i) *General.* A card issuer that is a financial institution shall not impose a cut-off time earlier than the close of business for payments on a credit card account under an open-end (not home-secured) consumer credit plan made in person at any branch or office of the card issuer at which such payments are accepted. Any such payment made in person at a branch or office of the card issuer earlier than the close of business of that branch or office shall be considered received on the date on which the consumer makes the payment.

(ii) *Financial institution.* For purposes of paragraph (b)(3) of this section, ''financial institution'' shall mean a ''depository institution'' as defined in 12 U.S.C. 1813(c).

(4) *Nonconforming payments.* If a creditor specifies, on or with the periodic statement, requirements for the consumer to follow in making payments, but accepts a payment that does not conform to the requirements, the creditor shall credit the payment within five days of receipt.

(c) *Adjustment of account.* If a creditor fails to credit a payment, as required by paragraphs (a) or (b) of this section, in time to avoid the imposition of finance or other charges, the creditor shall adjust the consumer's account so that the charges imposed are credited to the consumer's account during the next billing cycle.

(d) *Crediting of payments when creditor does not receive or accept payments on due date.* If the due date for payments is a day on which the creditor does not receive or accept payments by mail, the creditor may generally not treat a payment received by any method the next business day as late for any purpose. However, if the creditor accepts or receives payments made on the due date by a method other than mail, such as electronic or telephone payments, the creditor is not required to treat a payment made by that method on the next business day as timely, even if it does not accept mailed payments on the due date.

(e) *Limitations on fees related to method of payment.* For credit card accounts under an open-end (not home-secured) consumer credit plan, a creditor may not impose a separate fee to allow consumers to make a payment by any method, such as mail, electronic, or telephone payments, unless such payment method involves an expedited service by a customer service representative of the creditor.

(f) *Changes by card issuer.* If a card issuer makes a material change in the address for receiving payment or procedures for handling cardholder payments, and such change causes a material delay in the crediting of a payment to the consumer's account during the 60-day period following the date on which such change took effect, the card issuer may not impose any late fee or finance charge for a late payment on the credit card account.

13. Section 226.11 is revised to read as follows:

§ 226.11 Treatment of credit balances; account termination.

(a) *Credit balances.* When a credit balance in excess of $1 is created on a credit account (through transmittal of funds to a creditor in excess of the total balance due on an account, through rebates of unearned finance charges or insurance premiums, or through amounts otherwise owed to or held for the benefit of the consumer), the creditor shall—

(1) Credit the amount of the credit balance to the consumer's account;

(2) Refund any part of the remaining credit balance within seven business days from receipt of a written request from the consumer;

(3) Make a good faith effort to refund to the consumer by cash, check, or money order, or credit to a deposit account of the consumer, any part of the credit balance remaining in the account for more than six months. No further action is required if the consumer's current location is not known to the creditor and cannot be traced through the consumer's last known address or telephone number.

(b) *Account termination.* (1) A creditor shall not terminate an account prior to its expiration date solely because the consumer does not incur a finance charge.

(2) Nothing in paragraph (b)(1) of this section prohibits a creditor from terminating an account that is inactive for three or more consecutive months. An account is inactive for purposes of this paragraph if no credit has been extended (such as by purchase, cash advance or balance transfer) and if the account has no outstanding balance.

(c) *Timely settlement of estate debts.* (1) *General rule.* For credit card accounts under an open-end (not home-secured) consumer credit plan, creditors must adopt reasonable procedures designed to ensure that an administrator or executor of an estate of a deceased

accountholder can determine the amount of and pay any balance on the account in a timely manner.

(2) *Fees and charges.* (i) *Limitation on fees and charges.* Except as provided in paragraph (c)(2)(ii) of this section, upon receiving a request by the administrator or executor of an estate for the amount of the balance on a deceased consumer's account, a creditor may not impose fees or charges, such as a late fee or finance charge, on the account on or after the date of receiving the request.

(ii) *Application to joint accounts.* For joint accounts, a creditor may impose fees and charges on an account of a deceased consumer if a joint accountholder remains on the account.

(3) *Timely statement of balance.* (i) *Requirement.* Upon request by the administrator or executor of an estate, a creditor must provide the administrator or executor of an estate with the amount of the balance on a deceased consumer's account in a timely manner.

(ii) *Safe harbor.* For the purposes of paragraph (c)(3)(i) of this section, providing the amount of the balance on the account within 30 days of receiving the request is deemed to be timely.

14. Section 226.12 is revised to read as follows:

§ 226.12 Special credit card provisions.

(a) *Issuance of credit cards.* Regardless of the purpose for which a credit card is to be used, including business, commercial, or agricultural use, no credit card shall be issued to any person except—

(1) In response to an oral or written request or application for the card; or

(2) As a renewal of, or substitute for, an accepted credit card.[21]

(b) *Liability of cardholder for unauthorized use.* (1)(i) *Definition of unauthorized use.* For purposes of this section, the term ''unauthorized use'' means the use of a credit card by a person, other than the cardholder, who does not have actual, implied, or apparent authority for such use, and from which the cardholder receives no benefit.

(ii) *Limitation on amount.* The liability of a cardholder for unauthorized use[22] of a credit card shall not exceed the lesser of $50 or the amount of money, property, labor, or services obtained by the unauthorized use before notification to the card issuer under paragraph (b)(3) of this section.

(2) *Conditions of liability.* A cardholder shall be liable for unauthorized use of a credit card only if:

(i) The credit card is an accepted credit card;

(ii) The card issuer has provided adequate notice[23] of the cardholder's maximum potential liability and of means by which the card issuer may be notified of loss or theft of the card. The notice shall state that the cardholder's liability shall not exceed $50 (or any lesser amount) and that the cardholder may give oral or written notification, and shall describe a means of notification (for example, a telephone number, an address, or both); and

(iii) The card issuer has provided a means to identify the cardholder on the account or the authorized user of the card.

(3) *Notification to card issuer.* Notification to a card issuer is given when steps have been taken as may be reasonably required in the ordinary course of business to provide the card issuer with the pertinent information about the loss, theft, or possible unauthorized use of a credit card, regardless of whether any particular officer, employee, or agent of the card issuer does, in fact, receive the information. Notification may be given, at the option of the person giving it, in person, by telephone, or in writing. Notification in writing is considered given at the time of receipt or, whether or not received, at the expiration of the time ordinarily required for transmission, whichever is earlier.

(4) *Effect of other applicable law or agreement.* If State law or an agreement between a cardholder and the card issuer imposes lesser liability than that provided in this paragraph, the lesser liability shall govern.

(5) *Business use of credit cards.* If 10 or more credit cards are issued by one card issuer for use by the employees of an organization, this section does not prohibit the card issuer and the organization from agreeing to liability for unauthorized use without regard to this section. However, liability for unauthorized use may be imposed on an employee of the organization, by either the card issuer or the organization, only in accordance with this section.

(c) *Right of cardholder to assert claims or defenses against card issuer.*[24] (1) *General rule.* When a person who honors a credit card fails to resolve satisfactorily a dispute as to property or services purchased with the credit card in a consumer credit transaction, the cardholder may assert against the card issuer all claims (other than tort claims) and defenses arising out of the transaction and relating to the failure to resolve the dispute. The cardholder may withhold payment up to the amount of credit outstanding for the property or services that gave rise to the dispute and any finance or other charges imposed on that amount.[25]

(2) *Adverse credit reports prohibited.* If, in accordance with paragraph (c)(1) of this section, the cardholder withholds payment of the amount of credit outstanding for the disputed transaction, the card issuer shall not report that amount as delinquent until the dispute is settled or judgment is rendered.

(3) *Limitations.* (i) *General.* The rights stated in paragraphs (c)(1) and (c)(2) of this section apply only if:

(A) The cardholder has made a good faith attempt to resolve the dispute with the person honoring the credit card; and

(B) The amount of credit extended to obtain the property or services that result in the assertion of the claim or defense by the cardholder exceeds $50, and the disputed transaction occurred in the same State as the cardholder's current designated address or, if not within the same State, within 100 miles from that address.[26]

(ii) *Exclusion.* The limitations stated in paragraph (c)(3)(i)(B) of this section shall not apply when the person honoring the credit card:

(A) Is the same person as the card issuer;

(B) Is controlled by the card issuer directly or indirectly;

(C) Is under the direct or indirect control of a third person that also directly or indirectly controls the card issuer;

(D) Controls the card issuer directly or indirectly;

(E) Is a franchised dealer in the card issuer's products or services; or

(F) Has obtained the order for the disputed transaction through a mail solicitation made or participated in by the card issuer.

(d) *Offsets by card issuer prohibited.* (1) A card issuer may not take any action, either before or after termination of credit card privileges, to offset a cardholder's indebtedness arising from a consumer credit transaction under the relevant credit card plan against funds of the cardholder held on deposit with the card issuer.

(2) This paragraph does not alter or affect the right of a card issuer acting under State or Federal law to do any of the following with regard to funds of a cardholder held on deposit with the card issuer if the same procedure is constitutionally available to creditors

[21] [Reserved]

[22] [Reserved]

[23] [Reserved]

[24] [Reserved]

[25] [Reserved]

[26] [Reserved]

generally: obtain or enforce a consensual security interest in the funds; attach or otherwise levy upon the funds; or obtain or enforce a court order relating to the funds.

(3) This paragraph does not prohibit a plan, if authorized in writing by the cardholder, under which the card issuer may periodically deduct all or part of the cardholder's credit card debt from a deposit account held with the card issuer (subject to the limitations in § 226.13(d)(1)).

(e) *Prompt notification of returns and crediting of refunds.* (1) When a creditor other than the card issuer accepts the return of property or forgives a debt for services that is to be reflected as a credit to the consumer's credit card account, that creditor shall, within 7 business days from accepting the return or forgiving the debt, transmit a credit statement to the card issuer through the card issuer's normal channels for credit statements.

(2) The card issuer shall, within 3 business days from receipt of a credit statement, credit the consumer's account with the amount of the refund.

(3) If a creditor other than a card issuer routinely gives cash refunds to consumers paying in cash, the creditor shall also give credit or cash refunds to consumers using credit cards, unless it discloses at the time the transaction is consummated that credit or cash refunds for returns are not given. This section does not require refunds for returns nor does it prohibit refunds in kind.

(f) *Discounts; tie-in arrangements.* No card issuer may, by contract or otherwise:

(1) Prohibit any person who honors a credit card from offering a discount to a consumer to induce the consumer to pay by cash, check, or similar means rather than by use of a credit card or its underlying account for the purchase of property or services; or

(2) Require any person who honors the card issuer's credit card to open or maintain any account or obtain any other service not essential to the operation of the credit card plan from the card issuer or any other person, as a condition of participation in a credit card plan. If maintenance of an account for clearing purposes is determined to be essential to the operation of the credit card plan, it may be required only if no service charges or minimum balance requirements are imposed.

(g) *Relation to Electronic Fund Transfer Act and Regulation E.* For guidance on whether Regulation Z (12 CFR part 226) or Regulation E (12 CFR part 205) applies in instances involving both credit and electronic fund transfer aspects, refer to Regulation E, 12 CFR 205.12(a) regarding issuance and liability for unauthorized use. On matters other than issuance and liability, this section applies to the credit aspects of combined credit/electronic fund transfer transactions, as applicable.

15. Section 226.13 is revised to read as follows:

§ 226.13 Billing error resolution.[27]

(a) *Definition of billing error.* For purposes of this section, the term billing error means:

(1) A reflection on or with a periodic statement of an extension of credit that is not made to the consumer or to a person who has actual, implied, or apparent authority to use the consumer's credit card or open-end credit plan.

(2) A reflection on or with a periodic statement of an extension of credit that is not identified in accordance with the requirements of §§ 226.7(a)(2) or (b)(2), as applicable, and 226.8.

(3) A reflection on or with a periodic statement of an extension of credit for property or services not accepted by the consumer or the consumer's designee, or not delivered to the consumer or the consumer's designee as agreed.

(4) A reflection on a periodic statement of the creditor's failure to credit properly a payment or other credit issued to the consumer's account.

(5) A reflection on a periodic statement of a computational or similar error of an accounting nature that is made by the creditor.

(6) A reflection on a periodic statement of an extension of credit for which the consumer requests additional clarification, including documentary evidence.

(7) The creditor's failure to mail or deliver a periodic statement to the consumer's last known address if that address was received by the creditor, in writing, at least 20 days before the end of the billing cycle for which the statement was required.

(b) *Billing error notice.*[28] A billing error notice is a written notice[29] from a consumer that:

(1) Is received by a creditor at the address disclosed under § 226.7(a)(9) or (b)(9), as applicable, no later than 60 days after the creditor transmitted the first periodic statement that reflects the alleged billing error;

(2) Enables the creditor to identify the consumer's name and account number; and

(3) To the extent possible, indicates the consumer's belief and the reasons for the belief that a billing error exists, and the type, date, and amount of the error.

(c) *Time for resolution; general procedures.*

(1) The creditor shall mail or deliver written acknowledgment to the consumer within 30 days of receiving a billing error notice, unless the creditor has complied with the appropriate resolution procedures of paragraphs (e) and (f) of this section, as applicable, within the 30-day period; and

(2) The creditor shall comply with the appropriate resolution procedures of paragraphs (e) and (f) of this section, as applicable, within 2 complete billing cycles (but in no event later than 90 days) after receiving a billing error notice.

(d) *Rules pending resolution.* Until a billing error is resolved under paragraph (e) or (f) of this section, the following rules apply:

(1) *Consumer's right to withhold disputed amount; collection action prohibited.* The consumer need not pay (and the creditor may not try to collect) any portion of any required payment that the consumer believes is related to the disputed amount (including related finance or other charges).[30] If the cardholder has enrolled in an automatic payment plan offered by the card issuer and has agreed to pay the credit card indebtedness by periodic deductions from the cardholder's deposit account, the card issuer shall not deduct any part of the disputed amount or related finance or other charges if a billing error notice is received any time up to 3 business days before the scheduled payment date.

(2) *Adverse credit reports prohibited.* The creditor or its agent shall not (directly or indirectly) make or threaten to make an adverse report to any person about the consumer's credit standing, or report that an amount or account is delinquent, because the consumer failed to pay the disputed amount or related finance or other charges.

(3) *Acceleration of debt and restriction of account prohibited.* A creditor shall not accelerate any part of the consumer's indebtedness or restrict or close a consumer's account solely because the consumer has exercised in good faith rights provided by this section. A creditor may be subject to the forfeiture penalty under section 161(e) of the act for failure to comply with any of the requirements of this section.

(4) *Permitted creditor actions.* A creditor is not prohibited from taking

[27] [Reserved]

[28] [Reserved]

[29] [Reserved]

[30] [Reserved]

action to collect any undisputed portion of the item or bill; from deducting any disputed amount and related finance or other charges from the consumer's credit limit on the account; or from reflecting a disputed amount and related finance or other charges on a periodic statement, provided that the creditor indicates on or with the periodic statement that payment of any disputed amount and related finance or other charges is not required pending the creditor's compliance with this section.

(e) *Procedures if billing error occurred as asserted.* If a creditor determines that a billing error occurred as asserted, it shall within the time limits in paragraph (c)(2) of this section:

(1) Correct the billing error and credit the consumer's account with any disputed amount and related finance or other charges, as applicable; and

(2) Mail or deliver a correction notice to the consumer.

(f) *Procedures if different billing error or no billing error occurred.* If, after conducting a reasonable investigation,[31] a creditor determines that no billing error occurred or that a different billing error occurred from that asserted, the creditor shall within the time limits in paragraph (c)(2) of this section:

(1) Mail or deliver to the consumer an explanation that sets forth the reasons for the creditor's belief that the billing error alleged by the consumer is incorrect in whole or in part;

(2) Furnish copies of documentary evidence of the consumer's indebtedness, if the consumer so requests; and

(3) If a different billing error occurred, correct the billing error and credit the consumer's account with any disputed amount and related finance or other charges, as applicable.

(g) *Creditor's rights and duties after resolution.* If a creditor, after complying with all of the requirements of this section, determines that a consumer owes all or part of the disputed amount and related finance or other charges, the creditor:

(1) Shall promptly notify the consumer in writing of the time when payment is due and the portion of the disputed amount and related finance or other charges that the consumer still owes;

(2) Shall allow any time period disclosed under § 226.6(a)(1) or (b)(2)(v), as applicable, and § 226.7(a)(8) or (b)(8), as applicable, during which the consumer can pay the amount due under paragraph (g)(1) of this section without incurring additional finance or other charges;

(3) May report an account or amount as delinquent because the amount due under paragraph (g)(1) of this section remains unpaid after the creditor has allowed any time period disclosed under § 226.6(a)(1) or (b)(2)(v), as applicable, and § 226.7(a)(8) or (b)(8), as applicable or 10 days (whichever is longer) during which the consumer can pay the amount; but

(4) May not report that an amount or account is delinquent because the amount due under paragraph (g)(1) of the section remains unpaid, if the creditor receives (within the time allowed for payment in paragraph (g)(3) of this section) further written notice from the consumer that any portion of the billing error is still in dispute, unless the creditor also:

(i) Promptly reports that the amount or account is in dispute;

(ii) Mails or delivers to the consumer (at the same time the report is made) a written notice of the name and address of each person to whom the creditor makes a report; and

(iii) Promptly reports any subsequent resolution of the reported delinquency to all persons to whom the creditor has made a report.

(h) *Reassertion of billing error.* A creditor that has fully complied with the requirements of this section has no further responsibilities under this section (other than as provided in paragraph (g)(4) of this section) if a consumer reasserts substantially the same billing error.

(i) *Relation to Electronic Fund Transfer Act and Regulation E.* If an extension of credit is incident to an electronic fund transfer, under an agreement between a consumer and a financial institution to extend credit when the consumer's account is overdrawn or to maintain a specified minimum balance in the consumer's account, the creditor shall comply with the requirements of Regulation E, 12 CFR 205.11 governing error resolution rather than those of paragraphs (a), (b), (c), (e), (f), and (h) of this section.

16. Section 226.14 is revised to read as follows:

§ 226.14 Determination of annual percentage rate.

(a) *General rule.* The annual percentage rate is a measure of the cost of credit, expressed as a yearly rate. An annual percentage rate shall be considered accurate if it is not more than $\frac{1}{8}$th of 1 percentage point above or below the annual percentage rate determined in accordance with this section.[31a] An error in disclosure of the annual percentage rate or finance charge shall not, in itself, be considered a violation of this regulation if:

(1) The error resulted from a corresponding error in a calculation tool used in good faith by the creditor; and

(2) Upon discovery of the error, the creditor promptly discontinues use of that calculation tool for disclosure purposes, and notifies the Board in writing of the error in the calculation tool.

(b) *Annual percentage rate—in general.* Where one or more periodic rates may be used to compute the finance charge, the annual percentage rate(s) to be disclosed for purposes of §§ 226.5a, 226.5b, 226.6, 226.7(a)(4) or (b)(4), 226.9, 226.15, 226.16, and 226.26 shall be computed by multiplying each periodic rate by the number of periods in a year.

(c) *Optional effective annual percentage rate for periodic statements for creditors offering open-end plans subject to the requirements of § 226.5b.* A creditor offering an open-end plan subject to the requirements of § 226.5b need not disclose an effective annual percentage rate. Such a creditor may, at its option, disclose an effective annual percentage rate(s) pursuant to § 226.7(a)(7) and compute the effective annual percentage rate as follows:

(1) *Solely periodic rates imposed.* If the finance charge is determined solely by applying one or more periodic rates, at the creditor's option, either:

(i) By multiplying each periodic rate by the number of periods in a year; or

(ii) By dividing the total finance charge for the billing cycle by the sum of the balances to which the periodic rates were applied and multiplying the quotient (expressed as a percentage) by the number of billing cycles in a year.

(2) *Minimum or fixed charge, but not transaction charge, imposed.* If the finance charge imposed during the billing cycle is or includes a minimum, fixed, or other charge not due to the application of a periodic rate, other than a charge with respect to any specific transaction during the billing cycle, by dividing the total finance charge for the billing cycle by the amount of the balance(s) to which it is applicable[32] and multiplying the quotient (expressed as a percentage) by the number of billing cycles in a year.[33] If there is no balance to which the finance charge is applicable, an annual percentage rate cannot be determined under this section. Where the finance charge imposed during the billing cycle is or includes a loan fee, points, or similar

[31] [Reserved]

[31a] [Reserved]

[32] [Reserved]

[33] [Reserved]

charge that relates to opening, renewing, or continuing an account, the amount of such charge shall not be included in the calculation of the annual percentage rate.

(3) *Transaction charge imposed.* If the finance charge imposed during the billing cycle is or includes a charge relating to a specific transaction during the billing cycle (even if the total finance charge also includes any other minimum, fixed, or other charge not due to the application of a periodic rate), by dividing the total finance charge imposed during the billing cycle by the total of all balances and other amounts on which a finance charge was imposed during the billing cycle without duplication, and multiplying the quotient (expressed as a percentage) by the number of billing cycles in a year,[34] except that the annual percentage rate shall not be less than the largest rate determined by multiplying each periodic rate imposed during the billing cycle by the number of periods in a year.[35] Where the finance charge imposed during the billing cycle is or includes a loan fee, points, or similar charge that relates to the opening, renewing, or continuing an account, the amount of such charge shall not be included in the calculation of the annual percentage rate. *See* appendix F to this part regarding determination of the denominator of the fraction under this paragraph.

(4) If the finance charge imposed during the billing cycle is or includes a minimum, fixed, or other charge not due to the application of a periodic rate and the total finance charge imposed during the billing cycle does not exceed 50 cents for a monthly or longer billing cycle, or the pro rata part of 50 cents for a billing cycle shorter than monthly, at the creditor's option, by multiplying each applicable periodic rate by the number of periods in a year, notwithstanding the provisions of paragraphs (c)(2) and (c)(3) of this section.

(d) *Calculations where daily periodic rate applied.* If the provisions of paragraph (c)(1)(ii) or (c)(2) of this section apply and all or a portion of the finance charge is determined by the application of one or more daily periodic rates, the annual percentage rate may be determined either:

(1) By dividing the total finance charge by the average of the daily balances and multiplying the quotient by the number of billing cycles in a year; or

(2) By dividing the total finance charge by the sum of the daily balances and multiplying the quotient by 365.

17. Section 226.16 is revised to read as follows:

§ 226.16 Advertising.

(a) *Actually available terms.* If an advertisement for credit states specific credit terms, it shall state only those terms that actually are or will be arranged or offered by the creditor.

(b) *Advertisement of terms that require additional disclosures.* (1) Any term required to be disclosed under § 226.6(b)(3) set forth affirmatively or negatively in an advertisement for an open-end (not home-secured) credit plan triggers additional disclosures under this section. Any term required to be disclosed under § 226.6(a)(1) or (a)(2) set forth affirmatively or negatively in an advertisement for a home-equity plan subject to the requirements of § 226.5b triggers additional disclosures under this section. If any of the terms that trigger additional disclosures under this paragraph is set forth in an advertisement, the advertisement shall also clearly and conspicuously set forth the following:[36d]

(i) Any minimum, fixed, transaction, activity or similar charge that is a finance charge under § 226.4 that could be imposed.

(ii) Any periodic rate that may be applied expressed as an annual percentage rate as determined under § 226.14(b). If the plan provides for a variable periodic rate, that fact shall be disclosed.

(iii) Any membership or participation fee that could be imposed.

(2) If an advertisement for credit to finance the purchase of goods or services specified in the advertisement states a periodic payment amount, the advertisement shall also state the total of payments and the time period to repay the obligation, assuming that the consumer pays only the periodic payment amount advertised. The disclosure of the total of payments and the time period to repay the obligation must be equally prominent to the statement of the periodic payment amount.

(c) *Catalogs or other multiple-page advertisements; electronic advertisements.* (1) If a catalog or other multiple-page advertisement, or an electronic advertisement (such as an advertisement appearing on an Internet Web site), gives information in a table or schedule in sufficient detail to permit determination of the disclosures required by paragraph (b) of this section, it shall be considered a single advertisement if:

(i) The table or schedule is clearly and conspicuously set forth; and

(ii) Any statement of terms set forth in § 226.6 appearing anywhere else in the catalog or advertisement clearly refers to the page or location where the table or schedule begins.

(2) A catalog or other multiple-page advertisement or an electronic advertisement (such as an advertisement appearing on an Internet Web site) complies with this paragraph if the table or schedule of terms includes all appropriate disclosures for a representative scale of amounts up to the level of the more commonly sold higher-priced property or services offered.

(d) *Additional requirements for home-equity plans.* (1) *Advertisement of terms that require additional disclosures.* If any of the terms required to be disclosed under § 226.6(a)(1) or (a)(2) or the payment terms of the plan are set forth, affirmatively or negatively, in an advertisement for a home-equity plan subject to the requirements of § 226.5b, the advertisement also shall clearly and conspicuously set forth the following:

(i) Any loan fee that is a percentage of the credit limit under the plan and an estimate of any other fees imposed for opening the plan, stated as a single dollar amount or a reasonable range.

(ii) Any periodic rate used to compute the finance charge, expressed as an annual percentage rate as determined under § 226.14(b).

(iii) The maximum annual percentage rate that may be imposed in a variable-rate plan.

(2) *Discounted and premium rates.* If an advertisement states an initial annual percentage rate that is not based on the index and margin used to make later rate adjustments in a variable-rate plan, the advertisement also shall state with equal prominence and in close proximity to the initial rate:

(i) The period of time such initial rate will be in effect; and

(ii) A reasonably current annual percentage rate that would have been in effect using the index and margin.

(3) *Balloon payment.* If an advertisement contains a statement of any minimum periodic payment and a balloon payment may result if only the minimum periodic payments are made, even if such a payment is uncertain or unlikely, the advertisement also shall state with equal prominence and in close proximity to the minimum periodic payment statement that a balloon payment may result, if

[34] [Reserved]

[35] [Reserved]

[36d] [Reserved]

applicable.[36e] A balloon payment results if paying the minimum periodic payments does not fully amortize the outstanding balance by a specified date or time, and the consumer is required to repay the entire outstanding balance at such time. If a balloon payment will occur when the consumer makes only the minimum payments required under the plan, an advertisement for such a program which contains any statement of any minimum periodic payment shall also state with equal prominence and in close proximity to the minimum periodic payment statement:

(i) That a balloon payment will result; and

(ii) The amount and timing of the balloon payment that will result if the consumer makes only the minimum payments for the maximum period of time that the consumer is permitted to make such payments.

(4) *Tax implications.* An advertisement that states that any interest expense incurred under the home-equity plan is or may be tax deductible may not be misleading in this regard. If an advertisement distributed in paper form or through the Internet (rather than by radio or television) is for a home-equity plan secured by the consumer's principal dwelling, and the advertisement states that the advertised extension of credit may exceed the fair market value of the dwelling, the advertisement shall clearly and conspicuously state that:

(i) The interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes; and

(ii) The consumer should consult a tax adviser for further information regarding the deductibility of interest and charges.

(5) *Misleading terms.* An advertisement may not refer to a home-equity plan as ''free money'' or contain a similarly misleading term.

(6) *Promotional rates and payments.* (i) *Definitions.* The following definitions apply for purposes of paragraph (d)(6) of this section:

(A) *Promotional rate.* The term ''promotional rate'' means, in a variable-rate plan, any annual percentage rate that is not based on the index and margin that will be used to make rate adjustments under the plan, if that rate is less than a reasonably current annual percentage rate that would be in effect under the index and margin that will be used to make rate adjustments under the plan.

(B) *Promotional payment.* The term ''promotional payment'' means:

(*1*) For a variable-rate plan, any minimum payment applicable for a promotional period that:

(*i*) Is not derived by applying the index and margin to the outstanding balance when such index and margin will be used to determine other minimum payments under the plan; and

(*ii*) Is less than other minimum payments under the plan derived by applying a reasonably current index and margin that will be used to determine the amount of such payments, given an assumed balance.

(*2*) For a plan other than a variable-rate plan, any minimum payment applicable for a promotional period if that payment is less than other payments required under the plan given an assumed balance.

(C) *Promotional period.* A ''promotional period'' means a period of time, less than the full term of the loan, that the promotional rate or promotional payment may be applicable.

(ii) *Stating the promotional period and post-promotional rate or payments.* If any annual percentage rate that may be applied to a plan is a promotional rate, or if any payment applicable to a plan is a promotional payment, the following must be disclosed in any advertisement, other than television or radio advertisements, in a clear and conspicuous manner with equal prominence and in close proximity to each listing of the promotional rate or payment:

(A) The period of time during which the promotional rate or promotional payment will apply;

(B) In the case of a promotional rate, any annual percentage rate that will apply under the plan. If such rate is variable, the annual percentage rate must be disclosed in accordance with the accuracy standards in §§ 226.5b or 226.16(b)(1)(ii) as applicable; and

(C) In the case of a promotional payment, the amounts and time periods of any payments that will apply under the plan. In variable-rate transactions, payments that will be determined based on application of an index and margin shall be disclosed based on a reasonably current index and margin.

(iii) *Envelope excluded.* The requirements in paragraph (d)(6)(ii) of this section do not apply to an envelope in which an application or solicitation is mailed, or to a banner advertisement or pop-up advertisement linked to an application or solicitation provided electronically.

(e) *Alternative disclosures—television or radio advertisements.* An advertisement made through television or radio stating any of the terms requiring additional disclosures under paragraphs (b)(1) or (d)(1) of this section may alternatively comply with paragraphs (b)(1) or (d)(1) of this section by stating the information required by paragraphs (b)(1)(ii) or (d)(1)(ii) of this section, as applicable, and listing a toll-free telephone number, or any telephone number that allows a consumer to reverse the phone charges when calling for information, along with a reference that such number may be used by consumers to obtain the additional cost information.

(f) *Misleading terms.* An advertisement may not refer to an annual percentage rate as ''fixed,'' or use a similar term, unless the advertisement also specifies a time period that the rate will be fixed and the rate will not increase during that period, or if no such time period is provided, the rate will not increase while the plan is open.

(g) *Promotional Rates.* (1) *Scope.* The requirements of this paragraph apply to any advertisement of an open-end (not home-secured) plan, including promotional materials accompanying applications or solicitations subject to § 226.5a(c) or accompanying applications or solicitations subject to § 226.5a(e).

(2) *Definitions.* (i) *Promotional rate* means any annual percentage rate applicable to one or more balances or transactions on an open-end (not home-secured) plan for a specified period of time that is lower than the annual percentage rate that will be in effect at the end of that period on such balances or transactions.

(ii) *Introductory rate* means a promotional rate offered in connection with the opening of an account.

(iii) *Promotional period* means the maximum time period for which the promotional rate may be applicable.

(3) *Stating the term ''introductory''.* If any annual percentage rate that may be applied to the account is an introductory rate, the term *introductory* or *intro* must be in immediate proximity to each listing of the introductory rate in a written or electronic advertisement.

(4) *Stating the promotional period and post-promotional rate.* If any annual percentage rate that may be applied to the account is a promotional rate under paragraph (g)(2)(i) of this section, the information in paragraphs (g)(4)(i) and (g)(4)(ii) of this section must be stated in a clear and conspicuous manner in the advertisement. If the rate is stated in a written or electronic advertisement, the information in paragraphs (g)(4)(i) and (g)(4)(ii) of this section must also be stated in a prominent location closely

[36e] [Reserved.]

proximate to the first listing of the promotional rate.

(i) When the promotional rate will end; and

(ii) The annual percentage rate that will apply after the end of the promotional period. If such rate is variable, the annual percentage rate must comply with the accuracy standards in §§ 226.5a(c)(2), 226.5a(d)(3), 226.5a(e)(4), or 226.16(b)(1)(ii), as applicable. If such rate cannot be determined at the time disclosures are given because the rate depends at least in part on a later determination of the consumer's creditworthiness, the advertisement must disclose the specific rates or the range of rates that might apply.

(5) *Envelope excluded.* The requirements in paragraph (g)(4) of this section do not apply to an envelope or other enclosure in which an application or solicitation is mailed, or to a banner advertisement or pop-up advertisement, linked to an application or solicitation provided electronically.

(h) *Deferred interest or similar offers.* (1) *Scope.* The requirements of this paragraph apply to any advertisement of an open-end credit plan not subject to § 226.5b, including promotional materials accompanying applications or solicitations subject to § 226.5a(c) or accompanying applications or solicitations subject to § 226.5a(e).

(2) *Definitions.* ''Deferred interest'' means finance charges accrued on balances or transactions that a consumer is not obligated to pay or that will be waived or refunded to a consumer if those balances or transactions are paid in full by a specified date. The maximum period from the date the consumer becomes obligated for the balance or transaction until the specified date by which the consumer must pay the balance or transaction in full in order to avoid finance charges, or receive a waiver or refund of finance charges, is the ''deferred interest period.'' ''Deferred interest'' does not include any finance charges the consumer avoids paying in connection with any recurring grace period.

(3) *Stating the deferred interest period.* If a deferred interest offer is advertised, the deferred interest period must be stated in a clear and conspicuous manner in the advertisement. If the phrase ''no interest'' or similar term regarding the possible avoidance of interest obligations under the deferred interest program is stated, the term ''if paid in full'' must also be stated in a clear and conspicuous manner preceding the disclosure of the deferred interest period in the advertisement. If the deferred interest offer is included in a written or electronic advertisement, the deferred interest period and, if applicable, the term ''if paid in full'' must also be stated in immediate proximity to each statement of ''no interest,'' ''no payments,'' ''deferred interest,'' ''same as cash,'' or similar term regarding interest or payments during the deferred interest period.

(4) *Stating the terms of the deferred interest or similar offer.* If any deferred interest offer is advertised, the information in paragraphs (h)(4)(i) and (h)(4)(ii) of this section must be stated in the advertisement, in language similar to Sample G–24 in Appendix G to this part. If the deferred interest offer is included in a written or electronic advertisement, the information in paragraphs (h)(4)(i), and (h)(4)(ii) of this section must also be stated in a prominent location closely proximate to the first statement of ''no interest,'' ''no payments,'' ''deferred interest,'' ''same as cash,'' or similar term regarding interest or payments during the deferred interest period.

(i) A statement that interest will be charged from the date the consumer becomes obligated for the balance or transaction subject to the deferred interest offer if the balance or transaction is not paid in full within the deferred interest period; and

(ii) A statement, if applicable, that interest will be charged from the date the consumer incurs the balance or transaction subject to the deferred interest offer if the account is in default before the end of the deferred interest period.

(5) *Envelope excluded.* The requirements in paragraph (h)(4) of this section do not apply to an envelope or other enclosure in which an application or solicitation is mailed, or to a banner advertisement or pop-up advertisement linked to an application or solicitation provided electronically.

18. Section 226.30 is revised to read as follows:

§ 226.30 Limitation on rates.

A creditor shall include in any consumer credit contract secured by a dwelling and subject to the act and this regulation the maximum interest rate that may be imposed during the term of the obligation [50] when:

(a) In the case of closed-end credit, the annual percentage rate may increase after consummation, or

(b) In the case of open-end credit, the annual percentage rate may increase during the plan.

* * * * *

[50] [Reserved.]

19. A new subpart G consisting of §§ 226.51, 226.52, 226.53, 226.54, 226.55, 226.56, 226.57, and 226.58 is added to read as follows:

Subpart G—Special Rules Applicable to Credit Card Accounts and Open-End Credit Offered to College Students

Sec.
226.51 Ability to Pay.
226.52 Limitations on fees.
226.53 Allocation of payments.
226.54 Limitations on the imposition of finance charges.
226.55 Limitations on increasing annual percentage rates, fees, and charges.
226.56 Requirements for over-the-limit transactions.
226.57 Special rules for marketing open-end credit to college students.
226.58 Internet posting of credit card agreements.

Subpart G—Special Rules Applicable to Credit Card Accounts and Open-End Credit Offered to College Students

§ 226.51 Ability to Pay.

(a) *General rule.* (1) *Consideration of ability to pay.* A card issuer must not open a credit card account for a consumer under an open-end (not home-secured) consumer credit plan, or increase any credit limit applicable to such account, unless the card issuer considers the ability of the consumer to make the required minimum periodic payments under the terms of the account based on the consumer's income or assets and the consumer's current obligations. Card issuers must have reasonable policies and procedures in place to consider this information.

(2) *Minimum payments.* (i) *Reasonable method.* For purposes of paragraph (a)(1) of this section, a card issuer must use a reasonable method for estimating the minimum periodic payments the consumer would be required to pay under the terms of the account.

(ii) *Safe harbor.* A card issuer complies with paragraph (a)(2)(i) of this section if it estimates required minimum periodic payments using the following method:

(A) The card issuer assumes utilization of the full credit line that the issuer is considering offering to the consumer from the first day of the billing cycle; and

(B) The card issuer uses a minimum payment formula employed by the issuer for the product the issuer is considering offering to the consumer or, in the case of an existing account, the minimum payment formula that currently applies to that account, provided that:

(*1*) If the applicable minimum payment formula includes interest

charges, the card issuer estimates those charges using an interest rate that the issuer is considering offering to the consumer for purchases or, in the case of an existing account, the interest rate that currently applies to purchases; and

(*2*) If the applicable minimum payment formula includes fees, the card issuer may assume that no fees have been charged to the account.

(b) *Rules affecting young consumers.*

(1) *Applications from young consumers.* A card issuer may not open a credit card account under an open-end (not home-secured) consumer credit plan for a consumer less than 21 years old, unless the consumer has submitted a written application and provided:

(i)(A) a signed agreement of a cosigner, guarantor, or joint applicant who is at least 21 years old to be either secondarily liable for any debt on the account incurred by the consumer before the consumer has attained the age of 21 in the event the consumer defaults on the account or jointly liable with the consumer for any debt on the account incurred by either party, and

(B) financial information indicating such cosigner, guarantor, or joint applicant has the ability to make the minimum payments on such debts, consistent with paragraph (a) of this section; or

(ii) financial information indicating an independent ability to make the minimum payments on the proposed extension of credit in connection with the account, consistent with paragraph (a) of this section.

(2) *Credit line increases for young consumers.* If a credit card account has been opened pursuant to paragraph (b)(1)(i) of this section, no increase in the credit limit may be made on such account before the consumer attains the age of 21 unless the cosigner, guarantor, or joint accountholder who assumed liability at account opening agrees in writing to assume liability on the increase.

§ 226.52 Limitations on fees.

(a) *Limitations during first year after account opening.* (1) *General rule.* Except as provided in paragraph (a)(2) of this section, if a card issuer charges any fees to a credit card account under an open-end (not home-secured) consumer credit plan during the first year after the account is opened:

(i) The card issuer must not charge to the account during that period fees that in total constitute more than 25 percent of the credit limit in effect when the account is opened; and

(ii) The card issuer must not require the consumer to pay any fees in excess of the total amount permitted by paragraph (a)(1)(i) of this section with respect to the account during that period.

(2) *Fees not subject to limitations.* Paragraph (a) of this section does not apply to:

(i) Late payment fees, over-the-limit fees, and returned-payment fees; or

(ii) Fees that the consumer is not required to pay with respect to the account.

(3) *Rule of construction.* Paragraph (a) of this section does not authorize the imposition or payment of fees or charges otherwise prohibited by law.

§ 226.53 Allocation of payments.

(a) *General rule.* Except as provided in paragraph (b) of this section, when a consumer makes a payment in excess of the required minimum periodic payment for a credit card account under an open-end (not home-secured) consumer credit plan, the card issuer must allocate the excess amount first to the balance with the highest annual percentage rate and any remaining portion to the other balances in descending order based on the applicable annual percentage rate.

(b) *Special rule for balances subject to deferred interest or similar programs.* When a balance on a credit card account under an open-end (not home-secured) consumer credit plan is subject to a deferred interest or similar program that provides that a consumer will not be obligated to pay interest that accrues on the balance if the balance is paid in full prior to the expiration of a specified period of time, the card issuer must allocate any amount paid by the consumer in excess of the required minimum periodic payment first to that balance during the two billing cycles immediately preceding expiration of the specified period and any remaining portion to any other balances consistent with paragraph (a) of this section.

§ 226.54 Limitations on the imposition of finance charges.

(a) *Limitations on imposing finance charges as a result of the loss of a grace period.* (1) *General rule.* Except as provided in paragraph (b) of this section, a card issuer must not impose finance charges as a result of the loss of a grace period on a credit card account under an open-end (not home-secured) consumer credit plan if those finance charges are based on:

(i) Balances for days in billing cycles that precede the most recent billing cycle; or

(ii) Any portion of a balance subject to a grace period that was repaid prior to the expiration of the grace period.

(2) *Definition of grace period.* For purposes of paragraph (a)(1) of this section, ''grace period'' has the same meaning as in § 226.5(b)(2)(ii).

(b) *Exceptions.* Paragraph (a) of this section does not apply to:

(1) Adjustments to finance charges as a result of the resolution of a dispute under § 226.12 or § 226.13; or

(2) Adjustments to finance charges as a result of the return of a payment.

§ 226.55 Limitations on increasing annual percentage rates, fees, and charges.

(a) *General rule.* Except as provided in paragraph (b) of this section, a card issuer must not increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) on a credit card account under an open-end (not home-secured) consumer credit plan.

(b) *Exceptions.* A card issuer may increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) pursuant to an exception set forth in this paragraph even if that increase would not be permitted under a different exception.

(1) *Temporary rate exception.* A card issuer may increase an annual percentage rate upon the expiration of a specified period of six months or longer, provided that:

(i) Prior to the commencement of that period, the card issuer disclosed in writing to the consumer, in a clear and conspicuous manner, the length of the period and the annual percentage rate that would apply after expiration of the period; and

(ii) Upon expiration of the specified period:

(A) The card issuer must not apply an annual percentage rate to transactions that occurred prior to the period that exceeds the annual percentage rate that applied to those transactions prior to the period;

(B) If the disclosures required by paragraph (b)(1)(i) of this section are provided pursuant to § 226.9(c), the card issuer must not apply an annual percentage rate to transactions that occurred within 14 days after provision of the notice that exceeds the annual percentage rate that applied to that category of transactions prior to provision of the notice; and

(C) The card issuer must not apply an annual percentage rate to transactions that occurred during the period that exceeds the increased annual percentage rate disclosed pursuant to paragraph (b)(1)(i) of this section.

(2) *Variable rate exception.* A card issuer may increase an annual percentage rate when:

(i) The annual percentage rate varies according to an index that is not under

the card issuer's control and is available to the general public; and

(ii) The increase in the annual percentage rate is due to an increase in the index.

(3) *Advance notice exception.* A card issuer may increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) after complying with the applicable notice requirements in § 226.9(b), (c), or (g), provided that:

(i) If a card issuer discloses an increased annual percentage rate, fee, or charge pursuant to § 226.9(b), the card issuer must not apply that rate, fee, or charge to transactions that occurred prior to provision of the notice;

(ii) If a card issuer discloses an increased annual percentage rate, fee, or charge pursuant to § 226.9(c) or (g), the card issuer must not apply that rate, fee, or charge to transactions that occurred prior to or within 14 days after provision of the notice; and

(iii) This exception does not permit a card issuer to increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) during the first year after the credit card account is opened.

(4) *Delinquency exception.* A card issuer may increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) due to the card issuer not receiving the consumer's required minimum periodic payment within 60 days after the due date for that payment, provided that:

(i) The card issuer must disclose in a clear and conspicuous manner in the notice of the increase pursuant to § 226.9(c) or (g):

(A) A statement of the reason for the increase; and

(B) That the increased annual percentage rate, fee, or charge will cease to apply if the card issuer receives six consecutive required minimum periodic payments on or before the payment due date beginning with the first payment due following the effective date of the increase; and

(ii) If the card issuer receives six consecutive required minimum periodic payments on or before the payment due date beginning with the first payment due following the effective date of the increase, the card issuer must reduce any annual percentage rate, fee, or charge increased pursuant to this exception to the annual percentage rate, fee, or charge that applied prior to the increase with respect to transactions that occurred prior to or within 14 days after provision of the § 226.9(c) or (g) notice.

(5) *Workout and temporary hardship arrangement exception.* A card issuer may increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) due to the consumer's completion of a workout or temporary hardship arrangement or the consumer's failure to comply with the terms of such an arrangement, provided that:

(i) Prior to commencement of the arrangement, the card issuer has provided the consumer with a clear and conspicuous written disclosure of the terms of the arrangement (including any increases due to the completion or failure of the arrangement); and

(ii) Upon the completion or failure of the arrangement, the card issuer must not apply to any transactions that occurred prior to commencement of the arrangement an annual percentage rate, fee, or charge that exceeds the annual percentage rate, fee, or charge that applied to those transactions prior to commencement of the arrangement.

(6) *Servicemembers Civil Relief Act exception.* If an annual percentage rate has been decreased pursuant to 50 U.S.C. app. 527, a card issuer may increase that annual percentage rate once 50 U.S.C. app. 527 no longer applies, provided that the card issuer must not apply to any transactions that occurred prior to the decrease an annual percentage rate that exceeds the annual percentage rate that applied to those transactions prior to the decrease.

(c) *Treatment of protected balances.* (1) *Definition of protected balance.* For purposes of this paragraph, ''protected balance'' means the amount owed for a category of transactions to which an increased annual percentage rate or an increased fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) cannot be applied after the annual percentage rate, fee, or charge for that category of transactions has been increased pursuant to paragraph (b)(3) of this section.

(2) *Repayment of protected balance.* The card issuer must not require repayment of the protected balance using a method that is less beneficial to the consumer than one of the following methods:

(i) The method of repayment for the account before the effective date of the increase;

(ii) An amortization period of not less than five years, beginning no earlier than the effective date of the increase; or

(iii) A required minimum periodic payment that includes a percentage of the balance that is equal to no more than twice the percentage required before the effective date of the increase.

(d) *Continuing application.* This section continues to apply to a balance on a credit card account after:

(1) The account is closed or acquired by another creditor; or

(2) The balance is transferred from a credit card account issued by a creditor to another credit account issued by the same creditor or its affiliate or subsidiary (unless the account to which the balance is transferred is subject to § 226.5b).

§ 226.56 Requirements for over-the-limit transactions.

(a) *Definition.* For purposes of this section, the term ''over-the-limit transaction'' means any extension of credit by a creditor to complete a transaction that causes a consumer's credit card account balance to exceed the credit limit.

(b) *Opt-in requirement.* (1) *General.* A creditor shall not assess a fee or charge on a consumer's credit card account under an open-end (not home-secured) consumer credit plan for an over-the-limit transaction unless the creditor:

(i) Provides the consumer with an oral, written or electronic notice explaining the consumer's right to affirmatively consent, or opt in, to the creditor's payment of an over-the-limit transaction;

(ii) Provides a reasonable opportunity for the consumer to affirmatively consent, or opt in, to the creditor's payment of over-the-limit transactions;

(iii) Obtains the consumer's affirmative consent, or opt-in, to the creditor's payment of such transactions; and

(iv) If the consumer affirmatively consents, or opts in, provides the consumer notice of the right to revoke that consent following the assessment of an over-the-limit fee or charge.

(2) *Completion of over-the-limit transactions without consumer consent.* Notwithstanding the absence of a consumer's affirmative consent under paragraph (b)(1)(iii) of this section, a creditor may pay any over-the-limit transaction on a consumer's account provided that the creditor does not impose any fee or charge on the account for paying that over-the-limit transaction.

(c) *Method of election.* A creditor may permit a consumer to consent to the creditor's payment of any over-the-limit transaction in writing, orally, or electronically. The creditor must also permit the consumer to revoke his or

her consent using the same methods available to the consumer for providing consent.

(d) *Timing of notices.* (1) *Initial notice.* (i) *General.* The notice required by paragraph (b)(1)(i) of this section shall be provided prior to the assessment of any over-the-limit fee or charge on a consumer's account;

(ii) *Oral or written consent.* If a consumer elects to consent to the creditor's payment of any over-the-limit transaction by oral or electronic means, the creditor must provide the notice required by paragraph (b)(1)(i) of this section immediately prior to and contemporaneously with obtaining that consent.

(2) *Subsequent notice.* The notice required by paragraph (b)(1)(iv) of this section shall be provided on the front of any page of each periodic statement that reflects the assessment of an over-the-limit fee or charge on a consumer's account.

(e) *Content.* (1) *Initial notice.* The notice required by paragraph (b)(1)(i) of this section shall include:

(i) *Fees.* The dollar amount of any fees or charges assessed by the creditor on a consumer's account for an over-the-limit transaction;

(ii) *APRs.* Any increased periodic rate(s) (expressed as an annual percentage rate(s)) that may be imposed on the account as a result of an over-the-limit transaction; and

(iii) *Disclosure of opt-in right.* An explanation of the consumer's right to affirmatively consent to the creditor's payment of over-the-limit transactions, including the method(s) by which the consumer may consent to the service.

(2) *Subsequent notice.* The notice required by paragraph (b)(1)(iv) of this section shall describe the consumer's right to revoke any consent provided under paragraph (b)(1)(iii) of this section, including the method(s) by which the consumer may revoke the service.

(3) *Safe harbor.* Use of Model Forms G–25(A) or G–25(B) of Appendix G to this part, or substantially similar notices, constitutes compliance with the notice content requirements of paragraph (e) of this section.

(f) *Joint relationships.* If two or more consumers are jointly liable on a credit card account under an open-end (not home-secured) consumer credit plan, the creditor shall treat the affirmative consent of any of the joint consumers as affirmative consent for that account. Similarly, the creditor shall treat a revocation of consent by any of the joint consumers as revocation of consent for that account.

(g) *Continuing right to opt in or revoke opt-in.* A consumer may affirmatively consent to the creditor's payment of over-the-limit transactions at any time in the manner described in the notice required by paragraph (b)(1)(i) of this section. Similarly, the consumer may revoke the consent at any time in the manner described in the notice required by paragraph (b)(1)(iv) of this section.

(h) *Duration of opt-in.* A consumer's affirmative consent to the creditor's payment of over-the-limit transactions is effective until revoked by the consumer, or until the creditor decides for any reason to cease paying over-the-limit transactions for the consumer.

(i) *Time to comply with revocation request.* A creditor must comply with a consumer's revocation request as soon as reasonably practicable after the creditor receives it.

(j) *Prohibited practices.* Notwithstanding a consumer's affirmative consent to a creditor's payment of over-the-limit transactions, a creditor is prohibited from engaging in the following practices:

(1) *Fees or charges imposed per cycle.*

(i) *General rule.* A creditor may not impose more than one over-the-limit fee or charge on a consumer's credit card account per billing cycle, and, except as provided in paragraph (j)(1)(ii) of this section, may not impose an over-the-limit fee or charge on the consumer's credit card account for more than three billing cycles for the same over-the-limit transaction where the consumer has not reduced the account balance below the credit limit by the payment due date for either of the last two billing cycles.

(ii) *Exception.* The prohibition in paragraph (j)(1)(i) of this section on imposing an over-the-limit fee or charge in more than three billing cycles for the same over-the-limit transaction(s) does not apply if an over-the-limit transaction occurs during either of the last two billing cycles.

(2) *Failure to promptly replenish.* A creditor may not impose an over-the-limit fee or charge solely because of creditor's failure to promptly replenish the consumer's available credit following the crediting of the consumer's payment under § 226.10.

(3) *Conditioning.* A creditor may not condition the amount of a consumer's credit limit on the consumer affirmatively consenting to the creditor's payment of over-the-limit transactions if the creditor assesses a fee or charge for such service.

(4) *Over-the-limit fees attributed to fees or interest.* A creditor may not impose an over-the-limit fee or charge if a consumer exceeds a credit limit solely because of fees or interest charged by the creditor to the consumer's account during the billing cycle. For purposes of this paragraph (j)(4), fees or interest charges that may not trigger an over-the-limit fee or charge are charges imposed as part of the plan under § 226.6(b)(3).

§ 226.57 Special rules for marketing open-end credit to college students.

(a) *Definitions:*

(1) *College student credit card.* The term ''college student credit card'' in this section means a credit card issued under a credit card account under an open-end (not home-secured) consumer credit plan to any college student.

(2) *College student.* The term ''college student'' as used in this section means an individual who is a full-time or part-time student of an institution of higher education.

(3) *Institution of higher education.* The term ''institution of higher education'' as used in this section has the same meaning as in sections 101 and 102 of the Higher Education Act of 1965 (20 U.S.C. 1001 and 1002).

(4) *Affiliated organization.* The term ''affiliated organization'' in this section means an alumni organization or foundation affiliated with or related to an institution of higher education.

(5) *College credit card agreement.* The term ''college credit card agreement'' in this section means any business, marketing or promotional agreement between a card issuer and an institution of higher education or an affiliated organization in connection with which college student credit cards are issued to college students currently enrolled at that institution.

(b) *Public disclosure of agreements.* An institution of higher education shall publicly disclose any contract or other agreement made with a card issuer or creditor for the purpose of marketing a credit card.

(c) *Prohibited inducements.* No card issuer or creditor may offer a college student any tangible item to induce such student to apply for or open an open-end consumer credit plan offered by such card issuer or creditor, if such offer is made:

(1) On the campus of an institution of higher education;

(2) Near the campus of an institution of higher education; or

(3) At an event sponsored by or related to an institution of higher education.

(d) *Annual report to the Board.* (1) *Requirement to register.* A card issuer subject to the requirement to report under § 226.57(d)(2) with regard to calendar year 2009 must register with the Board in the form and manner prescribed by the Board no later than

February 1, 2010. A card issuer that becomes subject to the requirement to report under § 226.57(d)(2) after December 31, 2009, must register with the Board in the form and manner prescribed by the Board no later than February 1 following the calendar year in which the issuer becomes subject.

(2) *Requirement to report.* Any card issuer that was a party to one or more college credit card agreements in effect at any time during a calendar year must submit to the Board an annual report regarding those agreements in the form and manner prescribed by the Board.

(3) *Contents of report.* The annual report to the Board must include the following:

(i) A copy of any college credit card agreement to which the card issuer was a party that was in effect at any time during the period covered by the report;

(ii) A copy of any memorandum of understanding in effect at any time during the period covered by the report between the card issuer and an institution of higher education or affiliated organization that directly or indirectly relates to the college credit card agreement or that controls or directs any obligations or distribution of benefits between any such entities;

(iii) The total dollar amount of any payments pursuant to a college credit card agreement from the card issuer to an institution of higher education or affiliated organization during the period covered by the report, and how such amounts are determined;

(iv) The number of credit card accounts opened pursuant to any college credit card agreement during the period covered by the report; and

(v) The total number of credit card accounts opened pursuant to any such agreement that were open at the end of the period covered by the report.

(4) *Timing of reports.* Except for the initial report described below, a card issuer must submit its annual report for each calendar year to the Board by the first business day on or after March 31 of the following year. Card issuers must submit the first report following the effective date of this section, providing information for the 2009 calendar year, to the Board by February 22, 2010.

§ 226.58 Internet posting of credit card agreements.

(a) *Applicability.* The requirements of this section apply to any card issuer that issues credit cards under a credit card account under an open-end (not home-secured) consumer credit plan.

(b) *Definitions.* (1) *Agreement.* For purposes of this section, ''agreement'' or ''credit card agreement'' means a written document or documents evidencing the terms of the legal obligation, or the prospective legal obligation, between a card issuer and a consumer under a credit card account for an open-end (not home-secured) consumer credit plan. The ''agreement'' or ''credit card agreement'' also includes the pricing information, as defined in § 226.58(b)(4).

(2) *Business day.* For purposes of this section, ''business day'' means a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions.

(3) *Offers.* For purposes of this section, an issuer ''offers'' or ''offers to the public'' an agreement if the issuer is soliciting or accepting applications for accounts that would be subject to that agreement.

(4) *Pricing information.* For purposes of this section, ''pricing information'' means:

(i) The information under § 226.6(b)(2)(i) through (b)(2)(xii), (b)(3) and (b)(4) required to be disclosed in writing pursuant to § 226.5(a)(1)(ii);

(ii) The credit limit; and

(iii) The method used to calculate required minimum payments.

(c) *Registration with Board.* (1) *Initial registration.* A card issuer that offered one or more credit card agreements as of December 31, 2009, must register with the Board, in the form and manner prescribed by the Board, no later than February 1, 2010, unless the card issuer would have qualified for the *de minimis* exception under § 226.58(e) as of December 31, 2009.

(2) *Subsequent registrations.* A card issuer that that is required to make a submission to the Board under § 226.58(d) that has not previously registered with the Board must register with the Board, in the form and manner prescribed by the Board, at least 21 days before the quarterly submission deadline specified in § 226.58(d)(1) on which the card issuer's first submission to the Board is due.

(3) *Updates.* If information contained in a card issuer's registration under § 226.58(c)(1) or (c)(2) changes, the issuer must provide to the Board updated registration information, in the form and manner prescribed by the Board, no later than the first quarterly submission deadline specified in § 226.58(d)(1) following the change.

(d) *Submission of agreements to Board.* (1) *Timing and content of submissions.* A card issuer must make quarterly submissions to the Board, in the form and manner specified by the Board, that contain:

(i) The credit card agreements, as described in Appendix N, that the card issuer offered to the public as of the last business day of the preceding calendar quarter that the card issuer has not previously submitted to the Board;

(ii) Any credit card agreement previously submitted to the Board that was modified or amended during the preceding calendar quarter, as described in § 226.58(d)(3); and

(iii) Notification regarding any credit card agreement previously submitted to the Board that the issuer is withdrawing, as described in § 226.58(d)(4) and (e). Except as provided in § 226.58(d)(2), quarterly submissions to the Board are due no later than the first business day on or after January 31, April 30, July 31, and October 31 of each year.

(2) *Timing of first two submissions.* The first submission following the effective date of this section must be sent to the Board no later than February 22, 2010, and must contain the credit card agreements that the card issuer offered to the public as of December 31, 2009. The next submission must be sent to the Board no later than August 2, 2010, and must contain:

(i) The credit card agreements that the card issuer offered to the public as of June 30, 2010, that the card issuer has not previously submitted to the Board;

(ii) Any credit card agreement previously submitted to the Board that was modified or amended after December 31, 2009, and on or before June 30, 2010, as described in § 226.58(d)(3); and

(iii) Notification regarding any credit card agreement previously submitted to the Board that the issuer is withdrawing as of June 30, 2010, as described in § 226.58(d)(4) and (e).

(3) *Changes to agreements.* If a credit card agreement has been submitted to the Board, no changes have been made to the agreement, and the card issuer continues to offer the agreement to the public, no additional submission of that agreement is required. If a change is made to a credit card agreement that previously has been submitted to the Board, including a change to any provisions of the agreement or to the pricing information, the card issuer must submit the entire revised agreement to the Board, in the form and manner specified by the Board, by the first quarterly submission deadline after the last day of the calendar quarter in which the change became effective.

(4) *Withdrawal of agreements.* If a card issuer no longer offers to the public a credit card agreement that previously has been submitted to the Board, the card issuer must notify the Board, in the form and manner specified by the Board, by the first quarterly submission deadline after the last day of the

calendar quarter in which the issuer ceased to offer the agreement that the agreement is being withdrawn.

(e) *De minimis exception.* (1) A card issuer is not required to submit any credit card agreements to the Board under § 226.58(d) if the card issuer had fewer than 10,000 open credit card accounts under open-end (not home-secured) consumer credit plans as of the last business day of the calendar quarter.

(2) If an issuer that previously qualified for the *de minimis* exception ceases to qualify, the card issuer must begin making quarterly submissions to the Board under § 226.58(d) no later than the first quarterly submission deadline after the date as of which the issuer ceased to qualify.

(3) If a card issuer that did not previously qualify comes within the *de minimis* exception, the card issuer may notify the Board that the card issuer is withdrawing each agreement the card issuer previously submitted to the Board. Until the card issuer notifies the Board, in the form and manner specified by the Board, that each agreement the card issuer previously submitted to the Board is being withdrawn, the card issuer must continue to make quarterly submissions to the Board under § 226.58(d) and to provide updated registration information under § 226.58(c)(3).

(f) *Agreements posted on card issuer's Web site.* A card issuer must establish and maintain a publicly available Web site and make its credit card agreements available through the Web site, as specified in Appendix N, as follows:

(1) *Agreements offered to the public.* A card issuer must post and maintain on its publicly available Web site the credit card agreements that the issuer is required to submit to the Board as provided in § 226.58(d).

(2) *Agreements for all open accounts.* With respect to any open credit card account under an open-end (not home-secured) consumer credit plan, a card issuer must either:

(i) Post and maintain the cardholder's agreement on its Web site; or

(ii) Promptly provide a copy of the cardholder's agreement to the cardholder upon the cardholder's request. If the card issuer makes an agreement available upon request, the issuer must provide the cardholder with the ability to request a copy of the agreement both:

(A) By using the issuer's Web site (such as by clicking on a clearly identified box to make the request); and

(B) By calling a toll-free telephone number that is displayed on the issuer's Web site and clearly identified as to purpose. The card issuer must send to the cardholder or otherwise make available to the cardholder a copy of the cardholder's agreement no later than 10 business days after the issuer receives the cardholder's request.

(3) *E-Sign Act requirements.* Card issuers may provide credit card agreements in electronic form under § 226.58(f)(1) and (f)(2) without regard to the consumer notice and consent requirements of section 101(c) of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*).

20. Appendix E to part 226 is revised to read as follows:

Appendix E to Part 226—Rules for Card Issuers that Bill on a Transaction-by-Transaction Basis

The following provisions of Subpart B apply if credit cards are issued and the card issuer and the seller are the same or related persons; no finance charge is imposed; consumers are billed in full for each use of the card on a transaction-by-transaction basis, by means of an invoice or other statement reflecting each use of the card; and no cumulative account is maintained which reflects the transactions by each consumer during a period of time, such as a month. The term ''related person'' refers to, for example, a franchised or licensed seller of a creditor's product or service or a seller who assigns or sells sales accounts to a creditor or arranges for credit under a plan that allows the consumer to use the credit only in transactions with that seller. A seller is not related to the creditor merely because the seller and the creditor have an agreement authorizing the seller to honor the creditor's credit card.

1. *Section 226.6(a)(5) or § 226.6(b)(5)(iii).*

2. *Section 226.6(a)(2) or § 226.6(b)(3)(ii)(B), as applicable.* The disclosure required by § 226.6(a)(2) or § 226.6(b)(3)(ii)(B) shall be limited to those charges that are or may be imposed as a result of the deferral of payment by use of the card, such as late payment or delinquency charges. A tabular format is not required.

3. *Section 226.6(a)(4) or § 226.6(b)(5)(ii).*

4. *Section 226.7(a)(2) or § 226.7(b)(2), as applicable; § 226.7(a)(9) or § 226.7(b)(9), as applicable.* Creditors may comply by placing the required disclosures on the invoice or statement sent to the consumer for each transaction.

5. *Section 226.9(a).* Creditors may comply by mailing or delivering the statement required by § 226.6(a)(5) or § 226.6(b)(5)(iii) (*see* appendix G–3 and G–3(A) to this part) to each consumer receiving a transaction invoice during a one-month period chosen by the card issuer or by sending either the statement prescribed by § 226.6(a)(5) or § 226.6(b)(5)(iii), or an alternative billing error rights statement substantially similar to that in appendix G–4 and G–4(A) to this part, with each invoice sent to a consumer.

6. *Section 226.9(c).* A tabular format is not required.

7. *Section 226.10.*

8. *Section 226.11(a).* This section applies when a card issuer receives a payment or other credit that exceeds by more than $1 the amount due, as shown on the transaction invoice. The requirement to credit amounts to an account may be complied with by other reasonable means, such as by a credit memorandum. Since no periodic statement is provided, a notice of the credit balance shall be sent to the consumer within a reasonable period of time following its occurrence unless a refund of the credit balance is mailed or delivered to the consumer within seven business days of its receipt by the card issuer.

9. *Section 226.12 including § 226.12(c) and (d), as applicable.* Section 226.12(e) is inapplicable.

10. *Section 226.13, as applicable.* All references to ''periodic statement'' shall be read to indicate the invoice or other statement for the relevant transaction. All actions with regard to correcting and adjusting a consumer's account may be taken by issuing a refund or a new invoice, or by other appropriate means consistent with the purposes of the section.

11. *Section 226.15, as applicable.*

21. Appendix F to part 226 is revised to read as follows:

Appendix F to Part 226—Optional Annual Percentage Rate Computations for Creditors Offering Open-End Plans Subject to the Requirements of § 226.5b

In determining the denominator of the fraction under § 226.14(c)(3), no amount will be used more than once when adding the sum of the balances [1] subject to periodic rates to the sum of the amounts subject to specific transaction charges. (Where a portion of the finance charge is determined by application of one or more daily periodic rates, the phrase ''sum of the balances'' shall also mean the ''average of daily balances.'') In every case, the full amount of transactions subject to specific transaction charges shall be included in the denominator. Other balances or parts of balances shall be included according to the manner of determining the balance subject to a periodic rate, as illustrated in the following examples of accounts on monthly billing cycles:

1. Previous balance—none.

A specific transaction of $100 occurs on the first day of the billing cycle. The average daily balance is $100. A specific transaction charge of 3 percent is applicable to the specific transaction. The periodic rate is 1½ percent applicable to the average daily balance. The numerator is the amount of the finance charge, which is $4.50. The denominator is the amount of the transaction (which is $100), plus the amount by which the balance subject to the periodic rate exceeds the amount of the specific transactions (such excess in this case is 0), totaling $100.

The annual percentage rate is the quotient (which is 4½ percent) multiplied by 12 (the number of months in a year), *i.e.,* 54 percent.

2. Previous balance—$100.

A specific transaction of $100 occurs at the midpoint of the billing cycle. The average

[1] [Reserved].

daily balance is $150. A specific transaction charge of 3 percent is applicable to the specific transaction. The periodic rate is 1½ percent applicable to the average daily balance. The numerator is the amount of the finance charge which is $5.25. The denominator is the amount of the transaction (which is $100), plus the amount by which the balance subject to the periodic rate exceeds the amount of the specific transaction (such excess in this case is $50), totaling $150. As explained in example 1, the annual percentage rate is 3½ percent × 12 = 42 percent.

3. If, in example 2, the periodic rate applies only to the previous balance, the numerator is $4.50 and the denominator is $200 (the amount of the transaction, $100, plus the balance subject only to the periodic rate, the $100 previous balance). As explained in example 1, the annual percentage rate is 2¼ percent × 12 = 27 percent.

4. If, in example 2, the periodic rate applies only to an adjusted balance (previous balance less payments and credits) and the consumer made a payment of $50 at the midpoint of the billing cycle, the numerator is $3.75 and the denominator is $150 (the amount of the transaction, $100, plus the balance subject to the periodic rate, the $50 adjusted balance). As explained in example 1, the annual percentage rate is 2½ percent × 12 = 30 percent.

5. Previous balance—$100.

A specific transaction (check) of $100 occurs at the midpoint of the billing cycle. The average daily balance is $150. The specific transaction charge is $.25 per check. The periodic rate is 1½ percent applied to the average daily balance. The numerator is the amount of the finance charge, which is $2.50 and includes the $.25 check charge and the $2.25 resulting from the application of the periodic rate. The denominator is the full amount of the specific transaction (which is $100) plus the amount by which the average daily balance exceeds the amount of the specific transaction (which in this case is $50), totaling $150. As explained in example 1, the annual percentage rate would be 1⅔ percent × 12 = 20 percent.

6. Previous balance—none.

A specific transaction of $100 occurs at the midpoint of the billing cycle. The average daily balance is $50. The specific transaction charge is 3 percent of the transaction amount or $3.00. The periodic rate is 1½; percent per month applied to the average daily balance. The numerator is the amount of the finance charge, which is $3.75, including the $3.00 transaction charge and $.75 resulting from application of the periodic rate. The denominator is the full amount of the specific transaction ($100) plus the amount by which the balance subject to the periodic rate exceeds the amount of the transaction ($0). Where the specific transaction amount exceeds the balance subject to the periodic rate, the resulting number is considered to be zero rather than a negative number ($50 − $100 = −$50). The denominator, in this case, is $100. As explained in example 1, the annual percentage rate is 3¾ percent × 12 = 45 percent.

22. Appendix G to part 226 is amended by:

A. Revising the table of contents at the beginning of the appendix;

B. Revising Forms G–1, G–2, G–3, G–4, G–10(A), G–10(B), G–10(C), G–11, and G–13(A) and (B);

C. Adding new Forms G–1(A), G–2(A), G–3(A), G–4(A), G–10(D) and (E), G–16(A) and (B), G–17(A) through (D), G–18(A) through (D), and G–18(F) through (H), G–19, G–20, G–21, G–22, G–23, G–24, G–25(A) and (B) in numerical order; and

D. Removing and reserving Form G–12.

E. Reserving Form G–18(E).

Appendix G to Part 226—Open-End Model Forms and Clauses

G–1 Balance Computation Methods Model Clauses (Home-equity Plans) (§§ 226.6 and 226.7)
G–1(A) Balance Computation Methods Model Clauses (Plans other than Home-equity Plans) (§§ 226.6 and 226.7)
G–2 Liability for Unauthorized Use Model Clause (Home-equity Plans) (§ 226.12)
G–2(A) Liability for Unauthorized Use Model Clause (Plans Other Than Home-equity Plans) (§ 226.12)
G–3 Long-Form Billing-Error Rights Model Form (Home-equity Plans) (§§ 226.6 and 226.9)
G–3(A) Long-Form Billing-Error Rights Model Form (Plans Other Than Home-equity Plans) (§§ 226.6 and 226.9)
G–4 Alternative Billing-Error Rights Model Form (Home-equity Plans) (§ 226.9)
G–4(A) Alternative Billing-Error Rights Model Form (Plans Other Than Home-equity Plans) (§ 226.9)
G–5 Rescission Model Form (When Opening an Account) (§ 226.15)
G–6 Rescission Model Form (For Each Transaction) (§ 226.15)
G–7 Rescission Model Form (When Increasing the Credit Limit) (§ 226.15)
G–8 Rescission Model Form (When Adding a Security Interest) (§ 226.15)
G–9 Rescission Model Form (When Increasing the Security) (§ 226.15)
G–10(A) Applications and Solicitations Model Form (Credit Cards) (§ 226.5a(b))
G–10(B) Applications and Solicitations Sample (Credit Cards) (§ 226.5a(b))
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G–11 Applications and Solicitations Made Available to General Public Model Clauses (§ 226.5a(e))
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G–13(A) Change in Insurance Provider Model Form (Combined Notice) (§ 226.9(f))
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G–15 Home-equity Model Clauses
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G–18(C)(1) Minimum Payment Warning (When Amortization Occurs and Minimum Payment Repayment Estimate is Greater than Three Years) (§ 226.7(b))
G–18(C)(2) Minimum Payment Warning (When Amortization Occurs and Minimum Payment Repayment Estimate is Equal to or Less than Three Years) (§ 226.7(b))
G–18(C)(3) Minimum Payment Warning (When Negative or No Amortization Occurs) (§ 226.7(b))
G–18(D) Periodic Statement New Balance, Due Date, Late Payment and Minimum Payment Sample (Credit cards) (§ 226.7(b))
G–18(E) [Reserved]
G–18(F) Periodic Statement Form
G–18(G) Periodic Statement Form
G–18(H) Deferred Interest Periodic Statement Clause
G–19 Checks Accessing a Credit Card Account Sample (§ 226.9(b)(3))
G–20 Change-in-Terms Sample (Increase in Annual Percentage Rate) (§ 226.9(c)(2))
G–21 Change-in-Terms Sample (Increase in Fees) (§ 226.9(c)(2))
G–22 Penalty Rate Increase Sample (Payment 60 or Fewer Days Late) (§ 226.9(g)(3))
G–23 Penalty Rate Increase Sample (Payment More Than 60 Days Late) (§ 226.9(g)(3))
G–24 Deferred Interest Offer Clauses (§ 226.16(h))
G–25(A) Consent Form for Over-the-Limit Transactions (§ 226.56)
G–25(B) Revocation Notice for Periodic Statement Regarding Over-the-Limit Transactions (§ 226.56)

G–1—Balance Computation Methods Model Clauses (Home-Equity Plans)

(a) Adjusted balance method

We figure [a portion of] the finance charge on your account by applying the periodic rate to the ''adjusted balance'' of your account. We get the ''adjusted balance'' by taking the balance you owed at the end of the previous billing cycle and subtracting [any unpaid finance charges and] any payments and credits received during the present billing cycle.

(b) Previous balance method

We figure [a portion of] the finance charge on your account by applying the periodic rate to the amount you owe at the beginning of each billing cycle [minus any unpaid finance charges]. We do not subtract any payments or credits received during the billing cycle. [The amount of payments and credits to your account this billing cycle was $ ___.]

(c) Average daily balance method (excluding current transactions)

We figure [a portion of] the finance charge on your account by applying the periodic rate to the ''average daily balance'' of your account (excluding current transactions). To get the ''average daily balance'' we take the beginning balance of your account each day and subtract any payments or credits [and any unpaid finance charges]. We do not add in any new [purchases/advances/loans]. This gives us the daily balance. Then, we add all the daily balances for the billing cycle together and divide the total by the number of days in the billing cycle. This gives us the ''average daily balance.''

(d) Average daily balance method (including current transactions)

We figure [a portion of] the finance charge on your account by applying the periodic rate to the ''average daily balance'' of your account (including current transactions). To get the ''average daily balance'' we take the beginning balance of your account each day, add any new [purchases/advances/loans], and subtract any payments or credits, [and unpaid finance charges]. This gives us the daily balance. Then, we add up all the daily balances for the billing cycle and divide the total by the number of days in the billing cycle. This gives us the ''average daily balance.''

(e) Ending balance method

We figure [a portion of] the finance charge on your account by applying the periodic rate to the amount you owe at the end of each billing cycle (including new purchases and deducting payments and credits made during the billing cycle).

(f) Daily balance method (including current transactions)

We figure [a portion of] the finance charge on your account by applying the periodic rate to the ''daily balance'' of your account for each day in the billing cycle. To get the ''daily balance'' we take the beginning balance of your account each day, add any new [purchases/advances/fees], and subtract [any unpaid finance charges and] any payments or credits. This gives us the daily balance.

G–1(A)—Balance Computation Methods Model Clauses (Plans Other Than Home-Equity Plans)

(a) Adjusted balance method

We figure the interest charge on your account by applying the periodic rate to the ''adjusted balance'' of your account. We get the ''adjusted balance'' by taking the balance you owed at the end of the previous billing cycle and subtracting [any unpaid interest or other finance charges and] any payments and credits received during the present billing cycle.

(b) Previous balance method

We figure the interest charge on your account by applying the periodic rate to the amount you owe at the beginning of each billing cycle. We do not subtract any payments or credits received during the billing cycle.

(c) Average daily balance method (excluding current transactions)

We figure the interest charge on your account by applying the periodic rate to the ''average daily balance'' of your account. To get the ''average daily balance'' we take the beginning balance of your account each day and subtract [any unpaid interest or other finance charges and] any payments or credits. We do not add in any new [purchases/advances/fees]. This gives us the daily balance. Then, we add all the daily balances for the billing cycle together and divide the total by the number of days in the billing cycle. This gives us the ''average daily balance.''

(d) Average daily balance method (including current transactions)

We figure the interest charge on your account by applying the periodic rate to the ''average daily balance'' of your account. To get the ''average daily balance'' we take the beginning balance of your account each day, add any new [purchases/advances/fees], and subtract [any unpaid interest or other finance charges and] any payments or credits. This gives us the daily balance. Then, we add up all the daily balances for the billing cycle and divide the total by the number of days in the billing cycle. This gives us the ''average daily balance.''

(e) Ending balance method

We figure the interest charge on your account by applying the periodic rate to the amount you owe at the end of each billing cycle (including new [purchases/advances/fees] and deducting payments and credits made during the billing cycle).

(f) Daily balance method (including current transactions)

We figure the interest charge on your account by applying the periodic rate to the ''daily balance'' of your account for each day in the billing cycle. To get the ''daily balance'' we take the beginning balance of your account each day, add any new [purchases/advances/fees], and subtract [any unpaid interest or other finance charges and] any payments or credits. This gives us the daily balance.

G–2—Liability for Unauthorized Use Model Clause (Home-Equity Plans)

You may be liable for the unauthorized use of your credit card [or other term that describes the credit card]. You will not be liable for unauthorized use that occurs after you notify [name of card issuer or its designee] at [address], orally or in writing, of the loss, theft, or possible unauthorized use. [You may also contact us on the Web: [Creditor Web or e-mail address]] In any case, your liability will not exceed [insert $50 or any lesser amount under agreement with the cardholder].

G–2(A)—Liability for Unauthorized Use Model Clause (Plans Other Than Home-Equity Plans)

If you notice the loss or theft of your credit card or a possible unauthorized use of your card, you should write to us immediately at: [address] [address listed on your bill], or call us at [telephone number]. [You may also contact us on the Web: [Creditor Web or e-mail address]]

You will not be liable for any unauthorized use that occurs after you notify us. You may, however, be liable for unauthorized use that occurs before your notice to us. In any case, your liability will not exceed [insert $50 or any lesser amount under agreement with the cardholder].

G–3—Long-Form Billing-Error Rights Model Form (Home-Equity Plans)

YOUR BILLING RIGHTS

KEEP THIS NOTICE FOR FUTURE USE

This notice contains important information about your rights and our responsibilities under the Fair Credit Billing Act.

Notify Us in Case of Errors or Questions About Your Bill

If you think your bill is wrong, or if you need more information about a transaction on your bill, write us [on a separate sheet] at [address] [the address listed on your bill]. Write to us as soon as possible. We must hear from you no later than 60 days after we sent you the first bill on which the error or problem appeared. [You may also contact us on the Web: [Creditor Web or e-mail address]] You can telephone us, but doing so will not preserve your rights.

In your letter, give us the following information:

- Your name and account number.
- The dollar amount of the suspected error.
- Describe the error and explain, if you can, why you believe there is an error. If you need more information, describe the item you are not sure about.

If you have authorized us to pay your credit card bill automatically from your savings or checking account, you can stop the payment on any amount you think is wrong. To stop the payment your letter must reach us three business days before the automatic payment is scheduled to occur.

Your Rights and Our Responsibilities After We Receive Your Written Notice

We must acknowledge your letter within 30 days, unless we have corrected the error by then. Within 90 days, we must either correct the error or explain why we believe the bill was correct.

After we receive your letter, we cannot try to collect any amount you question, or report you as delinquent. We can continue to bill you for the amount you question, including finance charges, and we can apply any unpaid amount against your credit limit. You do not have to pay any questioned amount while we are investigating, but you are still obligated to pay the parts of your bill that are not in question.

If we find that we made a mistake on your bill, you will not have to pay any finance charges related to any questioned amount. If we didn't make a mistake, you may have to pay finance charges, and you will have to make up any missed payments on the questioned amount. In either case, we will send you a statement of the amount you owe and the date that it is due.

If you fail to pay the amount that we think you owe, we may report you as delinquent.

However, if our explanation does not satisfy you and you write to us within ten days telling us that you still refuse to pay, we must tell anyone we report you to that you have a question about your bill. And, we must tell you the name of anyone we reported you to. We must tell anyone we report you to that the matter has been settled between us when it finally is.

If we don't follow these rules, we can't collect the first $50 of the questioned amount, even if your bill was correct.

Special Rule for Credit Card Purchases

If you have a problem with the quality of property or services that you purchased with a credit card, and you have tried in good faith to correct the problem with the merchant, you may have the right not to pay the remaining amount due on the property or services.

There are two limitations on this right:

(a) You must have made the purchase in your home State or, if not within your home State within 100 miles of your current mailing address; and

(b) The purchase price must have been more than $50.

These limitations do not apply if we own or operate the merchant, or if we mailed you the advertisement for the property or services.

G–3(A)—Long-Form Billing-Error Rights Model Form (Plans Other Than Home-Equity Plans)

Your Billing Rights: Keep this Document for Future Use

This notice tells you about your rights and our responsibilities under the Fair Credit Billing Act.

What To Do If You Find A Mistake On Your Statement

If you think there is an error on your statement, write to us at:

[Creditor Name]
[Creditor Address]

[You may also contact us on the Web:
[Creditor Web or e-mail address]]

In your letter, give us the following information:

- *Account information:* Your name and account number.
- *Dollar amount:* The dollar amount of the suspected error.
- *Description of problem:* If you think there is an error on your bill, describe what you believe is wrong and why you believe it is a mistake.

You must contact us:

- Within 60 days after the error appeared on your statement.
- At least 3 business days before an automated payment is scheduled, if you want to stop payment on the amount you think is wrong.

You must notify us of any potential errors *in writing* [or electronically]. You may call us, but if you do we are not required to investigate any potential errors and you may have to pay the amount in question.

What Will Happen After We Receive Your Letter

When we receive your letter, we must do two things:

1. Within 30 days of receiving your letter, we must tell you that we received your letter. We will also tell you if we have already corrected the error.

2. Within 90 days of receiving your letter, we must either correct the error or explain

While we investigate whether or not there has been an error:

- We cannot try to collect the amount in question, or report you as delinquent on that amount.
- The charge in question may remain on your statement, and we may continue to charge you interest on that amount.
- While you do not have to pay the amount in question, you are responsible for the remainder of your balance.
- We can apply any unpaid amount against your credit limit.

After we finish our investigation, one of two things will happen:

- *If we made a mistake:* You will not have to pay the amount in question or any interest or other fees related to that amount.
- *If we do not believe there was a mistake:* You will have to pay the amount in question, along with applicable interest and fees. We will send you a statement of the amount you owe and the date payment is due. We may then report you as delinquent if you do not pay the amount we think you owe.

If you receive our explanation but still believe your bill is wrong, you must write to us within *10 days* telling us that you still refuse to pay. If you do so, we cannot report you as delinquent without also reporting that you are questioning your bill. We must tell you the name of anyone to whom we reported you as delinquent, and we must let those organizations know when the matter has been settled between us.

If we do not follow all of the rules above, you do not have to pay the first $50 of the amount you question even if your bill is correct.

Your Rights if You Are Dissatisfied With Your Credit Card Purchases

If you are dissatisfied with the goods or services that you have purchased with your credit card, and you have tried in good faith to correct the problem with the merchant, you may have the right not to pay the remaining amount due on the purchase.

To use this right, all of the following must be true:

1. The purchase must have been made in your home State or within 100 miles of your current mailing address, and the purchase price must have been more than $50. (Note: Neither of these are necessary if your purchase was based on an advertisement we mailed to you, or if we own the company that sold you the goods or services.)

2. You must have used your credit card for the purchase. Purchases made with cash advances from an ATM or with a check that accesses your credit card account do not qualify.

3. You must not yet have fully paid for the purchase.

If all of the criteria above are met and you are still dissatisfied with the purchase, contact us *in writing* [or electronically] at:

[Creditor Name]
[Creditor Address]
[[Creditor Web or e-mail address]]

While we investigate, the same rules apply to the disputed amount as discussed above. After we finish our investigation, we will tell you our decision. At that point, if we think you owe an amount and you do not pay, we may report you as delinquent.

G–4—Alternative Billing-Error Rights Model Form (Home-Equity Plans)

BILLING RIGHTS SUMMARY

In Case of Errors or Questions About Your Bill

If you think your bill is wrong, or if you need more information about a transaction on your bill, write us [on a separate sheet] at [address] [the address shown on your bill] as soon as possible. [You may also contact us on the Web: [Creditor Web or e-mail address]] We must hear from you no later than 60 days after we sent you the first bill on which the error or problem appeared. You can telephone us, but doing so will not preserve your rights.

In your letter, give us the following information:

- Your name and account number.
- The dollar amount of the suspected error.
- Describe the error and explain, if you can, why you believe there is an error. If you need more information, describe the item you are unsure about.

You do not have to pay any amount in question while we are investigating, but you are still obligated to pay the parts of your bill that are not in question. While we investigate your question, we cannot report you as delinquent or take any action to collect the amount you question.

Special Rule for Credit Card Purchases

If you have a problem with the quality of goods or services that you purchased with a credit card, and you have tried in good faith to correct the problem with the merchant, you may not have to pay the remaining amount due on the goods or services. You have this protection only when the purchase price was more than $50 and the purchase was made in your home State or within 100 miles of your mailing address. (If we own or operate the merchant, or if we mailed you the advertisement for the property or services, all purchases are covered regardless of amount or location of purchase.)

G–4(A)—Alternative Billing-Error Rights Model Form (Plans Other Than Home-Equity Plans)

What To Do if You Think You Find a Mistake on Your Statement

If you think there is an error on your statement, write to us at:

[Creditor Name]
[Creditor Address]

[You may also contact us on the Web:
[Creditor Web or e-mail address]]

In your letter, give us the following information:

• *Account information:* Your name and account number.

• *Dollar amount:* The dollar amount of the suspected error.

• *Description of Problem:* If you think there is an error on your bill, describe what you believe is wrong and why you believe it is a mistake.

You must contact us within 60 days after the error appeared on your statement.

You must notify us of any potential errors *in writing* [or electronically] . You may call us, but if you do we are not required to investigate any potential errors and you may have to pay the amount in question.

While we investigate whether or not there has been an error, the following are true:

• We cannot try to collect the amount in question, or report you as delinquent on that amount.

• The charge in question may remain on your statement, and we may continue to charge you interest on that amount. But, if we determine that we made a mistake, you will not have to pay the amount in question or any interest or other fees related to that amount.

• While you do not have to pay the amount in question, you are responsible for the remainder of your balance.

• We can apply any unpaid amount against your credit limit.

Your Rights if You Are Dissatisfied With Your Credit Card Purchases

If you are dissatisfied with the goods or services that you have purchased with your credit card, and you have tried in good faith to correct the problem with the merchant, you may have the right not to pay the remaining amount due on the purchase.

To use this right, all of the following must be true:

1. The purchase must have been made in your home State or within 100 miles of your current mailing address, and the purchase price must have been more than $50. (Note: Neither of these are necessary if your purchase was based on an advertisement we mailed to you, or if we own the company that sold you the goods or services.)

2. You must have used your credit card for the purchase. Purchases made with cash advances from an ATM or with a check that accesses your credit card account do not qualify.

3. You must not yet have fully paid for the purchase.

If all of the criteria above are met and you are still dissatisfied with the purchase, contact us *in writing* [or electronically] at:

[Creditor Name]
[Creditor Address]
[[Creditor Web address]]

While we investigate, the same rules apply to the disputed amount as discussed above. After we finish our investigation, we will tell you our decision. At that point, if we think you owe an amount and you do not pay we may report you as delinquent.

* * * * *

BILLING CODE 6210–01–P

G-10(A) Applications and Solicitations Model Form (Credit Cards)

Interest Rates and Interest Charges	
Annual Percentage Rate (APR) for Purchases	[Purchase rate] [Description that rate varies and how it is determined, if applicable]
APR for Balance Transfers	[Balance transfer rate] [Description that rate varies and how it is determined, if applicable]
APR for Cash Advances	[Cash advance rate] [Description that rate varies and how it is determined, if applicable]
Penalty APR and When it Applies	[Penalty rate] [Description of events that may result in the penalty rate] [Description of how long penalty rate may apply]
[How to Avoid Paying Interest on Purchases/ Paying Interest]	[Description of grace period for purchases or statement that no grace period applies]
[Minimum Interest Charge]/[Minimum Charge]	[Description of minimum interest charge or minimum charge]
For Credit Card Tips from the Federal Reserve Board	[Reference to Board's website]

Fees	
[Annual Fee]/[Set-up and Maintenance Fees]	[Notice of available credit, if applicable] [Description of fees for availability or issuance of credit, such as an annual fee, if applicable]
Transaction Fees • Balance Transfer • Cash Advance • Foreign Transaction	 [Description of balance transfer fee] [Description of cash advance fee] [Description of foreign transaction fee]
Penalty Fees • Late Payment • Over-the-Credit Limit • Returned Payment	 [Description of late payment fee] [Description of over-the-credit limit fee] [Description of returned payment fee]
Other Fees • Required [insert name of required insurance, or debt cancellation or suspension coverage]	 [Description of cost of insurance, or debt cancellation or suspension plans] [Cross reference to additional information, if applicable]

How We Will Calculate Your Balance: [Description of balance computation method]

Loss of Introductory APR: [Circumstances in which introductory rate may be revoked and rate that applies if introductory rate is revoked, if applicable]

[Description that rate that applies after introductory rate is revoked varies and how it is determined, if applicable]

G-10(B) Applications and Solicitations Sample (Credit Cards)

Interest Rates and Interest Charges	
Annual Percentage Rate (APR) for Purchases	**8.99%** to **19.99%** when you open your account, based on your creditworthiness. After that, your APR will vary with the market based on the Prime Rate.
APR for Balance Transfers	**15.99%** This APR will vary with the market based on the Prime Rate.
APR for Cash Advances	**21.99%** This APR will vary with the market based on the Prime Rate.
Penalty APR and When it Applies	**28.99%** This APR may be applied to your account if you: 1) Make a late payment; 2) Go over your credit limit twice in a six-month period; 3) Make a payment that is returned; or 4) Do any of the above on another account that you have with us. **How Long Will the Penalty APR Apply?:** If your APRs are increased for any of these reasons, the Penalty APR will apply until you make six consecutive minimum payments when due.
How to Avoid Paying Interest on Purchases	Your due date is at least 25 days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month.
Minimum Interest Charge	If you are charged interest, the charge will be no less than $1.50.
For Credit Card Tips from the Federal Reserve Board	To learn more about factors to consider when applying for or using a credit card, visit the website of the Federal Reserve Board at **http://www.federalreserve.gov/creditcard**.

Fees	
Annual Fee	**None**
Transaction Fees	
• Balance Transfer	Either **$5** or **3%** of the amount of each transfer, whichever is greater (maximum fee: $100).
• Cash Advance	Either **$5** or **3%** of the amount of each cash advance, whichever is greater.
• Foreign Transaction	**2%** of each transaction in U.S. dollars.
Penalty Fees	
• Late Payment	**$29** if balance is less than or equal to $1,000; **$35** if balance is more than $1,000
• Over-the-Credit Limit	**$29**
• Returned Payment	**$35**
Other Fees	
• Required Account Protector Plan	**$0.79** per $100 of balance at the end of each statement period. See back for details.

How We Will Calculate Your Balance: We use a method called "average daily balance (including new purchases)."

G-10(C) Applications and Solicitations (Credit Cards)

Interest Rates and Interest Charges	
Annual Percentage Rate (APR) for Purchases	**8.99%, 10.99%, or 12.99%** introductory APR for one year, based on your creditworthiness. After that, your APR will be **14.99%**. This APR will vary with the market based on the Prime Rate.
APR for Balance Transfers	**15.99%** This APR will vary with the market based on the Prime Rate
APR for Cash Advances	**21.99%** This APR will vary with the market based on the Prime Rate.
Penalty APR and When it Applies	**28.99%** This APR may be applied to your account if you: 1) Make a late payment; 2) Go over your credit limit; 3) Make a payment that is returned; or 4) Do any of the above on another account that you have with us. **How Long Will the Penalty APR Apply?:** If your APRs are increased for any of these reasons, the Penalty APR will apply until you make six consecutive minimum payments when due.
How to Avoid Paying Interest on Purchases	Your due date is at least 25 days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month.
Minimum Interest Charge	If you are charged interest, the charge will be no less than $1.50.
For Credit Card Tips from the Federal Reserve Board	To learn more about factors to consider when applying for or using a credit card, visit the website of the Federal Reserve Board at http://www.federalreserve.gov/creditcard.

Fees	
Set-up and Maintenance Fees	NOTICE: Some of these set-up and maintenance fees will be assessed before you begin using your card and will reduce the amount of credit you initially have available. For example, if you are assigned the minimum credit limit of $250, your initial available credit will be only about $209 (or about $204 if you choose to have an additional card).
• Annual Fee	**$20**
• Account Set-up Fee	**$20** (one-time fee)
• Participation Fee	**$12** annually ($1 per month)
• Additional Card Fee	**$5** annually (if applicable)
Transaction Fees	
• Balance Transfer	Either **$5** or **3%** of the amount of each transfer, whichever is greater (maximum fee: $100).
• Cash Advance	Either **$5** or **3%** of the amount of each cash advance, whichever is greater.
• Foreign Transaction	**2%** of each transaction in U.S. dollars.
Penalty Fees	
• Late Payment	**$29** if balance is less than or equal to $1,000; **$35** if balance is more than $1,000
• Over-the-Credit Limit	**$29**
• Returned Payment	**$35**

How We Will Calculate Your Balance: We use a method called "average daily balance (including new purchases)."

Loss of Introductory APR: We may end your introductory APR and apply the Penalty APR if you make a late payment.

G-10(D) Applications and Solicitations Model Form (Charge Cards)

Payment Information
[A statement that charges incurred through use of the charge card are due when the periodic statement is received]

Fees	
[Annual Fee]/[Set-up and Maintenance Fees]	[Notice of available credit, if applicable] [Description of fees for availability or issuance of credit, such as an annual fee, if applicable]
Transaction Fees	
• Balance Transfer	[Description of balance transfer fee]
• Cash Advance	[Description of cash advance fee]
• Foreign Transaction	[Description of foreign transaction fee]
Penalty Fees	
• Late Payment	[Description of late payment fee]
• Over-the-Credit Limit	[Description of over-the-credit limit fee]
• Returned Payment	[Description of returned payment fee]

G-10(E) Applications and Solicitations Sample (Charge Cards)

Payment Information
All charges made on this charge card are due and payable when you receive your periodic statement.

Fees	
Annual Fee	**$50**
Transaction Fees	
• Balance Transfer	Either **$5** or **3%** of the amount of each transfer, whichever is greater (maximum fee: $100).
• Cash Advance	Either **$5** or **3%** of the amount of each cash advance, whichever is greater.
Penalty Fees	
• Late Payment	**$31** if balance is less than or equal to $1,000; **$35** if balance is more than $1,000
• Over-the-Credit Limit	**$30**
• Returned Payment	**$30**

BILLING CODE 6210–01–C

G–11—Applications and Solicitations Made Available to the General Public Model Clauses

(a) Disclosure of Required Credit Information

The information about the costs of the card described in this [application]/[solicitation] is accurate as of (*month/year*). This information may have changed after that date. To find out what may have changed, [call us at (*telephone number*)][write to us at (*address*)].

(b) No Disclosure of Credit Information

There are costs associated with the use of this card. To obtain information about these costs, call us at (*telephone number*) or write to us at (*address*).

G–12 [Reserved]

G–13(A)—Change in Insurance Provider Model Form (Combined Notice)

The credit card account you have with us is insured. This is to notify you that we plan to replace your current coverage with insurance coverage from a different insurer. If we obtain insurance for your account from a different insurer, you may cancel the insurance.

[Your premium rate will increase to $ _ per _.]

[Your coverage will be affected by the following:

[ ] The elimination of a type of coverage previously provided to you. [(explanation)] [*See* _ of the attached policy for details.]

[ ] A lowering of the age at which your coverage will terminate or will become more restrictive. [(explanation)] [*See* _ of the attached policy or certificate for details.]

[ ] A decrease in your maximum insurable loan balance, maximum periodic benefit payment, maximum number of payments, or any other decrease in the dollar amount of your coverage or benefits. [(explanation)] [*See* _ of the attached policy or certificate for details.]

[ ] A restriction on the eligibility for benefits for you or others. [(explanation)] [*See* _ of the attached policy or certificate for details.]

[ ] A restriction in the definition of ''disability'' or other key term of coverage. [(explanation)] [*See* _ of the attached policy or certificate for details.]

[ ] The addition of exclusions or limitations that are broader or other than those under the current coverage. [(explanation)] [*See* _ of the attached policy or certificate for details.]

[ ] An increase in the elimination (waiting) period or a change to nonretroactive coverage. [(explanation)] [*See* _ of the attached policy or certificate for details).]

[The name and mailing address of the new

insurer providing the coverage for your account is (name and address).]

G–13(B)—Change in Insurance Provider Model Form

We have changed the insurer providing the coverage for your account. The new insurer's name and address are (name and address). A copy of the new policy or certificate is attached.

You may cancel the insurance for your account.

* * * * *

G–16(A) Debt Suspension Model Clause

Please enroll me in the optional [insert name of program], and bill my account the fee of [how cost is determined]. I understand that enrollment is not required to obtain credit. I also understand that depending on the event, the protection may only temporarily suspend my duty to make minimum payments, not reduce the balance I owe. I understand that my balance will actually grow during the suspension period as interest continues to accumulate.

[To Enroll, Sign Here]/[To Enroll, Initial Here]. X _____

G–16(B) Debt Suspension Sample

Please enroll me in the optional [name of program], and bill my account the fee of $.83 per $100 of my month-end account balance. I understand that enrollment is not required to obtain credit. I also understand that depending on the event, the protection may only temporarily suspend my duty to make minimum payments, not reduce the balance I owe. I understand that my balance will actually grow during the suspension period as interest continues to accumulate.

[To Enroll, Initial Here]. X _____

BILLING CODE 6210–01–P

G-17(A) Account-Opening Model Form

Interest Rates and Interest Charges	
Annual Percentage Rate (APR) for Purchases	[Purchase rate] [Description that rate varies and how it is determined, if applicable]
APR for Balance Transfers	[Balance transfer rate] [Description that rate varies and how it is determined, if applicable]
APR for Cash Advances	[Cash advance rate] [Description that rate varies and how it is determined, if applicable]
Penalty APR and When it Applies	[Penalty rate] [Description of events that may result in the penalty rate] [Description of how long penalty rate may apply]
[How to Avoid Paying Interest]/[Paying Interest]	[Description of grace period for purchases, cash advances, balance transfers, or any other credit extended or statement that no grace period applies]
[Minimum Interest Charge]/[Minimum Charge]	[Description of minimum interest charge or minimum charge, if applicable]
For Credit Card Tips from the Federal Reserve Board	[Reference to Board's website]

Fees	
[Annual Fee]/[Set-up and Maintenance Fees]	[Notice of available credit, if applicable] [Notice of right to reject plan, if applicable] [Description of fees for availability or issuance of credit, such as an annual fee, if applicable]
Transaction Fees • Balance Transfer • Cash Advance • Foreign Transaction	 [Description of balance transfer fee] [Description of cash advance fee] [Description of foreign transaction fee]
Penalty Fees • Late Payment • Over-the-Credit Limit • Returned Payment	 [Description of late payment fee] [Description of over-the-credit limit fee] [Description of returned payment fee]
Other Fees • Required [insert name of required insurance, or debt cancellation or suspension coverage]	 [Description of cost of insurance, or debt cancellation or suspension plans] [Cross reference to additional information, if applicable]

How We Will Calculate Your Balance: [Description of balance computation method]

Loss of Introductory APR: [Circumstances in which introductory rate may be revoked and rate that applies if introductory rate is revoked, if applicable]

[Description that rate that applies after introductory rate is revoked varies and how it is determined, if applicable]

Billing Rights: [Reference to account agreement for details on billing-error rights]

G-17(B) Account-Opening Sample

Interest Rates and Interest Charges	
Annual Percentage Rate (APR) for Purchases	**8.99%** This APR will vary with the market based on the Prime Rate.
APR for Balance Transfers	**15.99%** This APR will vary with the market based on the Prime Rate.
APR for Cash Advances	**21.99%** This APR will vary with the market based on the Prime Rate.
Penalty APR and When it Applies	**28.99%** This APR may be applied to your account if you: 1) Make a late payment; 2) Go over your credit limit twice in a six-month period; 3) Make a payment that is returned; or 4) Do any of the above on another account that you have with us. **How Long Will the Penalty APR Apply?:** If your APRs are increased for any of these reasons, the Penalty APR will apply until you make six consecutive minimum payments when due.
Paying Interest	Your due date is at least 25 days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month. We will begin charging interest on cash advances and balance transfers on the transaction date.
Minimum Interest Charge	If you are charged interest, the charge will be no less than $1.50.
For Credit Card Tips from the Federal Reserve Board	To learn more about factors to consider when applying for or using a credit card, visit the website of the Federal Reserve Board at **http://www.federalreserve.gov/creditcard**.

Fees	
Annual Fee	**None**
Transaction Fees	
• Balance Transfer	Either **$5** or **3%** of the amount of each transfer, whichever is greater (maximum fee: $100).
• Cash Advance	Either **$5** or **3%** of the amount of each cash advance, whichever is greater.
• Foreign Transaction	**2%** of each transaction in U.S. dollars.
Penalty Fees	
• Late Payment	**$29** if balance is less than or equal to $1,000; **$35** if balance is more than $1,000
• Over-the-Credit Limit	**$29**
• Returned Payment	**$35**
Other Fees	
• Required Account Protector Plan	**$0.79** per $100 of balance at the end of each statement period. See back for details.

How We Will Calculate Your Balance: We use a method called "average daily balance (including new purchases)." See your account agreement for more details.

Billing Rights: Information on your rights to dispute transactions and how to exercise those rights is provided in your account agreement.

G-17(C) Account-Opening Sample

Interest Rates and Interest Charges	
Annual Percentage Rate (APR) for Purchases	**8.99%** introductory APR for one year. After that, your APR will be **14.99%**. This APR will vary with the market based on the Prime Rate.
APR for Balance Transfers	**15.99%** This APR will vary with the market based on the Prime Rate.
APR for Cash Advances	**21.99%** This APR will vary with the market based on the Prime Rate.
Penalty APR and When it Applies	**28.99%** This APR may be applied to your account if you: 1) Make a late payment; 2) Go over your credit limit; 3) Make a payment that is returned; or 4) Do any of the above on another account that you have with us. **How Long Will the Penalty APR Apply?:** If your APRs are increased for any of these reasons, the Penalty APR will apply until you make six consecutive minimum payments when due.
Paying Interest	Your due date is at least 25 days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month. We will begin charging interest on cash advances and balance transfers on the transaction date.
Minimum Interest Charge	If you are charged interest, the charge will be no less than $1.50.
For Credit Card Tips from the Federal Reserve Board	To learn more about factors to consider when applying for or using a credit card, visit the website of the Federal Reserve Board at **http://www.federalreserve.gov/creditcard**.

Fees	
Set-up and Maintenance Fees	NOTICE: Some of these set-up and maintenance fees will be assessed before you begin using your card and will reduce the amount of credit you initially have available. Based on your initial credit limit of $250, your initial available credit will be only about $209 (or about $204 if you choose to have an additional card). You may still reject this plan, provided that you have not yet used the account or paid a fee after receiving a billing statement. If you do reject the plan, you are not responsible for any fees or charges.
• Annual Fee	**$20**
• Account Set-up Fee	**$20** (one-time fee)
• Participation Fee	**$12** annually ($1 per month)
• Additional Card Fee	**$5** annually (if applicable)
Transaction Fees	
• Balance Transfer	Either **$5** or **3%** of the amount of each transfer, whichever is greater (maximum fee: $100).
• Cash Advance	Either **$5** or **3%** of the amount of each cash advance, whichever is greater.
• Foreign Transaction	**2%** of each transaction in U.S. dollars.
Penalty Fees	
• Late Payment	**$29** if balance is less than or equal to $1,000; **$35** if balance is more than $1,000
• Over-the-Credit Limit	**$29**
• Returned Payment	**$35**

How We Will Calculate Your Balance: We use a method called "average daily balance (including new purchases)." See your account agreement for more details.

Loss of Introductory APR: We may end your introductory APR and apply the Penalty APR if you make a late payment.

Billing Rights: Information on your rights to dispute transactions and how to exercise those rights is provided in your account agreement.

G-17(D) Account-Opening Sample (Line of Credit)

Interest Rate and Interest Charges	
APR for Cash Advances	**18.00%.**
Minimum Interest Charge	If you are charged interest, the charge will be no less than $1.50.
Paying Interest	You will be charged interest from the transaction date.

Fees	
Annual Fee	**$20**
Penalty Fees	
• Late Payment	**$10**
• Over-the-Credit Limit	**$29**

How We Will Calculate Your Balance: We use a method called "average daily balance (including new purchases)." See your account agreement for more details.

Billing Rights: Information on your rights to dispute transactions and how to exercise those rights is provided in your account agreement.

Form G–18(A) Periodic Statement
Transactions; Interest Charges; Fees Sample

G-18(A) Periodic Statement Transactions; Interest Charges; Fees Sample

Transactions				
Reference Number	Trans Date	Post Date	Description of Transaction or Credit	Amount
5884186PS0388W6YM	2/22	2/23	Store #1	$2.05
0544400060ZLV72VL	2/24	2/25	Store #2	$12.11
854338203FS8OO0Z5	2/25	2/25	Pymt Thank You	$450.00–
55541860705RDYD0X	2/25	2/26	Store #3	$4.63
554328608008W90M0	2/25	2/26	Store #4	$114.95
054830709LYMRPT4L	2/25	2/26	Store #5	$7.35
564891561545KOSHD	2/25	2/26	Store #6	$14.35
841517877845AKOJIO	2/25	2/26	Store #7	$40.35
895848561561894KOH	2/26	2/27	Store #8	$27.68
1871556189456SAMKL	2/26	2/27	Store #9	$124.76
1542202074TWWZV48	2/26	2/26	Cash Advance	$121.50
2564894185189LKDFID	2/27	2/28	Store #10	$32.87
4545754784KOHUIOS	2/27	3/1	Balance Transfer	$785.00
2564561023184102315	2/28	3/1	Store #11	$14.76
14547847586KDDL564	2/28	2/28	Cash Advance	$196.50
55542818705RASD0X	3/1	3/2	Store #12	$3.76
289189194ASDS8744	3/1	3/3	Store #13	$13.45
178105417841045784	3/2	3/4	Store #14	$2.35
045148714518979874	3/4	3/5	Store #13	$13.45–
8456152156181SDSA	3/5	3/6	Store #15	$25.00
31289105205648AWD	3/11	3/12	Store #16	$7.34
04518478415615ASD	3/11	3/16	Store #17	$10.56
0547810544898718AF	3/15	3/17	Store #18	$24.50
056489413216848OP	3/16	3/17	Store #19	$8.76
054894561564ASDW	3/17	3/18	Store #20	$14.23
5648974891AD98156	3/19	3/20	Store #21	$23.76
Fees				
9525156489SFD4545Q	2/23	2/23	Late Fee	$35.00
56415615647OJSNDS	2/26	2/26	Cash Advance Fee	$5.00
84151564SADS8745H	2/27	2/27	Balance Transfer Fee	$23.55
2564891561894515 16L	2/28	2/28	Cash Advance Fee	$5.90
			TOTAL FEES FOR THIS PERIOD	**$69.45**
Interest Charged				
			Interest Charge on Purchases	$6.31
			Interest Charge on Cash Advances	$4.58
			TOTAL INTEREST FOR THIS PERIOD	**$10.89**

2012 Totals Year-to-Date	
Total fees charged in 2012	$90.14
Total interest charged in 2012	$18.27

G–18(B)—Late Payment Fee Sample

Late Payment Warning: If we do not receive your minimum payment by the date listed above, you may have to pay a $35 late fee and your APRs may be increased up to the Penalty APR of 28.99%.

Form G–18(C)(1) Minimum Payment Warming (When Amortization Occurs and Minimum Payment Repayment is Greater than Three Years)

G-18(C)(1) Minimum Payment Warning (When Amortization Occurs and Minimum Payment Repayment Estimate is Greater than Three Years)

Minimum Payment Warning: If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance. For example:

If you make no additional charges using this card and each month you pay...	You will pay off the balance shown on this statement in about...	And you will end up paying an estimated total of...
Only the minimum payment	10 years	$3,284
$62	3 years	$2,232 (*Savings=$1,052*)

If you would like information about credit counseling services, call 1-800-xxx-xxxx.

Form G–18(C)(2) Minimum Payment Warning (When Amortization Occurs and Minimum Payment Repayment Estimate is Equal to or less than Three Years);

G-18(C)(2) Minimum Payment Warning (When Amortization Occurs and Minimum Payment Repayment Estimate is Equal to or Less than Three Years)

Minimum Payment Warning: If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance. For example:

If you make no additional charges using this card and each month you pay...	You will pay off the balance shown on this statement in about...	And you will end up paying an estimated total of...
Only the minimum payment	14 months	$130

If you would like information about credit counseling services, call 1-800-xxx-xxxx.

Form G–18(C)(3) Minimum Payment Warning (When Negative or No Amortization Occurs);

G-18(C)(3) Minimum Payment Warning (When Negative or No Amortization Occurs)

Minimum Payment Warning: Even if you make no more charges using this card, if you make only the minimum payment each month we estimate **you will never pay off the balance shown on this statement** because your payment will be less than the interest charged each month.

If you make more than the minimum payment each period, you will pay less in interest and pay off your balance sooner. For example, if you instead paid **$74** per month, you would pay off the balance shown on this statement in around **3 years**.

If you would like information about credit counseling services, call 1-800-xxx-xxxx.

Form G–18(D) Periodic Statement New Balance, Due Date, late Payment and Minimum Payment Sample (Credit Cards)

G-18(D) Periodic Statement New Balance, Due Date, Late Payment and Minimum Payment Sample (Credit Cards)

Payment Information	
New Balance	$1,784.53
Minimum Payment Due	$53.00
Payment Due Date	4/20/12

Late Payment Warning: If we do not receive your minimum payment by the date listed above, you may have to pay a $35 late fee and your APRs may be increased up to the Penalty APR of 28.99%.

Minimum Payment Warning: If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance. For example:

If you make no additional charges using this card and each month you pay...	You will pay off the balance shown on this statement in about...	And you will end up paying an estimated total of...
Only the minimum payment	10 years	$3,284
$62	3 years	$2,232 *(Savings=$1,052)*

If you would like information about credit counseling services, call 1-800-xxx-xxxx.

G–18(E) [Reserved.]

G–18(F) Periodic Statement Form

G-18(F) Periodic Statement Form

Page 1 of 2

XXX Bank Credit Card Account Statement
Account Number XXXX XXXX XXXX XXXX
February 21, 2012 to March 22, 2012

Summary of Account Activity

Previous Balance	$535.07
Payments	-$450.00
Other Credits	-$13.45
Purchases	+$529.57
Balance Transfers	+$785.00
Cash Advances	+$318.00
Past Due Amount	+$0.00
Fees Charged	**+$69.45**
Interest Charged	**+$10.89**
New Balance	$1,784.53
Credit limit	$2,000.00
Available credit	$215.47
Statement closing date	3/22/2012
Days in billing cycle	30

QUESTIONS?
Call Customer Service 1-XXX-XXX-XXXX
Lost or Stolen Credit Card 1-XXX-XXX-XXXX

Payment Information

New Balance	$1,784.53
Minimum Payment Due	$53.00
Payment Due Date	4/20/12

Late Payment Warning: If we do not receive your minimum payment by the date listed above, you may have to pay a $35 late fee and your APRs may be increased up to the Penalty APR of 28.99%.

Minimum Payment Warning: If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance. For example:

If you make no additional charges using this card and each month you pay...	You will pay off the balance shown on this statement in about...	And you will end up paying an estimated total of...
Only the minimum payment	10 years	$3,284
$62	3 years	$2,232 *(Savings=$1,052)*

If you would like information about credit counseling services, call 1-800-XXX-XXXX.

Please send billing inquiries and correspondence to:
PO Box XXXX, Anytown, Anystate XXXXX

Important Changes to Your Account Terms

The following is a summary of changes that are being made to your account terms. You have the right to opt out of these changes. For more detailed information, please refer to the booklet enclosed with this statement.

These changes will impact your account as follows:

Transactions made on or after 4/9/12: As of 5/10/12, any changes to APRs described below will apply to these transactions.

Transactions made before 4/9/12: Current APRs will continue to apply to these transactions.

If you are already being charged a higher Penalty APR for purchases: In this case, any changes to APRs described below will not go into effect at this time. These changes will go into effect when the Penalty APR no longer applies to your account.

Revised Terms, as of 5/10/12	
APR for Purchases	16.99%

Transactions

Reference Number	Trans Date	Post Date	Description of Transaction or Credit	Amount
5884186PS0388W6YM	2/22	2/23	Store #1	$2.05
0544400060ZLV72VL	2/24	2/25	Store #2	$12.11
55541860705RDYD0X	2/24	2/25	Store #3	$4.63
554328608008W90M0	2/24	2/25	Store #4	$114.95
054830709LYMRPT4L	2/24	2/25	Store #5	$7.35
854338203FS8OO0Z5	2/25	2/25	Pymt Thank You	$450.00–

(transactions continued on next page)

NOTICE: SEE REVERSE SIDE FOR IMPORTANT INFORMATION

Page 1 of 2

Please detach this portion and return with your payment to insure proper credit. Retain upper portion for your records.

Account Number:	**XXXX XXXX XXXX XXXX**
New Balance	**$1,784.53**
Minimum Payment Due	**$53.00**
Payment Due Date	**4/20/12**

AMOUNT ENCLOSED: $

Please indicate address change and additional cardholder requests on the reverse side.

XXX Bank
P.O. Box XXXX
Anytown, Anystate XXXXX

G–18(F) Periodic Statement Form (contd.)

G-18(F) Periodic Statement Form (contd.)

XXX Bank Credit Card Account Statement
Account Number XXXX XXXX XXXX XXXX
February 21, 2012 to March 22, 2012

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Transactions (cont.)

Reference Number	Trans Date	Post Date	Description of Transaction or Credit	Amount
564891561545KOSHD	2/25	2/26	Store #6	$14.35
841517877845AKOJIO	2/25	2/26	Store #7	$40.35
895848561561894KOH	2/26	2/27	Store #8	$27.68
1871556189456SAMKL	2/26	2/27	Store #9	$124.76
1542202074TWWZV48	2/26	2/26	Cash Advance	$121.50
2564894185189LKDFID	2/27	2/28	Store #10	$32.87
4545754784KOHUIOS	2/27	3/1	Balance Transfer	$785.00
14547847586KDDL564	2/28	2/28	Cash Advance	$196.50
2564561023184102315	2/28	3/1	Store #11	$14.76
55542818705RASD0X	3/1	3/2	Store #12	$3.76
289189194ASDS8744	3/1	3/3	Store #13	$13.45
178105417841045784	3/2	3/6	Store #14	$2.35
045148714518979874	3/4	3/5	Store #13	$13.45–
8456152156181SDSA	3/5	3/12	Store #15	$25.00
31289105205648AWD	3/11	3/12	Store #16	$7.34
04518478415615ASD	3/11	3/16	Store #17	$10.56
054781054489871 8AF	3/15	3/17	Store #18	$24.50
056489413216848OP	3/16	3/17	Store #19	$8.76
054894561564ASDW	3/17	3/18	Store #20	$14.23
5648974891AD98156	3/19	3/20	Store #21	$23.76
			Fees	
9525156489SFD4545Q	2/23	2/23	Late Fee	$35.00
56415615647OJSNDS	2/26	2/26	Cash Advance Fee	$5.00
84151564SADS8745H	2/27	2/27	Balance Transfer Fee	$23.55
256489156189451516L	2/28	2/28	Cash Advance Fee	$5.90
			TOTAL FEES FOR THIS PERIOD	**$69.45**
			Interest Charged	
			Interest Charge on Purchases	$6.31
			Interest Charge on Cash Advances	$4.58
			TOTAL INTEREST FOR THIS PERIOD	**$10.89**

2012 Totals Year-to-Date	
Total fees charged in 2012	$90.14
Total interest charged in 2012	$18.27

Interest Charge Calculation

Your **Annual Percentage Rate (APR)** is the annual interest rate on your account.

Type of Balance	Annual Percentage Rate (APR)	Balance Subject to Interest Rate	Interest Charge
Purchases	14.99% (v)	$512.14	$6.31
Cash Advances	21.99% (v)	$253.50	$4.58
Balance Transfers	0.00%	$637.50	$0.00

(v) = Variable Rate

G–18(G) Periodic Statement Form

G-18(G) Periodic Statement Form

G-18(G) Periodic Statement Form

Page 1 of 2

XXX Bank Credit Card Account Statement
Account Number XXXX XXXX XXXX XXXX
February 21, 2012 to March 22, 2012

Summary of Account Activity

Previous Balance	$80.52
Payments	-$50.00
Other Credits	+$0.00
Purchases	+$52.13
Balance Transfers	+$0.00
Cash Advances	+$0.00
Past Due Amount	+$0.00
Fees Charged	**+$37.00**
Interest Charged	**+$0.00**
New Balance	$119.65
Credit limit	$2,000.00
Available credit	$1,880.35
Statement closing date	3/22/2012
Days in billing cycle	30

QUESTIONS?
Call Customer Service 1-XXX-XXX-XXXX
Lost or Stolen Credit Card 1-XXX-XXX-XXXX

Payment Information

New Balance	$119.65
Minimum Payment Due	$10.00
Payment Due Date	4/20/12

Late Payment Warning: If we do not receive your minimum payment by the date listed above, you may have to pay a $35 late fee and your APRs may be increased up to the Penalty APR of 28.99%.

Minimum Payment Warning: If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance. For example:

If you make no additional charges using this card and each month you pay...	You will pay off the balance shown on this statement in about...	And you will end up paying an estimated total of...
Only the minimum payment	14 months	$130

If you would like information about credit counseling services, call 1-800-XXX-XXXX.

Please send billing inquiries and correspondence to:
PO Box XXXX, Anytown, Anystate XXXXX

Notice of Changes to Your Interest Rates

You have triggered the Penalty APR of 28.99%. This change will impact your account as follows:

Transactions made on or after 4/9/12: As of 5/10/12, the Penalty APR will apply to these transactions. We may keep the APR at this level indefinitely.

Transactions made before 4/9/12: Current rates will continue to apply to these transactions. However, if you become more than 60 days late on your account, the Penalty APR will apply to those transactions as well.

Transactions

Reference Number	Trans Date	Post Date	Description of Transaction or Credit	Amount
		Payments and Other Credits		
854338203FS8OO0Z5	2/25	2/25	Pymt Thank You	$50.00–
		Purchases		
5884186PS0388W6YM	2/22	2/23	Store #1	$2.05
0544400060ZLV72VL	2/24	2/25	Store #2	$2.11
55541860705RDYD0X	2/24	2/25	Store #3	$4.63
554328608008W90M0	2/24	2/25	Store #4	$4.95
054830709LYMRPT4L	2/24	2/25	Store #5	$7.35
564891561545KOSHD	2/25	2/26	Store #6	$4.35
841517877845AKOJIO	2/25	2/26	Store #7	$2.35
895848561561894KOH	2/26	2/27	Store #8	$7.68
1871556189456SAMKL	2/26	2/27	Store #9	$4.76
2564894185189LKDFID	2/27	2/28	Store #10	$2.87
55542818705RASD0X	3/1	3/2	Store #11	$3.76
178105417841045784	3/2	3/6	Store #12	$2.35
8456152156181SDSA	3/5	3/12	Store #13	$2.92

(transactions continued on next page)

NOTICE: SEE REVERSE SIDE FOR IMPORTANT INFORMATION

Page 1 of 2

Please detach this portion and return with your payment to insure proper credit. Retain upper portion for your records.

Account Number:	**XXXX XXXX XXXX XXXX**
New Balance	**$119.65**
Minimum Payment Due	**$10.00**
Payment Due Date	**4/20/12**
AMOUNT ENCLOSED:	**$**

Please indicate address change and additional cardholder requests on the reverse side.

XXX Bank
P.O. Box XXXX
Anytown, Anystate XXXXX

G–18(G) Periodic Statement Form (contd.)

G-18(G) Periodic Statement Form (contd.)

XXX Bank Credit Card Account Statement
Account Number XXXX XXXX XXXX XXXX
February 21, 2012 to March 22, 2012

Page 2 of 2

Transactions (cont.)

Reference Number	Trans Date	Post Date	Description of Transaction or Credit	Amount
			Fees	
9525156489SFD4545Q	2/23	2/23	Late Fee	$35.00
56415615647OJSNDS	3/22	3/22	Minimum Charge	$2.00
			TOTAL FEES FOR THIS PERIOD	**$37.00**
			Interest Charged	
			Interest Charge on Purchases	$0.00
			Interest Charge on Cash Advances	$0.00
			TOTAL INTEREST FOR THIS PERIOD	**$0.00**

2012 Totals Year-to-Date	
Total fees charged in 2012	$90.14
Total interest charged in 2012	$18.27

Interest Charge Calculation

Your **Annual Percentage Rate (APR)** is the annual interest rate on your account.

Type of Balance	Annual Percentage Rate (APR)	Balance Subject to Interest Rate	Interest Charge
Purchases	14.99% (v)	$113.80	$0.00
Cash Advances	21.99% (v)	$0.00	$0.00
Balance Transfers	0.00%	$0.00	$0.00

(v) = Variable Rate

G–18(H)—Deferred Interest Periodic Statement Clause

[You must pay your promotional balance in full by [date] to avoid paying accrued interest charges.]

Form G–19 Checks Accessing a Credit Card Sample

G-19 Checks Accessing a Credit Card Sample

Interest and Fee Information	
APR for Check Transactions	1.7% (Promotional APR through your November 2012 billing cycle) After November 2012, you will be charged the APR for Cash Advances, currently 21.99%.
Use by Date	You must use the check by 4/1/12 for the promotional APR to apply. If you use the check after that date, we may still honor the check but you will not receive the promotional APR. Instead, the standard APR for Cash Advances will apply.
Fee	Either $5 or 3% of the amount of each transaction, whichever is greater.
Paying Interest	We will begin charging interest on these checks on the transaction date.

Form G–20 Change- in-Terms Sample (Increase Annual Percentage Rate)

G-20 Change-in-Terms Sample (Increase in Annual Percentage Rate)

Important Changes to Your Account Terms

The following is a summary of changes that are being made to your account terms. You have the right to opt out of these changes. For more detailed information, please refer to the booklet enclosed with this statement.

These changes will impact your account as follows:

Transactions made on or after 4/9/12: As of 5/10/12, any changes to APRs described below will apply to these transactions.

Transactions made before 4/9/12: Current APRs will continue to apply to these transactions.

If you are already being charged a higher Penalty APR for purchases: In this case, any changes to APRs described below will not go into effect at this time. These changes will go into effect when the Penalty APR no longer applies to your account.

Revised Terms, as of 5/10/12	
APR for Purchases	16.99%

Form G–21 Change-in-Terms Sample (Increase in Fees)

G-21 Change-in-Terms Sample (Increase in Fees)

Important Changes to Your Account Terms

The following is a summary of changes that are being made to your account terms. These changes will take effect on 5/10/12. For more detailed information, please refer to the booklet enclosed with this statement.

You have the right to reject these changes, unless you become more than 60 days late on your account. However, if you do reject these changes you will not be able to use your account for new transactions. You can reject the changes by calling us at 1-800-xxx-xxxx.

Revised Terms, as of 5/10/12	
Late Payment Fee	$32 if your balance is less than or equal to $1,000; $39 if your balance is more than $1,000
Returned Payment Fee	$39

Form G–22 Penalty Rate Increase Sample (Payment 60 or Fewer Days Late)

G-22 Penalty Rate Increase Sample (Payment 60 or Fewer Days Late)

Notice of Changes to Your Interest Rates

You have triggered the Penalty APR of 28.99%. This change will impact your account as follows:

Transactions made on or after 4/9/12: As of 5/10/12, the Penalty APR will apply to these transactions. We may keep the APR at this level indefinitely.

Transactions made before 4/9/12: Current rates will continue to apply to these transactions. However, if you become more than 60 days late on your account, the Penalty APR will apply to those transactions as well.

Form G–23 Penalty Rate Increase Sample (Payment More Than 60 Days Late)

G-23 Penalty Rate Increase Sample (Payment More Than 60 Days Late)

Notice of Changes to Your Interest Rates

You have triggered the Penalty APR of 28.99% because we did not receive your minimum payment within 60 days of the due date. As of 5/10/12, the Penalty APR will apply to all existing balances and new transactions on your account.

If you make six consecutive minimum payments starting with your first payment due after 5/10/12, your rate will return to the Standard APR. If you do not make these six consecutive minimum payments, we may keep the Penalty APR on your account indefinitely.

BILLING CODE 6210–01–C

G–24—Deferred Interest Offer Clauses

(a) For Credit Card Accounts Under an Open-End (Not Home-Secured) Consumer Credit Plan

[Interest will be charged to your account from the purchase date if the purchase balance is not paid in full within the/by [deferred interest period/date] or if you make a late payment.]

(b) For Other Open-End Plans

[Interest will be charged to your account from the purchase date if the purchase balance is not paid in full within the/by [deferred interest period/date] or if your account is otherwise in default.]

G–25(A)—Consent Form for Over-the-Credit Limit Transactions

Your Right to Request Over-the-Credit Limit Coverage

Unless you tell us otherwise, we will decline any transaction that causes you to go over your credit limit. If you want us to authorize these transactions, you can request over-the-credit limit coverage.

If you have over-the-credit limit coverage and you go over your credit limit, we will charge you a fee of $XX and may increase your APRs to the Penalty APR of XX.XX%. You will only pay one fee per billing cycle, even if you go over your limit multiple times in the same cycle.

Even if you request over-the-credit limit coverage, in some cases we may still decline a transaction that would cause you to go over your limit, such as if you are past due or significantly over your credit limit.

If you want us to authorize transactions that go over your credit limit, please:

—Call us at [telephone number];

—Visit [Web site]; or

—Check the box below, and return the form to us at [address].

__I want you to authorize transactions that exceed my credit limit. I understand that if I go over my credit limit, I will be charged a fee of $__ and my APRs may be increased.

G–25(B)—Revocation Notice for Periodic Statement Regarding Over-the-Credit Limit Transactions

You currently have over-the-credit limit coverage on your account, which means that we will pay transactions that cause you to go over your credit limit. If you do go over your credit limit, we will charge you a fee of $XX and your APRs may be increased. To remove over-the-credit-limit coverage from your account, call us at 1–800–xxxxxxx or visit *http://www.xxxxxxx.com.* You may also write us at: [insert address].

23. Appendix H to part 226 is amended by revising the table of contents, and adding new forms H–17(A) and H–17(B) to read as follows:

Appendix H to Part 226—Closed-End Model Forms and Clauses

H–1 Credit Sale Model Form (§ 226.18)
H–2 Loan Model Form (§ 226.18)
H–3 Amount Financed Itemization Model Form (§ 226.18(c))
H–4(A) Variable-Rate Model Clauses (§ 226.18(f)(1))
H–4(B) Variable-Rate Model Clauses (§ 226.18(f)(2))
H–4(C) Variable-Rate Model Clauses (§ 226.19(b))
H–4(D) Variable-Rate Model Clauses (§ 226.20(c))
H–5 Demand Feature Model Clauses (§ 226.18(i))
H–6 Assumption Policy Model Clause (§ 226.18(q))
H–7 Required Deposit Model Clause (§ 226.18(r))
H–8 Rescission Model Form (General) (§ 226.23)
H–9 Rescission Model Form (Refinancing (with Original Creditor)) (§ 226.23)
H–10 Credit Sale Sample
H–11 Installment Loan Sample
H–12 Refinancing Sample
H–13 Mortgage with Demand Feature Sample
H–14 Variable-Rate Mortgage Sample (§ 226.19(b))
H–15 Graduated-Payment Mortgage Sample
H–16 Mortgage Sample
H–17(A) Debt Suspension Model Clause
H–17(B) Debt Suspension Sample

* * * * *

H–17(A) Debt Suspension Model Clause

Please enroll me in the optional [insert name of program], and bill my account the fee of [insert charge for the initial term of coverage]. I understand that enrollment is not required to obtain credit. I also understand that depending on the event, the protection may only temporarily suspend my duty to make minimum payments, not reduce the balance I owe. I understand that my balance will actually grow during the suspension period as interest continues to accumulate.

[To Enroll, Sign Here]/[To Enroll, Initial Here]. X_____

H–17(B) Debt Suspension Sample

Please enroll me in the optional [name of program], and bill my account the fee of $200.00. I understand that enrollment is not required to obtain credit. I also understand that depending on the event, the protection may only temporarily suspend my duty to make minimum payments, not reduce the

balance I owe. I understand that my balance will actually grow during the suspension period as interest continues to accumulate.

To Enroll, Initial Here.

X_____

24. Appendix M1 is added to part 226 to read as follows:

Appendix M1 to Part 226—Repayment Disclosures

(a) *Definitions.* (1) ''Promotional terms'' means terms of a cardholder's account that will expire in a fixed period of time, as set forth by the card issuer.

(2) ''Deferred interest or similar plan'' means a plan where a consumer will not be obligated to pay interest that accrues on balances or transactions if those balances or transactions are paid in full prior to the expiration of a specified period of time.

(b) *Calculating minimum payment repayment estimates.*

(1) *Minimum payment formulas.* When calculating the minimum payment repayment estimate, credit card issuers must use the minimum payment formula(s) that apply to a cardholder's account. If more than one minimum payment formula applies to an account, the issuer must apply each minimum payment formula to the portion of the balance to which the formula applies. In this case, the issuer must disclose the longest repayment period calculated. For example, assume that an issuer uses one minimum payment formula to calculate the minimum payment amount for a general revolving feature, and another minimum payment formula to calculate the minimum payment amount for special purchases, such as a ''club plan purchase.'' Also, assume that based on a consumer's balances in these features and the annual percentage rates that apply to such features, the repayment period calculated pursuant to this Appendix for the general revolving feature is 5 years, while the repayment period calculated for the special purchase feature is 3 years. This issuer must disclose 5 years as the repayment period for the entire balance to the consumer. If any promotional terms related to payments apply to a cardholder's account, such as a deferred billing plan where minimum payments are not required for 12 months, credit card issuers may assume no promotional terms apply to the account.

(2) *Annual percentage rate.* When calculating the minimum payment repayment estimate, a credit card issuer must use the annual percentage rates that apply to a cardholder's account, based on the portion of the balance to which the rate applies. If any promotional terms related to annual percentage rates apply to a cardholder's account, other than deferred interest or similar plans, a credit card issuer in calculating the minimum payment repayment estimate must apply the promotional annual percentage rate(s) until it expires and then must apply the rate that applies after the promotional rate(s) expires. If the rate that applies after the promotional rate(s) expires is a variable rate, a card issuer must calculate that rate based on the applicable index or formula. This variable rate is accurate if it was in effect within the last 30 days before the minimum payment repayment estimate is provided. For deferred interest plans or similar plans, if minimum payments under the deferred interest or similar plan will repay the balances or transactions in full prior to the expiration of the specified period of time, a card issuer must assume that the consumer will not be obligated to pay the accrued interest. This means, in calculating the minimum payment repayment estimate, the card issuer must apply a zero percent annual percentage rate to the balance subject to the deferred interest or similar plan. If, however, minimum payments under the deferred interest plan or similar plan may not repay the balances or transactions in full prior to the expiration of the specified period of time, a credit card issuer must assume that a consumer will not repay the balances or transactions in full prior to the expiration of the specified period of time and thus the consumer will be obligated to pay the accrued interest. This means, in calculating the minimum payment repayment estimate, the card issuer must apply the annual percentage rate at which interest is accruing to the balance subject to the deferred interest or similar plan.

(3) *Beginning balance.* When calculating the minimum payment repayment estimate, a credit card issuer must use as the beginning balance the outstanding balance on a consumer's account as of the closing date of the last billing cycle. When calculating the minimum payment repayment estimate, a credit card issuer may round the beginning balance as described above to the nearest whole dollar.

(4) *Assumptions.* When calculating the minimum payment repayment estimate, a credit card issuer for each of the terms below, may either make the following assumption about that term, or use the account term that applies to a consumer's account.

(i) Only minimum monthly payments are made each month. In addition, minimum monthly payments are made each month—for example, a debt cancellation or suspension agreement, or skip payment feature does not apply to the account.

(ii) No additional extensions of credit are obtained, such as new purchases, transactions, fees, charges or other activity. No refunds or rebates are given.

(iii) The annual percentage rate or rates that apply to a cardholder's account will not change, through either the operation of a variable rate or the change to a rate, except as provided in paragraph (b)(2) of this Appendix. For example, if a penalty annual percentage rate currently applies to a consumer's account, an issuer may assume that the penalty annual percentage rate will apply to the consumer's account indefinitely, even if the consumer may potentially return to a non-penalty annual percentage rate in the future under the account agreement.

(iv) There is no grace period.

(v) The final payment pays the account in full (*i.e.,* there is no residual finance charge after the final month in a series of payments).

(vi) The average daily balance method is used to calculate the balance.

(vii) All months are the same length and leap year is ignored. A monthly or daily periodic rate may be assumed. If a daily periodic rate is assumed, the issuer may either assume (1) a year is 365 days long, and all months are 30.41667 days long, or (2) a year is 360 days long, and all months are 30 days long.

(viii) Payments are credited on the last day of the month.

(ix) Payments are allocated to lower annual percentage rate balances before higher annual percentage rate balances.

(x) The account is not past due and the account balance does not exceed the credit limit.

(xi) When calculating the minimum payment repayment estimate, the assumed payments, current balance and interest charges for each month may be rounded to the nearest cent, as shown in Appendix M2 to this part.

(5) *Tolerance.* A minimum payment repayment estimate shall be considered accurate if it is not more than 2 months above or below the minimum payment repayment estimate determined in accordance with the guidance in this Appendix (prior to rounding described in § 226.7(b)(12)(i)(B)). For example, assume the minimum payment repayment estimate calculated using the guidance in this Appendix is 28 months (2 years, 4 months), and the minimum payment repayment estimate calculated by the issuer is 30 months (2 years, 6 months). The minimum payment repayment estimate should be disclosed as 2 years, due to the rounding rule set forth in § 226.7(b)(12)(i)(B). Nonetheless, based on the 30 month estimate, the issuer disclosed 3 years, based on that rounding rule. The issuer would be in compliance with this guidance by disclosing 3 years, instead of 2 years, because the issuer's estimate is within the 2 months' tolerance, prior to rounding. In addition, even if an issuer's estimate is more than 2 months above or below the minimum payment repayment estimate calculated using the guidance in this Appendix, so long as the issuer discloses the correct number of years to the consumer based on the rounding rule set forth in § 226.7(b)(12)(i)(B), the issuer would be in compliance with this guidance. For example, assume the minimum payment repayment estimate calculated using the guidance in this Appendix is 32 months (2 years, 8 months), and the minimum payment repayment estimate calculated by the issuer is 38 months (3 years, 2 months). Under the rounding rule set forth in § 226.7(b)(12)(i)(B), both of these estimates would be rounded and disclosed to the consumer as 3 years. Thus, if the issuer disclosed 3 years to the consumer, the issuer would be in compliance with this guidance even though the minimum payment repayment estimate calculated by the issuer is outside the 2 months' tolerance amount.

(c) *Calculating the minimum payment total cost estimate.* When calculating the minimum payment total cost estimate, a credit card issuer must total the dollar amount of the interest and principal that the consumer would pay if he or she made minimum payments for the length of time calculated as the minimum payment repayment estimate under paragraph (b) of this Appendix. The minimum payment total cost estimate is deemed to be accurate if it

is based on a minimum payment repayment estimate that is within the tolerance guidance set forth in paragraph (b)(5) of this Appendix. For example, assume the minimum payment repayment estimate calculated using the guidance in this Appendix is 28 months (2 years, 4 months), and the minimum payment repayment estimate calculated by the issuer is 30 months (2 years, 6 months). The minimum payment total cost estimate will be deemed accurate even if it is based on the 30 month estimate for length of repayment, because the issuer's minimum payment repayment estimate is within the 2 months' tolerance, prior to rounding. In addition, assume the minimum payment repayment estimate calculated under this Appendix is 32 months (2 years, 8 months), and the minimum payment repayment estimate calculated by the issuer is 38 months (3 years, 2 months). Under the rounding rule set forth in § 226.7(b)(12)(i)(B), both of these estimates would be rounded and disclosed to the consumer as 3 years. If the issuer based the minimum payment total cost estimate on 38 months (or any other minimum payment repayment estimate that would be rounded to 3 years), the minimum payment total cost estimate would be deemed to be accurate.

(d) *Calculating the estimated monthly payment for repayment in 36 months.* (1) *In general.* When calculating the estimated monthly payment for repayment in 36 months, a credit card issuer must calculate the estimated monthly payment amount that would be required to pay off the outstanding balance shown on the statement within 36 months, assuming the consumer paid the same amount each month for 36 months.

(2) *Weighted annual percentage rate.* In calculating the estimated monthly payment for repayment in 36 months, an issuer must use a weighted annual percentage rate that is based on the annual percentage rates that apply to a cardholder's account and the portion of the balance to which the rate applies, as shown in Appendix M2 to this part. If any promotional terms related to annual percentage rates apply to a cardholder's account, other than deferred interest plans or similar plans, in calculating the weighted annual percentage rate, the issuer must calculate a weighted average of the promotional rate and the rate that will apply after the promotional rate expires based on the percentage of 36 months each rate will apply, as shown in Appendix M2 to this part. For deferred interest plans or similar plans, if minimum payments under the deferred interest or similar plan will repay the balances or transactions in full prior to the expiration of the specified period of time, a card issuer must assume that the consumer will not be obligated to pay the accrued interest. This means, in calculating the weighted annual percentage rate, the card issuer must apply a zero percent annual percentage rate to the balance subject to the deferred interest or similar plan. If, however, minimum payments under the deferred interest plan or similar plan may not repay the balances or transactions in full prior to the expiration of the specified period of time, a credit card issuer in calculating the weighted annual percentage rate must assume that a consumer will not repay the balances or transactions in full prior to the expiration of the specified period of time and thus the consumer will be obligated to pay the accrued interest. This means, in calculating the weighted annual percentage rate, the card issuer must apply the annual percentage rate at which interest is accruing to the balance subject to the deferred interest or similar plan.

(3) *Assumptions.* In calculating the estimated monthly payment for repayment in 36 months, a card issuer must use the same terms described in paragraph (b) of this Appendix, as appropriate.

(e) *Calculating the total cost estimate for repayment in 36 months.* When calculating the total cost estimate for repayment in 36 months, a credit card issuer must total the dollar amount of the interest and principal that the consumer would pay if he or she made the estimated monthly payment calculated under paragraph (d) of this Appendix each month for 36 months.

(f) *Calculating the savings estimate for repayment in 36 months.* When calculating the saving estimate for repayment in 36 months, a credit card issuer must subtract the total cost estimate for repayment in 36 months calculated under paragraph (e) of this Appendix (rounded to the nearest whole dollar as set forth in § 226.7(b)(12)(i)(F)(*3*)) from the minimum payment total cost estimate calculated under paragraph (c) of this Appendix (rounded to the nearest whole dollar as set forth in § 226.7(b)(12)(i)(C)).

24a. Appendix M2 is added to part 226 to read as follows:

Appendix M2 to Part 226—Sample Calculations of Repayment Disclosures

The following is an example of how to calculate the minimum payment repayment estimate, the minimum payment total cost estimate, the estimated monthly payment for repayment in 36 months, the total cost estimate for repayment in 36 months, and the savings estimate for repayment in 36 month using the guidance in Appendix M1 to this part where three annual percentage rates apply (where one of the rates is a promotional APR), the total outstanding balance is $1000, and the minimum payment formula is 2 percent of the outstanding balance or $20, whichever is greater. The following calculation is written in SAS code.

```
data one;
/*
  Note: pmt01 = estimated monthly payment to repay balance in 36 months
  sumpmts36 = sum of payments for repayment in 36 months
  month = number of months to repay total balance if making only minimum payments
  pmt = minimum monthly payment
  fc = monthly finance charge
  sumpmts = sum of payments for minimum payments
*/
* inputs;
* annual percentage rates; apr1= 0.0; apr2=0.17; apr3=0.21; * insert in ascending order;
* outstanding balances;   cbal1=500; cbal2=250; cbal3=250;
* dollar minimum payment;   dmin=20; * percent minimum payment; pmin=0.02; * (0.02+perrate);
* promotional rate information;
* last month for promotional rate;   expm=6; * = 0 if no promotional rate;
* regular rate;   rrate=.17; * = 0 if no promotional rate;
array apr(3); array perrate(3);
days=365/12;   * calculate days in month;
* calculate estimated monthly payment to pay off balances in 36 months, and total cost of repaying balance in 36 months;
array xperrate(3);
do I=1 to 3;
xperrate(I)=(apr(I)/365)*days; * calculate periodic rate; end;
if expm gt 0 then xperrate1a=(expm/36)*xperrate1+(1-(expm/36))*(rrate/365)*days; else xperrate1a=xperrate1;
tbal=cbal1+cbal2+cbal3;
perrate36=(cbal1*xperrate1a+cbal2*xperrate2+cbal3*xperrate3)/(cbal1+cbal2+cbal3);
* months to repay; dmonths=36;
* initialize counters for sum of payments for repayment in 36 months;
Sumpmts36=0;
pvaf=(1-(1+perrate36)**-dmonths)/perrate36; * calculate present value of annuity factor;
pmt01=round(tbal/pvaf,0.01);   * calculate monthly payment for designated number of months;
sumpmts36 = pmt01 * 36;
* calculate time to repay and total cost of making minimum payments each month;
* initialize counter for months, and sum of payments;
month=0;
sumpmts=0;
do I=1 to 3;
perrate(I)=(apr(I)/365)*days; * calculate periodic rate; end;
put perrate1= perrate2= perrate3=;
eins:
month=month+1;   * increment month counter;
pmt=round(pmin*tbal,0.01); * calculate payment as percentage of balance;
if month ge expm and expm ne 0 then perrate1=(rrate/365)*days;
if pmt lt dmin then pmt=dmin; * set dollar minimum payment;
array xxxbal(3); array cbal(3);
do I=1 to 3;
xxxbal(I)=round(cbal(I)*(1+perrate(I)),0.01);
end;
fc=xxxbal1+xxxbal2+xxxbal3-tbal;
if pmt gt (tbal+fc) then do;
do I=1 to 3;
if cbal(I) gt 0 then pmt=round(cbal(I)*(1+perrate(I)),0.01); * set final payment amount;
end;
end;
if pmt le xxxbal1 then do;
cbal1=xxxbal1-pmt;
cbal2=xxxbal2;
cbal3=xxxbal3;
end;
if pmt gt xxxbal1 and xxxbal2 gt 0 and pmt le (xxxbal1+xxxbal2) then do;
```

```
  cbal2=xxxbal2 – (pmt – xxxbal1);
  cbal1=0;
  cbal3=xxxbal3;
  end;
if pmt gt xxxbal2 and xxxbal3 gt 0 then do;
  cbal3=xxxbal3 – (pmt-xxxbal1 – xxxbal2);
  cbal2=0;
  end;
sumpmts=sumpmts+pmt;   * increment sum
      of payments;
tbal=cbal1+cbal2+cbal3; * calculate new total
      balance;
* print month, balance, payment amount,
      and finance charge;
put month= tbal= cbal1= cbal2= cbal3= pmt=
      fc= ;
if tbal gt 0 then go to eins; * go to next month
      if balance is greater than zero;
* initialize total cost savings;
savtot=0;
savtot= round(sumpmts,1) – round
      (sumpmts36,1);
* print number of months to repay debt if
      minimum payments made, final balance
      (zero), total cost if minimum payments
      made, estimated monthly payment for
      repayment in 36 months, total cost for
      repayment in 36 months, and total
      savings if repaid in 36 months;
put title=' ';
put title='number of months to repay debt if
      minimum payment made, final balance,
      total cost if minimum payments made,
      estimated monthly payment for
      repayment in 36 months, total cost for
      repayment in 36 months, and total
      savings if repaid in 36 months';
put month= tbal= sumpmts= pmt01=
      sumpmts36= savtot=;
put title=' ';
run;
```

25. Appendix N to part 226 is added to read as follows:

Appendix N—Internet Posting of Credit Card Agreements

1. Credit Card Agreements Submitted to the Board Under § 226.58(d)

(a) Each agreement submitted to the Board must contain the provisions of the agreement and the pricing information in effect as of the last business day of the preceding calendar quarter.

(b) Information that is not uniform for all cardholders under an agreement, but that instead may vary from one cardholder to another depending upon a cardholder's creditworthiness, State of residence, or other factors, such as the pricing information, must be set forth in an addendum to the agreement. The addendum must provide the information either by setting forth all the possible variations (such as purchase APRs of 6.9 percent, 8.9 percent, 10.9 percent, or 12.9 percent), or by providing a range (such as purchase APR ranging from 6.9 percent to 12.9 percent).

(c) Card issuers are not required to submit any disclosures required by State or Federal law, such as affiliate marketing notices, privacy policies, or disclosures under the E-Sign Act, except to the extent that those disclosures are included in the provisions of the agreement or the pricing information. Similarly, card issuers are not required to submit solicitation materials or periodic statements.

(d) Agreements must not include any personally identifiable information relating to any cardholder, such as name, address, telephone number, or account number.

(e) Issuers may not provide provisions of the agreement or pricing information in the form of change-in-terms notices or riders (other than the single addendum described above, if applicable). Changes in provisions or pricing information must be integrated into the body of the agreement (or into the single addendum described above, if applicable).

2. Posting of Agreements Offered to the Public on Card Issuer's Web Site Under Proposed § 226.58(f)(1)

(a) Agreements may be posted in any electronic format that is readily usable by the general public.

(b) The content of the agreements posted on the issuer's Web site must the same as those submitted to the Board, as specified in paragraph 1. above.

(c) The card issuer must update the agreements posted on its Web site at least as frequently as the quarterly schedule required for submission of agreements to the Board under § 226.58(d). If the issuer chooses to update the agreements on its Web site more frequently, the agreements posted on the issuer's Web site may contain the provisions of the agreement and the pricing information in effect as of a date other than the last business day of the preceding calendar quarter.

(d) The agreements posted on the issuer's Web site must be placed in a location that is prominent and easily accessible by the public and must be presented in a clear and legible typeface.

3. Availability of Agreements for All Open Accounts under § 226.58(f)(2)

(a) If the card issuer posts an agreement on its Web site under § 226.58(f)(2)(i), the agreement may be posted in any electronic format this is readily usable by the general public and must be placed in a location that is prominent and easily accessible to the cardholder.

(b) The content of such agreements (whether posted on the card issuer's Web site under § 226.58(f)(2)(i) or made available upon the cardholder's request under § 226.58(f)(2)(ii)) must conform to the content requirements for agreements submitted to the Board, as specified in paragraph 1. above, except that each agreement: (1) Must set forth the specific provisions and pricing information applicable to the particular cardholder; and (2) may contain personally identifiable information relating to the cardholder, such as name, address, telephone number, or account number, provided that the issuer takes appropriate measures to make the agreement accessible only to the cardholder or other authorized persons. Pricing information may be integrated into the text of the agreement or provided in a single attached addendum. All agreements must be presented in a clear and legible typeface.

(c) Agreements must contain provisions and pricing information that is complete and accurate as of a date no more than 60 days prior to: (1) The date on which the agreement is posted on the card issuer's Web site under § 226.58(f)(2)(i); or (2) the date the cardholder's request is received under § 226.58(f)(2)(ii).

(d) Issuers may not provide provisions of the agreement or pricing information in the form of change-in-terms notices or riders (other than the single addendum described above, if applicable). Changes in provisions or pricing information must be integrated into the body of the agreement (or into the single addendum described above, if applicable).

26. In Supplement I to Part 226:

A. Revise the Introduction.

B. Revise Subpart A.

C. In Subpart B, revise sections 226.5 and 226.5a and sections 226.6 through 226.14 and section 226.16.

D. Under *Section 226.5b—Requirements for Home-equity Plans,* under *5b(a) Form of Disclosures,* under 5b(a)(1) *General,* paragraph 1. is revised.

E. Under *Section 226.5b—Requirements for Home-equity Plans,* under *5b(f) Limitations on Home-equity Plans,* under *5b(f)(3)(vi),* paragraph 4. is revised.

F. Under *Section 226.26—Use of Annual Percentage Rate in Oral Disclosures,* under *26(a) Open-end credit.,* paragraph 1. is revised.

G. Under *Section 226.27—Language of Disclosures,* paragraph 1. is revised.

H. Under *Section 226.28—Effect on State Laws,* under *28(a) Inconsistent disclosure requirements.,* paragraph 6. is revised.

I. Under *Section 226.30—Limitation on Rates,* paragraph 8. is revised and paragraph 13. is deleted.

J. Add a new Subpart G, consisting of sections 226.51 through 226.58.

K. Revise Appendix F.

L. Amend Appendix G by revising paragraphs 1. through 3. and 5. through 6. and adding paragraphs 8. through 12.

M. Remove the References paragraph at the end of sections 226.1, 226.2, 226.3, 226.4, 226.5, 226.6, 226.7, 226.8, 226.9, 226.10, 226.11, 226.12, 226.13, 226.14, 226.16, and Appendix F.

Supplement I to Part 226—Official Staff Interpretations

Introduction

1. *Official status.* This commentary is the vehicle by which the staff of the Division of Consumer and Community Affairs of the Federal Reserve Board issues official staff interpretations of Regulation Z. Good faith compliance with this commentary affords protection from liability under 130(f) of the Truth in Lending Act. Section 130(f) (15 U.S.C. 1640) protects creditors from

civil liability for any act done or omitted in good faith in conformity with any interpretation issued by a duly authorized official or employee of the Federal Reserve System.

2. *Procedure for requesting interpretations.* Under appendix C of the regulation, anyone may request an official staff interpretation. Interpretations that are adopted will be incorporated in this commentary following publication in the **Federal Register**. No official staff interpretations are expected to be issued other than by means of this commentary.

3. *Rules of construction.* (a) Lists that appear in the commentary may be exhaustive or illustrative; the appropriate construction should be clear from the context. In most cases, illustrative lists are introduced by phrases such as ''including, but not limited to,'' ''among other things,'' ''for example,'' or ''such as.''

(b) Throughout the commentary, reference to ''this section'' or ''this paragraph'' means the section or paragraph in the regulation that is the subject of the comment.

4. *Comment designations.* Each comment in the commentary is identified by a number and the regulatory section or paragraph which it interprets. The comments are designated with as much specificity as possible according to the particular regulatory provision addressed. For example, some of the comments to § 226.18(b) are further divided by subparagraph, such as comment 18(b)(1)–1 and comment 18(b)(2)–1. In other cases, comments have more general application and are designated, for example, as comment 18–1 or comment 18(b)–1. This introduction may be cited as comments I–1 through I–4. Comments to the appendices may be cited, for example, as comment app. A–1.

Subpart A—General

§ 226.1 Authority, Purpose, Coverage, Organization, Enforcement and Liability.

1(c) Coverage.

1. *Foreign applicability.* Regulation Z applies to all persons (including branches of foreign banks and sellers located in the United States) that extend consumer credit to residents (including resident aliens) of any State as defined in § 226.2. If an account is located in the United States and credit is extended to a U.S. resident, the transaction is subject to the regulation. This will be the case whether or not a particular advance or purchase on the account takes place in the United States and whether or not the extender of credit is chartered or based in the United States or a foreign country. For example, if a U.S. resident has a credit card account located in the consumer's State issued by a bank (whether U.S. or foreign-based), the account is covered by the regulation, including extensions of credit under the account that occur outside the United States. In contrast, if a U.S. resident residing or visiting abroad, or a foreign national abroad, opens a credit card account issued by a foreign branch of a U.S. bank, the account is not covered by the regulation.

1(d) Organization.

Paragraph (1)(d)(5).

1. *Effective dates.* The Board's revisions to Regulation Z published on July 30, 2008 (the ''final rules''), apply to covered loans (including refinance loans and assumptions considered new transactions under § 226.20), for which the creditor receives an application on or after October 1, 2009, except for the final rules on advertising, escrows, and loan servicing. The final rules on escrows in § 226.35(b)(3) are effective for covered loans, (including refinancings and assumptions in § 226.20) for which the creditor receives an application on or after April 1, 2010; but for such loans secured by manufactured housing on or after October 1, 2010. The final rules applicable to servicers in § 226.36(c) apply to all covered loans serviced on or after October 1, 2009. The final rules on advertising apply to advertisements occurring on or after October 1, 2009. For example, a radio ad occurs on the date it is first broadcast; a solicitation occurs on the date it is mailed to the consumer. The following examples illustrate the application of the effective dates for the final rules.

i. *General.* A refinancing or assumption as defined in § 226.20(a) or (b) is a new transaction and is covered by a provision of the final rules if the creditor receives an application for the transaction on or after that provision's effective date. For example, if a creditor receives an application for a refinance loan covered by § 226.35(a) on or after October 1, 2009, and the refinance loan is consummated on October 15, 2009, the provision restricting prepayment penalties in § 226.35(b)(2) applies. However, if the transaction were a modification of an existing obligation's terms that does not constitute a refinance loan under § 226.20(a), the final rules, including for example the restriction on prepayment penalties would not apply.

ii. *Escrows.* Assume a consumer applies for a refinance loan to be secured by a dwelling (that is not a manufactured home) on March 15, 2010, and the loan is consummated on April 2, 2010, the escrow rule in § 226.35(b)(3) does not apply.

iii. *Servicing.* Assume that a consumer applies for a new loan on August 1, 2009. The loan is consummated on September 1, 2009. The servicing rules in § 226.36(c) apply to the servicing of that loan as of October 1, 2009.

Paragraph 1(d)(6).

1. *Mandatory compliance dates.* Compliance with the Board's revisions to Regulation Z published on August 14, 2009 is mandatory for private education loans for which the creditor receives an application on or after February 14, 2010. Compliance with the final rules on co-branding in Sec. 226.48(a) and (b) is mandatory for marketing occurring on or after February 14, 2010. Compliance with the final rules is optional for private education loan transactions for which an application was received prior to February 14, 2010, even if consummated after the mandatory compliance date.

2. *Optional compliance.* A creditor may, at its option, provide the approval and final disclosures required under §§ 226.47(b) or (c) for private education loans where an application was received prior to the mandatory compliance date. If the creditor opts to provide the disclosures, the creditor must also comply with the applicable timing and other rules in §§ 226.46 and 226.48 (including providing the consumer with the 30-day acceptance period under § 226.48(c), and the right to cancel under § 226.48(d)). For example if the creditor receives an application on January 25, 2010 and approves the consumer's application on or after February 14, 2010, the creditor may, at its option, provide the approval disclosures under § 226.47(b), the final disclosures under § 226.47(c) and comply with the applicable requirements §§ 226.46 and 226.48. The creditor must also obtain the self-certification form as required in § 226.48(e), if applicable. Or, for example, if the creditor receives an application on January 25, 2010 and approves the consumer's application before February 14, 2010, the creditor may, at its option, provide the final disclosure under § 226.47(c) and comply with the applicable timing and other requirements of §§ 226.46 and 226.48, including providing the consumer with the right to cancel under § 226.48(d). The creditor must also obtain the self-certification form as required in § 226.48(e), if applicable.

Paragraph 1(d)(7).

1. [Reserved.]

§ 226.2 Definitions and Rules of Construction.

2(a)(2) Advertisement.

1. *Coverage.* Only commercial messages that promote consumer credit transactions requiring disclosures are advertisements. Messages inviting, offering, or otherwise announcing generally to prospective customers the availability of credit transactions, whether in visual, oral, or print media, are covered by Regulation Z (12 CFR part 226).

i. Examples include:

A. Messages in a newspaper, magazine, leaflet, promotional flyer, or catalog.

B. Announcements on radio, television, or public address system.

C. Electronic advertisements, such as on the Internet.

D. Direct mail literature or other printed material on any exterior or interior sign.

E. Point of sale displays.

F. Telephone solicitations.

G. Price tags that contain credit information.

H. Letters sent to customers or potential customers as part of an organized solicitation of business.

I. Messages on checking account statements offering auto loans at a stated annual percentage rate.

J. Communications promoting a new open-end plan or closed-end transaction.

ii. The term does not include:

A. Direct personal contacts, such as follow-up letters, cost estimates for individual consumers, or oral or written communication relating to the negotiation of a specific transaction.

B. Informational material, for example, interest-rate and loan-term memos, distributed only to business entities.

C. Notices required by Federal or State law, if the law mandates that specific information be displayed and only the information so mandated is included in the notice.

D. News articles the use of which is controlled by the news medium.

E. Market-research or educational materials that do not solicit business.

F. Communications about an existing credit account (for example, a promotion encouraging additional or different uses of an existing credit card account.)

2. *Persons covered.* All *persons* must comply with the advertising provisions in §§ 226.16 and 226.24, not just those that meet the definition of creditor in § 226.2(a)(17). Thus, home builders, merchants, and others who are not themselves creditors must comply with the advertising provisions of the regulation if they advertise consumer credit transactions. However, under section 145 of the act, the owner and the personnel of the medium in which an advertisement appears, or through which it is disseminated, are not subject to civil liability for violations.

2(a)(3) Reserved.

2(a)(4) Billing cycle or cycle.

1. *Intervals.* In open-end credit plans, the billing cycle determines the intervals for which periodic disclosure statements are required; these intervals are also used as measuring points for other duties of the creditor. Typically, billing cycles are monthly, but they may be more frequent or less frequent (but not less frequent than quarterly).

2. *Creditors that do not bill.* The term *cycle* is interchangeable with *billing cycle* for definitional purposes, since some creditors' cycles do not involve the sending of bills in the traditional sense but only statements of account activity. This is commonly the case with financial institutions when periodic payments are made through payroll deduction or through automatic debit of the consumer's asset account.

3. *Equal cycles.* Although cycles must be equal, there is a permissible variance to account for weekends, holidays, and differences in the number of days in months. If the actual date of each statement does not vary by more than four days from a fixed ''day'' (for example, the third Thursday of each month) or ''date'' (for example, the 15th of each month) that the creditor regularly uses, the intervals between statements are considered equal. The requirement that cycles be equal applies even if the creditor applies a daily periodic rate to determine the finance charge. The requirement that intervals be equal does not apply to the first billing cycle on an open-end account (*i.e.,* the time period between account opening and the generation of the first periodic statement) or to a transitional billing cycle that can occur if the creditor occasionally changes its billing cycles so as to establish a new statement day or date. (*See* comments 9(c)(1)–3 and 9(c)(2)–3.)

4. *Payment reminder.* The sending of a regular payment reminder (rather than a late payment notice) establishes a cycle for which the creditor must send periodic statements.

2(a)(6) Business day.

1. *Business function test.* Activities that indicate that the creditor is open for substantially all of its business functions include the availability of personnel to make loan disbursements, to open new accounts, and to handle credit transaction inquiries. Activities that indicate that the creditor is not open for substantially all of its business functions include a retailer's merely accepting credit cards for purchases or a bank's having its customer-service windows open only for limited purposes such as deposits and withdrawals, bill paying, and related services.

2. *Rule for rescission, disclosures for certain mortgage transactions, and private education loans.* A more precise rule for what is a business day (all calendar days except Sundays and the Federal legal holidays specified in 5 U.S.C. 6103(a)) applies when the right of rescission, the receipt of disclosures for certain dwelling-secured mortgage transactions under §§ 226.19(a)(1)(ii), 226.19(a)(2), 226.31(c), or the receipt of disclosures for private education loans under § 226.46(d)(4) is involved. Four Federal legal holidays are identified in 5 U.S.C. 6103(a) by a specific date: New Year's Day, January 1; Independence Day, July 4; Veterans Day, November 11; and Christmas Day, December 25. When one of these holidays (July 4, for example) falls on a Saturday, Federal offices and other entities might observe the holiday on the preceding Friday (July 3). In cases where the more precise rule applies, the observed holiday (in the example, July 3) is a business day.

2(a)(7) Card issuer.

1. *Agent.* An agent of a card issuer is considered a card issuer. Because agency relationships are traditionally defined by contract and by State or other applicable law, the regulation does not define agent. Merely providing services relating to the production of credit cards or data processing for others, however, does not make one the agent of the card issuer. In contrast, a financial institution may become the agent of the card issuer if an agreement between the institution and the card issuer provides that the cardholder may use a line of credit with the financial institution to pay obligations incurred by use of the credit card.

2(a)(8) Cardholder.

1. *General rule.* A cardholder is a natural person at whose request a card is issued for consumer credit purposes or who is a co-obligor or guarantor for such a card issued to another. The second category does not include an employee who is a co-obligor or guarantor on a card issued to the employer for business purposes, nor does it include a person who is merely the authorized user of a card issued to another.

2. *Limited application of regulation.* For the limited purposes of the rules on issuance of credit cards and liability for unauthorized use, a cardholder includes *any* person, including an organization,

to whom a card is issued for *any* purpose—including a business, agricultural, or commercial purpose.

3. *Issuance. See* the commentary to § 226.12(a).

4. *Dual-purpose cards and dual-card systems.* Some card issuers offer dual-purpose cards that are for business as well as consumer purposes. If a card is issued to an individual for consumer purposes, the fact that an organization has guaranteed to pay the debt does not make it business credit. On the other hand, if a card is issued for business purposes, the fact that an individual sometimes uses it for consumer purchases does not subject the card issuer to the provisions on periodic statements, billing-error resolution, and other protections afforded to consumer credit. Some card issuers offer dual-card systems—that is, they issue two cards to the same individual, one intended for business use, the other for consumer or personal use. With such a system, the same person may be a cardholder for general purposes when using the card issued for consumer use, and a cardholder only for the limited purposes of the restrictions on issuance and liability when using the card issued for business purposes.

2(a)(9) Cash price.

1. *Components.* This amount is a starting point in computing the amount financed and the total sale price under § 226.18 for credit sales. Any charges imposed equally in cash and credit transactions may be included in the cash price, or they may be treated as other amounts financed under § 226.18(b)(2).

2. *Service contracts.* Service contracts include contracts for the repair or the servicing of goods, such as mechanical breakdown coverage, even if such a contract is characterized as insurance under State law.

3. *Rebates.* The creditor has complete flexibility in the way it treats rebates for purposes of disclosure and calculation. (*See* the commentary to § 226.18(b).)

2(a)(10) Closed-end credit.

1. *General.* The coverage of this term is defined by exclusion. That is, it includes any credit arrangement that does not fall within the definition of open-end credit. Subpart C contains the disclosure rules for closed-end credit when the obligation is subject to a finance charge or is payable by written agreement in more than four installments.

2(a)(11) Consumer.

1. *Scope.* Guarantors, endorsers, and sureties are not generally consumers for purposes of the regulation, but they may be entitled to rescind under certain circumstances and they may have certain rights if they are obligated on credit card plans.

2. *Rescission rules.* For purposes of rescission under §§ 226.15 and 226.23, a consumer includes any natural person whose ownership interest in his or her principal dwelling is subject to the risk of loss. Thus, if a security interest is taken in A's ownership interest in a house and that house is A's principal dwelling, A is a consumer for purposes of rescission, even if A is not liable, either primarily or secondarily, on the underlying consumer credit transaction. An ownership interest does not include, for example, leaseholds or inchoate rights, such as dower.

3. *Land trusts.* Credit extended to land trusts, as described in the commentary to § 226.3(a), is considered to be extended to a natural person for purposes of the definition of consumer.

2(a)(12) Consumer credit.

1. *Primary purpose.* There is no precise test for what constitutes credit offered or extended for personal, family, or household purposes, nor for what constitutes the primary purpose. (*See,* however, the discussion of business purposes in the commentary to § 226.3(a).)

2(a)(13) Consummation.

1. *State law governs.* When a contractual obligation on the consumer's part is created is a matter to be determined under applicable law; Regulation Z does not make this determination. A contractual commitment agreement, for example, that under applicable law binds the consumer to the credit terms would be consummation. Consummation, however, does not occur merely because the consumer has made some financial investment in the transaction (for example, by paying a nonrefundable fee) unless, of course, applicable law holds otherwise.

2. *Credit v. sale.* Consummation does not occur when the consumer becomes contractually committed to a sale transaction, unless the consumer also becomes legally obligated to accept a particular credit arrangement. For example, when a consumer pays a nonrefundable deposit to purchase an automobile, a purchase contract may be created, but consummation for purposes of the regulation does not occur unless the consumer also contracts for financing at that time.

2(a)(14) Credit.

1. *Exclusions.* The following situations are not considered credit for purposes of the regulation:

i. Layaway plans, unless the consumer is contractually obligated to continue making payments. Whether the consumer is so obligated is a matter to be determined under applicable law. The fact that the consumer is not entitled to a refund of any amounts paid towards the cash price of the merchandise does not bring layaways within the definition of credit.

ii. Tax liens, tax assessments, court judgments, and court approvals of reaffirmation of debts in bankruptcy. However, third-party financing of such obligations (for example, a bank loan obtained to pay off a tax lien) is credit for purposes of the regulation.

iii. Insurance premium plans that involve payment in installments with each installment representing the payment for insurance coverage for a certain future period of time, unless the consumer is contractually obligated to continue making payments.

iv. Home improvement transactions that involve progress payments, if the consumer pays, as the work progresses, only for work completed and has no contractual obligation to continue making payments.

v. Borrowing against the accrued cash value of an insurance policy or a pension account, if there is no independent obligation to repay.

vi. Letters of credit.

vii. The execution of option contracts. However, there may be an extension of credit when the option is exercised, if there is an agreement at that time to defer payment of a debt.

viii. Investment plans in which the party extending capital to the consumer risks the loss of the capital advanced. This includes, for example, an arrangement with a home purchaser in which the investor pays a portion of the downpayment and of the periodic mortgage payments in return for an ownership interest in the property, and shares in any gain or loss of property value.

ix. Mortgage assistance plans administered by a government agency in which a portion of the consumer's monthly payment amount is paid by the agency. No finance charge is imposed on the subsidy amount, and that amount is due in a lump-sum payment on a set date or upon the occurrence of certain events. (If payment is not made when due, a new note imposing a finance charge may be written, which may then be subject to the regulation.)

2. *Payday loans; deferred presentment.* Credit includes a transaction in which a cash advance is made to a consumer in exchange for the consumer's personal check, or in exchange for the consumer's authorization to debit the consumer's deposit account, and where the parties agree either that the check will not be cashed or deposited, or that the

consumer's deposit account will not be debited, until a designated future date. This type of transaction is often referred to as a ''payday loan'' or ''payday advance'' or ''deferred-presentment loan.'' A fee charged in connection with such a transaction may be a finance charge for purposes of § 226.4, regardless of how the fee is characterized under State law. Where the fee charged constitutes a finance charge under § 226.4 and the person advancing funds regularly extends consumer credit, that person is a creditor and is required to provide disclosures consistent with the requirements of Regulation Z. (*See* § 226.2(a)(17).)

2(a)(15) Credit card.

1. *Usable from time to time.* A credit card must be usable from time to time. Since this involves the possibility of repeated use of a single device, checks and similar instruments that can be used only once to obtain a single credit extension are not credit cards.

2. *Examples.* i. Examples of credit cards include:

A. A card that guarantees checks or similar instruments, if the asset account is also tied to an overdraft line or if the instrument directly accesses a line of credit.

B. A card that accesses both a credit and an asset account (that is, a debit-credit card).

C. An identification card that permits the consumer to defer payment on a purchase.

D. An identification card indicating loan approval that is presented to a merchant or to a lender, whether or not the consumer signs a separate promissory note for each credit extension.

E. A card or device that can be activated upon receipt to access credit, even if the card has a substantive use other than credit, such as a purchase-price discount card. Such a card or device is a credit card notwithstanding the fact that the recipient must first contact the card issuer to access or activate the credit feature.

ii. In contrast, credit card does not include, for example:

A. A check-guarantee or debit card with no credit feature or agreement, even if the creditor occasionally honors an inadvertent overdraft.

B. Any card, key, plate, or other device that is used in order to obtain petroleum products for business purposes from a wholesale distribution facility or to gain access to that facility, and that is required to be used without regard to payment terms.

3. *Charge card.* Generally, charge cards are cards used in connection with an account on which outstanding balances cannot be carried from one billing cycle to another and are payable when a periodic statement is received. Under the regulation, a reference to credit cards generally includes charge cards. The term *charge card* is, however, distinguished from *credit card* in §§ 226.5a, 226.7(b)(11), 226.7(b)(12), 226.9(e), 226.9(f) and 226.28(d), and appendices G–10 through G–13. When the term *credit card* is used in those provisions, it refers to credit cards other than charge cards.

2(a)(16) Credit sale.

1. *Special disclosure.* If the seller is a creditor in the transaction, the transaction is a credit sale and the special credit sale disclosures (that is, the disclosures under § 226.18(j)) must be given. This applies even if there is more than one creditor in the transaction and the creditor making the disclosures is not the seller. (*See* the commentary to § 226.17(d).)

2. *Sellers who arrange credit.* If the seller of the property or services involved arranged for financing but is not a creditor as to that sale, the transaction is not a credit sale. Thus, if a seller assists the consumer in obtaining a direct loan from a financial institution and the consumer's note is payable to the financial institution, the transaction is a loan and only the financial institution is a creditor.

3. *Refinancings.* Generally, when a credit sale is refinanced within the meaning of § 226.20(a), loan disclosures should be made. However, if a new sale of goods or services is also involved, the transaction is a credit sale.

4. *Incidental sales.* Some lenders *sell* a product or service—such as credit, property, or health insurance—as part of a loan transaction. Section 226.4 contains the rules on whether the cost of credit life, disability or property insurance is part of the finance charge. If the insurance is financed, it may be disclosed as a separate credit-sale transaction or disclosed as part of the primary transaction; if the latter approach is taken, either loan or credit-sale disclosures may be made. (*See* the commentary to § 226.17(c)(1) for further discussion of this point.)

5. *Credit extensions for educational purposes.* A credit extension for educational purposes in which an educational institution is the creditor may be treated as either a credit sale or a loan, regardless of whether the funds are given directly to the student, credited to the student's account, or disbursed to other persons on the student's behalf. The disclosure of the total sale price need not be given if the transaction is treated as a loan.

2(a)(17) Creditor.

1. *General.* The definition contains four independent tests. If any one of the tests is met, the person is a creditor for purposes of that particular test.

Paragraph 2(a)(17)(i).

1. *Prerequisites.* This test is composed of two requirements, both of which must be met in order for a particular credit extension to be subject to the regulation and for the credit extension to count towards satisfaction of the numerical tests mentioned in § 226.2(a)(17)(v).

i. *First,* there must be either or both of the following:

A. A written (rather than oral) agreement to pay in more than four installments. A letter that merely confirms an oral agreement does not constitute a written agreement for purposes of the definition.

B. A finance charge imposed for the credit. The obligation to pay the finance charge need not be in writing.

ii. *Second,* the obligation must be payable to the person in order for that person to be considered a creditor. If an obligation is made payable to *bearer,* the creditor is the one who initially accepts the obligation.

2. *Assignees.* If an obligation is initially payable to one person, that person is the creditor even if the obligation by its terms is simultaneously assigned to another person. For example:

i. An auto dealer and a bank have a business relationship in which the bank supplies the dealer with credit sale contracts that are initially made payable to the dealer and provide for the immediate assignment of the obligation to the bank. The dealer and purchaser execute the contract only after the bank approves the creditworthiness of the purchaser. Because the obligation is initially payable on its face to the dealer, the dealer is the only creditor in the transaction.

3. *Numerical tests.* The examples below illustrate how the numerical tests of § 226.2(a)(17)(v) are applied. The examples assume that consumer credit with a finance charge or written agreement for more than 4 installments was extended in the years in question and that the person did not extend such credit in 2006.

4. *Counting transactions.* For purposes of closed-end credit, the creditor counts each credit transaction. For open-end credit, *transactions* means accounts, so that outstanding accounts are counted instead of individual credit extensions. Normally the number of transactions is measured by the preceding calendar year; if the requisite number is met, then the person is a

creditor for all transactions in the current year. However, if the person did not meet the test in the preceding year, the number of transactions is measured by the current calendar year. For example, if the person extends consumer credit 26 times in 2007, it is a creditor for purposes of the regulation for the last extension of credit in 2007 and for all extensions of consumer credit in 2008. On the other hand, if a business begins in 2007 and extends consumer credit 20 times, it is not a creditor for purposes of the regulation in 2007. If it extends consumer credit 75 times in 2008, however, it becomes a creditor for purposes of the regulation (and must begin making disclosures) after the 25th extension of credit in that year and is a creditor for all extensions of consumer credit in 2009.

5. *Relationship between consumer credit in general and credit secured by a dwelling.* Extensions of credit secured by a dwelling are counted towards the 25-extensions test. For example, if in 2007 a person extends unsecured consumer credit 23 times and consumer credit secured by a dwelling twice, it becomes a creditor for the succeeding extensions of credit, whether or not they are secured by a dwelling. On the other hand, extensions of consumer credit not secured by a dwelling are *not* counted towards the number of credit extensions secured by a dwelling. For example, if in 2007 a person extends credit not secured by a dwelling 8 times and credit secured by a dwelling 3 times, it is not a creditor.

6. *Effect of satisfying one test.* Once one of the numerical tests is satisfied, the person is also a creditor for the other type of credit. For example, in 2007 a person extends consumer credit secured by a dwelling 5 times. That person is a creditor for all succeeding credit extensions, whether they involve credit secured by a dwelling or not.

7. *Trusts.* In the case of credit extended by trusts, each individual trust is considered a separate entity for purposes of applying the criteria. For example:

i. A bank is the trustee for three trusts. Trust A makes 15 extensions of consumer credit annually; Trust B makes 10 extensions of consumer credit annually; and Trust C makes 30 extensions of consumer credit annually. Only Trust C is a creditor for purposes of the regulation.

Paragraph 2(a)(17)(ii). [Reserved]

Paragraph 2(a)(17)(iii).

1. *Card issuers subject to Subpart B.* Section 226.2(a)(17)(iii) makes certain card issuers creditors for purposes of the open-end credit provisions of the regulation. This includes, for example, the issuers of so-called travel and entertainment cards that expect repayment at the first billing and do not impose a finance charge. Since all disclosures are to be made only as applicable, such card issuers would omit finance charge disclosures. Other provisions of the regulation regarding such areas as scope, definitions, determination of which charges are finance charges, Spanish language disclosures, record retention, and use of model forms, also apply to such card issuers.

Paragraph 2(a)(17)(iv).

1. *Card issuers subject to Subparts B and C.* Section 226.2(a)(17)(iv) includes as creditors card issuers extending closed-end credit in which there is a finance charge or an agreement to pay in more than four installments. These card issuers are subject to the appropriate provisions of Subparts B and C, as well as to the general provisions.

2(a)(18) Downpayment.

1. *Allocation.* If a consumer makes a lump-sum payment, partially to reduce the cash price and partially to pay prepaid finance charges, only the portion attributable to reducing the cash price is part of the downpayment. (*See* the commentary to § 226.2(a)(23).)

2. *Pick-up payments.* i. Creditors may treat the deferred portion of the downpayment, often referred to as *pick-up payments,* in a number of ways. If the pick-up payment is treated as part of the downpayment:

A. It is subtracted in arriving at the amount financed under § 226.18(b).

B. It may, but need not, be reflected in the payment schedule under § 226.18(g).

ii. If the pick-up payment does not meet the definition (for example, if it is payable after the second regularly scheduled payment) or if the creditor chooses not to treat it as part of the downpayment:

A. It must be included in the amount financed.

B. It must be shown in the payment schedule.

iii. Whichever way the pick-up payment is treated, the total of payments under § 226.18(h) must equal the sum of the payments disclosed under § 226.18(g).

3. *Effect of existing liens.*

i. *No cash payment.* In a credit sale, the ''downpayment'' may only be used to reduce the cash price. For example, when a trade-in is used as the downpayment and the existing lien on an automobile to be traded in exceeds the value of the automobile, creditors must disclose a zero on the downpayment line rather than a negative number. To illustrate, assume a consumer owes $10,000 on an existing automobile loan and that the trade-in value of the automobile is only $8,000, leaving a $2,000 deficit. The creditor should disclose a downpayment of $0, not –$2,000.

ii. *Cash payment.* If the consumer makes a cash payment, creditors may, at their option, disclose the entire cash payment as the downpayment, or apply the cash payment first to any excess lien amount and disclose any remaining cash as the downpayment. In the above example:

A. If the downpayment disclosed is equal to the cash payment, the $2,000 deficit must be reflected as an additional amount financed under § 226.18(b)(2).

B. If the consumer provides $1,500 in cash (which does not extinguish the $2,000 deficit), the creditor may disclose a downpayment of $1,500 or of $0.

C. If the consumer provides $3,000 in cash, the creditor may disclose a downpayment of $3,000 or of $1,000.

2(a)(19) Dwelling.

1. *Scope.* A dwelling need not be the consumer's *principal* residence to fit the definition, and thus a vacation or second home could be a dwelling. However, for purposes of the definition of residential mortgage transaction and the right to rescind, a dwelling must be the principal residence of the consumer. (*See* the commentary to §§ 226.2(a)(24), 226.15, and 226.23.)

2. *Use as a residence.* Mobile homes, boats, and trailers are dwellings if they are in fact used as residences, just as are condominium and cooperative units. Recreational vehicles, campers, and the like not used as residences are not dwellings.

3. *Relation to exemptions.* Any transaction involving a security interest in a consumer's principal dwelling (as well as in any real property) remains subject to the regulation despite the general exemption in § 226.3(b) for credit extensions over $25,000.

2(a)(20) Open-end credit.

1. *General.* This definition describes the characteristics of open-end credit (for which the applicable disclosure and other rules are contained in Subpart B), as distinct from closed-end credit. Open-end credit is consumer credit that is extended under a plan and meets *all 3* criteria set forth in the definition.

2. *Existence of a plan.* The definition requires that there be a plan, which connotes a contractual arrangement between the creditor and the consumer. Some creditors offer programs containing a number of different credit features. The consumer has a single

account with the institution that can be accessed repeatedly via a number of sub-accounts established for the different program features and rate structures. Some features of the program might be used repeatedly (for example, an overdraft line) while others might be used infrequently (such as the part of the credit line available for secured credit). If the program as a whole is subject to prescribed terms and otherwise meets the definition of open-end credit, such a program would be considered a single, multifeatured plan.

3. *Repeated transactions*. Under this criterion, the creditor must reasonably contemplate repeated transactions. This means that the credit plan must be usable from time to time and the creditor must legitimately expect that there will be repeat business rather than a one-time credit extension. The creditor must expect repeated dealings with consumers under the credit plan as a whole and need not believe a consumer will reuse a particular feature of the plan. The determination of whether a creditor can reasonably contemplate repeated transactions requires an objective analysis. Information that much of the creditor's customer base with accounts under the plan make repeated transactions over some period of time is relevant to the determination, particularly when the plan is opened primarily for the financing of infrequently purchased products or services. A standard based on reasonable belief by a creditor necessarily includes some margin for judgmental error. The fact that particular consumers do not return for further credit extensions does not prevent a plan from having been properly characterized as open-end. For example, if much of the customer base of a clothing store makes repeat purchases, the fact that some consumers use the plan only once would not affect the characterization of the store's plan as open-end credit. The criterion regarding repeated transactions is a question of fact to be decided in the context of the creditor's type of business and the creditor's relationship with its customers. For example, it would be more reasonable for a bank or depository institution to contemplate repeated transactions with a customer than for a seller of aluminum siding to make the same assumption about its customers.

4. *Finance charge on an outstanding balance*. The requirement that a finance charge may be computed and imposed from time to time on the outstanding balance means that there is no specific amount financed for the plan for which the finance charge, total of payments, and payment schedule can be calculated. A plan may meet the definition of open-end credit even though a finance charge is not normally imposed, provided the creditor has the right, under the plan, to impose a finance charge from time to time on the outstanding balance. For example, in some plans, a finance charge is not imposed if the consumer pays all or a specified portion of the outstanding balance within a given time period. Such a plan could meet the finance charge criterion, if the creditor has the right to impose a finance charge, even though the consumer actually pays no finance charges during the existence of the plan because the consumer takes advantage of the option to pay the balance (either in full or in installments) within the time necessary to avoid finance charges.

5. *Reusable line*. The total amount of credit that may be extended during the existence of an open-end plan is unlimited because available credit is generally replenished as earlier advances are repaid. A line of credit is self-replenishing even though the plan itself has a fixed expiration date, as long as during the plan's existence the consumer may use the line, repay, and reuse the credit. The creditor may occasionally or routinely verify credit information such as the consumer's continued income and employment status or information for security purposes but, to meet the definition of open-end credit, such verification of credit information may not be done as a condition of granting a consumer's request for a particular advance under the plan. In general, a credit line is self-replenishing if the consumer can take further advances as outstanding balances are repaid without being required to separately apply for those additional advances. A credit card account where the plan as a whole replenishes meets the self-replenishing criterion, notwithstanding the fact that a credit card issuer may verify credit information from time to time in connection with specific transactions. This criterion of unlimited credit distinguishes open-end credit from a series of advances made pursuant to a closed-end credit loan commitment. For example:

i. Under a closed-end commitment, the creditor might agree to lend a total of $10,000 in a series of advances as needed by the consumer. When a consumer has borrowed the full $10,000, no more is advanced under that particular agreement, even if there has been repayment of a portion of the debt. (*See* § 226.2(a)(17)(iv) for disclosure requirements when a credit card is used to obtain the advances.)

ii. This criterion does not mean that the creditor must establish a specific credit limit for the line of credit or that the line of credit must always be replenished to its original amount. The creditor may reduce a credit limit or refuse to extend new credit in a particular case due to changes in the creditor's financial condition or the consumer's creditworthiness. (The rules in § 226.5b(f), however, limit the ability of a creditor to suspend credit advances for home equity plans.) While consumers should have a reasonable expectation of obtaining credit as long as they remain current and within any preset credit limits, further extensions of credit need not be an absolute right in order for the plan to meet the self-replenishing criterion.

6. *Verifications of collateral value*. Creditors that otherwise meet the requirements of § 226.2(a)(20) extend open-end credit notwithstanding the fact that the creditor must verify collateral values to comply with Federal, State, or other applicable law or verifies the value of collateral in connection with a particular advance under the plan.

7. *Open-end real estate mortgages*. Some credit plans call for negotiated advances under so-called open-end real estate mortgages. Each such plan must be independently measured against the definition of open-end credit, regardless of the terminology used in the industry to describe the plan. The fact that a particular plan is called an open-end real estate mortgage, for example, does not, by itself, mean that it is open-end credit under the regulation.

2(a)(21) Periodic rate.

1. *Basis*. The periodic rate may be stated as a percentage (for example, 1½% per month) or as a decimal equivalent (for example, .015 monthly). It may be based on any portion of a year the creditor chooses. Some creditors use 1/360 of an annual rate as their periodic rate. These creditors:

i. May disclose a 1/360 rate as a *daily* periodic rate, without further explanation, if it is in fact only applied 360 days per year. But if the creditor applies that rate for 365 days, the creditor must note that fact and, of course, disclose the true annual percentage rate.

ii. Would have to apply the rate to the balance to disclose the annual percentage rate with the degree of accuracy required in the regulation (that is, within 1/8th of 1 percentage point of the rate based on the actual 365 days in the year).

2. *Transaction charges. Periodic rate* does not include initial one-time transaction charges, even if the charge is computed as a percentage of the transaction amount.

2(a)(22) Person.

1. *Joint ventures.* A joint venture is an organization and is therefore a person.

2. *Attorneys.* An attorney and his or her client are considered to be the same person for purposes of this regulation when the attorney is acting within the scope of the attorney-client relationship with regard to a particular transaction.

3. *Trusts.* A trust and its trustee are considered to be the same person for purposes of this regulation.

2(a)(23) Prepaid finance charge.

1. *General.* Prepaid finance charges must be taken into account under § 226.18(b) in computing the disclosed amount financed, and must be disclosed if the creditor provides an itemization of the amount financed under § 226.18(c).

2. *Examples.* i. Common examples of prepaid finance charges include:

A. Buyer's points.

B. Service fees.

C. Loan fees.

D. Finder's fees.

E. Loan-guarantee insurance.

F. Credit-investigation fees.

ii. However, in order for these or any other finance charges to be considered prepaid, they must be either paid separately in cash or check or withheld from the proceeds. Prepaid finance charges include any portion of the finance charge paid prior to or at closing or settlement.

3. *Exclusions. Add-on* and *discount* finance charges are not prepaid finance charges for purposes of this regulation. Finance charges are not *prepaid* merely because they are precomputed, whether or not a portion of the charge will be rebated to the consumer upon prepayment. (*See* the commentary to § 226.18(b).)

4. *Allocation of lump-sum payments.* In a credit sale transaction involving a lump-sum payment by the consumer and a discount or other item that is a finance charge under § 226.4, the discount or other item is a prepaid finance charge to the extent the lump-sum payment is not applied to the cash price. For example, a seller sells property to a consumer for $10,000, requires the consumer to pay $3,000 at the time of the purchase, and finances the remainder as a closed-end credit transaction. The cash price of the property is $9,000. The seller is the creditor in the transaction and therefore the $1,000 difference between the credit and cash prices (the discount) is a finance charge. (*See* the commentary to § 226.4(b)(9) and (c)(5).) If the creditor applies the entire $3,000 to the cash price and adds the $1,000 finance charge to the interest on the $6,000 to arrive at the total finance charge, all of the $3,000 lump-sum payment is a downpayment and the discount is not a prepaid finance charge. However, if the creditor only applies $2,000 of the lump-sum payment to the cash price, then $2,000 of the $3,000 is a downpayment and the $1,000 discount is a prepaid finance charge.

2(a)(24) Residential mortgage transaction.

1. *Relation to other sections.* This term is important in five provisions in the regulation:

i. Section 226.4(c)(7)—exclusions from the finance charge.

ii. Section 226.15(f)—exemption from the right of rescission.

iii. Section 226.18(q)—whether or not the obligation is assumable.

iv. Section 226.20(b)—disclosure requirements for assumptions.

v. Section 226.23(f)—exemption from the right of rescission.

2. *Lien status.* The definition is not limited to first lien transactions. For example, a consumer might assume a paid-down first mortgage (or borrow part of the purchase price) and borrow the balance of the purchase price from a creditor who takes a second mortgage. The second mortgage transaction is a *residential mortgage transaction* if the dwelling purchased is the consumer's principal residence.

3. *Principal dwelling.* A consumer can have only *one* principal dwelling at a time. Thus, a vacation or other second home would not be a principal dwelling. However, if a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within a year or upon the completion of construction, the new dwelling is considered the principal dwelling for purposes of applying this definition to a particular transaction. (*See* the commentary to §§ 226.15(a) and 226.23(a).)

4. *Construction financing.* If a transaction meets the definition of a residential mortgage transaction and the creditor chooses to disclose it as several transactions under § 226.17(c)(6), each one is considered to be a residential mortgage transaction, even if different creditors are involved. For example:

i. The creditor makes a construction loan to finance the initial construction of the consumer's principal dwelling, and the loan will be disbursed in five advances. The creditor gives six sets of disclosures (five for the construction phase and one for the permanent phase). Each one is a residential mortgage transaction.

ii. One creditor finances the initial construction of the consumer's principal dwelling and another creditor makes a loan to satisfy the construction loan and provide permanent financing. Both transactions are residential mortgage transactions.

5. *Acquisition.* i. A residential mortgage transaction finances the acquisition of a consumer's principal dwelling. The term does not include a transaction involving a consumer's principal dwelling if the consumer had previously purchased and acquired some interest to the dwelling, even though the consumer had not acquired full legal title.

ii. Examples of new transactions involving a previously acquired dwelling include the financing of a balloon payment due under a land sale contract and an extension of credit made to a joint owner of property to buy out the other joint owner's interest. In these instances, disclosures are not required under § 226.18(q) (assumability policies). However, the rescission rules of §§ 226.15 and 226.23 do apply to these new transactions.

iii. In other cases, the disclosure and rescission rules do not apply. For example, where a buyer enters into a written agreement with the creditor holding the seller's mortgage, allowing the buyer to assume the mortgage, if the buyer had previously purchased the property and agreed with the seller to make the mortgage payments, § 226.20(b) does not apply (assumptions involving residential mortgages).

6. *Multiple purpose transactions.* A transaction meets the definition of this section if any part of the loan proceeds will be used to finance the acquisition or initial construction of the consumer's principal dwelling. For example, a transaction to finance the initial construction of the consumer's principal dwelling is a residential mortgage transaction even if a portion of the funds will be disbursed directly to the consumer or used to satisfy a loan for the purchase of the land on which the dwelling will be built.

7. *Construction on previously acquired vacant land.* A residential mortgage transaction includes a loan to finance the construction of a consumer's principal dwelling on a vacant lot previously acquired by the consumer.

2(a)(25) Security interest.

1. *Threshold test.* The threshold test is whether a particular interest in property is recognized as a security interest under applicable law. The regulation does not determine whether a particular interest is a security interest under applicable law. If the creditor is unsure whether a particular interest is a

security interest under applicable law (for example, if statutes and case law are either silent or inconclusive on the issue), the creditor may at its option consider such interests as security interests for Truth in Lending purposes. However, the regulation and the commentary do exclude specific interests, such as after-acquired property and accessories, from the scope of the definition regardless of their categorization under applicable law, and these named exclusions may not be disclosed as security interests under the regulation. (But *see* the discussion of exclusions elsewhere in the commentary to § 226.2(a)(25).)

2. *Exclusions.* The general definition of security interest excludes three groups of interests: incidental interests, interests in after-acquired property, and interests that arise solely by operation of law. These interests may not be disclosed with the disclosures required under § 226.18, but the creditor is not precluded from preserving these rights elsewhere in the contract documents, or invoking and enforcing such rights, if it is otherwise lawful to do so. If the creditor is unsure whether a particular interest is one of the excluded interests, the creditor may, at its option, consider such interests as security interests for Truth in Lending purposes.

3. *Incidental interests.* i. Incidental interests in property that are not security interests include, among other things:

A. Assignment of rents.

B. Right to condemnation proceeds.

C. Interests in accessories and replacements.

D. Interests in escrow accounts, such as for taxes and insurance.

E. Waiver of homestead or personal property rights.

ii. The notion of an *incidental interest* does not encompass an explicit security interest in an insurance policy if that policy is the primary collateral for the transaction—for example, in an insurance premium financing transaction.

4. *Operation of law.* Interests that arise solely by operation of law are excluded from the general definition. Also excluded are interests arising by operation of law that are merely repeated or referred to in the contract. However, if the creditor has an interest that arises by operation of law, such as a vendor's lien, and takes an independent security interest in the same property, such as a UCC security interest, the latter interest is a disclosable security interest unless otherwise provided.

5. *Rescission rules.* Security interests that arise solely by operation of law are security interests for purposes of rescission. Examples of such interests are mechanics' and materialmen's liens.

6. *Specificity of disclosure.* A creditor need not separately disclose multiple security interests that it may hold in the same collateral. The creditor need only disclose that the transaction is secured by the collateral, even when security interests from prior transactions remain of record and a new security interest is taken in connection with the transaction. In disclosing the fact that the transaction is secured by the collateral, the creditor also need not disclose how the security interest arose. For example, in a closed-end credit transaction, a rescission notice need not specifically state that a new security interest is ''acquired'' or an existing security interest is ''retained'' in the transaction. The acquisition or retention of a security interest in the consumer's principal dwelling instead may be disclosed in a rescission notice with a general statement such as the following: ''Your home is the security for the new transaction.''

2(b) Rules of construction.

1. *Footnotes.* Footnotes are used extensively in the regulation to provide special exceptions and more detailed explanations and examples. Material that appears in a footnote has the same legal weight as material in the body of the regulation.

2. *Amount.* The numerical amount must be a dollar amount unless otherwise indicated. For example, in a closed-end transaction (Subpart C), the amount financed and the amount of any payment must be expressed as a dollar amount. In some cases, an amount should be expressed as a percentage. For example, in disclosures provided before the first transaction under an open-end plan (Subpart B), creditors are permitted to explain how the amount of any finance charge will be determined; where a cash-advance fee (which is a finance charge) is a percentage of each cash advance, the amount of the finance charge for that fee is expressed as a percentage.

§ 226.3 Exempt Transactions.

1. *Relationship to § 226.12.* The provisions in § 226.12(a) and (b) governing the issuance of credit cards and the limitations on liability for their unauthorized use apply to all credit cards, even if the credit cards are issued for use in connection with extensions of credit that otherwise are exempt under this section.

3(a) Business, commercial, agricultural, or organizational credit.

1. *Primary purposes.* A creditor must determine in each case if the transaction is primarily for an exempt purpose. If some question exists as to the primary purpose for a credit extension, the creditor is, of course, free to make the disclosures, and the fact that disclosures are made under such circumstances is not controlling on the question of whether the transaction was exempt. (*See* comment 3(a)–2, however, with respect to credit cards.)

2. *Business purpose purchases.*

i. *Business-purpose credit cards—extensions of credit for consumer purposes.* If a business-purpose credit card is issued to a person, the provisions of the regulation do not apply, other than as provided in §§ 226.12(a) and 226.12(b), even if extensions of credit for consumer purposes are occasionally made using that business-purpose credit card. For example, the billing error provisions set forth in § 226.13 do not apply to consumer-purpose extensions of credit using a business-purpose credit card.

ii. *Consumer-purpose credit cards—extensions of credit for business purposes.* If a consumer-purpose credit card is issued to a person, the provisions of the regulation apply, even to occasional extensions of credit for business purposes made using that consumer-purpose credit card. For example, a consumer may assert a billing error with respect to any extension of credit using a consumer-purpose credit card, even if the specific extension of credit on such credit card or open-end credit plan that is the subject of the dispute was made for business purposes.

3. *Factors.* In determining whether credit to finance an acquisition—such as securities, antiques, or art—is primarily for business or commercial purposes (as opposed to a consumer purpose), the following factors should be considered:

i. *General.*

A. The relationship of the borrower's primary occupation to the acquisition. The more closely related, the more likely it is to be business purpose.

B. The degree to which the borrower will personally manage the acquisition. The more personal involvement there is, the more likely it is to be business purpose.

C. The ratio of income from the acquisition to the total income of the borrower. The higher the ratio, the more likely it is to be business purpose.

D. The size of the transaction. The larger the transaction, the more likely it is to be business purpose.

E. The borrower's statement of purpose for the loan.

ii. *Business-purpose examples.* Examples of business-purpose credit include:

A. A loan to expand a business, even if it is secured by the borrower's residence or personal property.

B. A loan to improve a principal residence by putting in a business office.

C. A business account used occasionally for consumer purposes.

iii. *Consumer-purpose examples.* Examples of consumer-purpose credit include:

A. Credit extensions by a company to its employees or agents if the loans are used for personal purposes.

B. A loan secured by a mechanic's tools to pay a child's tuition.

C. A personal account used occasionally for business purposes.

4. *Non-owner-occupied rental property.* Credit extended to acquire, improve, or maintain rental property (regardless of the number of housing units) that is not owner-occupied is deemed to be for business purposes. This includes, for example, the acquisition of a warehouse that will be leased or a single-family house that will be rented to another person to live in. If the owner expects to occupy the property for more than 14 days during the coming year, the property cannot be considered non-owner-occupied and this special rule will not apply. For example, a beach house that the owner will occupy for a month in the coming summer and rent out the rest of the year is owner occupied and is not governed by this special rule. (*See* comment 3(a)–5, however, for rules relating to owner-occupied rental property.)

5. *Owner-occupied rental property.* If credit is extended to acquire, improve, or maintain rental property that is or will be owner-occupied within the coming year, different rules apply:

i. Credit extended to acquire the rental property is deemed to be for business purposes if it contains more than 2 housing units.

ii. Credit extended to improve or maintain the rental property is deemed to be for business purposes if it contains more than 4 housing units. Since the amended statute defines dwelling to include 1 to 4 housing units, this rule preserves the right of rescission for credit extended for purposes other than acquisition. Neither of these rules means that an extension of credit for property containing fewer than the requisite number of units is necessarily consumer credit. In such cases, the determination of whether it is business or consumer credit should be made by considering the factors listed in comment 3(a)–3.

6. *Business credit later refinanced.* Business-purpose credit that is exempt from the regulation may later be rewritten for consumer purposes. Such a transaction is consumer credit requiring disclosures only if the existing obligation is satisfied and replaced by a new obligation made for consumer purposes undertaken by the same obligor.

7. *Credit card renewal.* A consumer-purpose credit card that is subject to the regulation may be converted into a business-purpose credit card at the time of its renewal, and the resulting business-purpose credit card would be exempt from the regulation. Conversely, a business-purpose credit card that is exempt from the regulation may be converted into a consumer-purpose credit card at the time of its renewal, and the resulting consumer-purpose credit card would be subject to the regulation.

8. *Agricultural purpose.* An agricultural purpose includes the planting, propagating, nurturing, harvesting, catching, storing, exhibiting, marketing, transporting, processing, or manufacturing of food, beverages (including alcoholic beverages), flowers, trees, livestock, poultry, bees, wildlife, fish, or shellfish by a natural person engaged in farming, fishing, or growing crops, flowers, trees, livestock, poultry, bees, or wildlife. The exemption also applies to a transaction involving real property that includes a dwelling (for example, the purchase of a farm with a homestead) if the transaction is primarily for agricultural purposes.

9. *Organizational credit.* The exemption for transactions in which the borrower is not a natural person applies, for example, to loans to corporations, partnerships, associations, churches, unions, and fraternal organizations. The exemption applies regardless of the purpose of the credit extension and regardless of the fact that a natural person may guarantee or provide security for the credit.

10. *Land trusts.* Credit extended for consumer purposes to a land trust is considered to be credit extended to a natural person rather than credit extended to an organization. In some jurisdictions, a financial institution financing a residential real estate transaction for an individual uses a land trust mechanism. Title to the property is conveyed to the land trust for which the financial institution itself is trustee. The underlying installment note is executed by the financial institution in its capacity as trustee and payment is secured by a trust deed, reflecting title in the financial institution as trustee. In some instances, the consumer executes a personal guaranty of the indebtedness. The note provides that it is payable only out of the property specifically described in the trust deed and that the trustee has no personal liability on the note. Assuming the transactions are for personal, family, or household purposes, these transactions are subject to the regulation since in substance (if not form) consumer credit is being extended.

3(b) Credit over $25,000 not secured by real property or a dwelling.

1. *Coverage.* Since a mobile home can be a dwelling under § 226.2(a)(19), this exemption does not apply to a credit extension secured by a mobile home used or expected to be used as the principal dwelling of the consumer, even if the credit exceeds $25,000. A loan commitment for closed-end credit in excess of $25,000 is exempt even though the amounts actually drawn never actually reach $25,000.

2. *Open-end credit.* i. An open-end credit plan is exempt under § 226.3(b) (unless secured by real property or personal property used or expected to be used as the consumer's principal dwelling) if either of the following conditions is met:

A. The creditor makes a firm commitment to lend over $25,000 with no requirement of additional credit information for any advances (except as permitted from time to time pursuant to § 226.2(a)(20)).

B. The initial extension of credit on the line exceeds $25,000.

ii. If a security interest is taken at a later time in any real property, or in personal property used or expected to be used as the consumer's principal dwelling, the plan would no longer be exempt. The creditor must comply with all of the requirements of the regulation including, for example, providing the consumer with an initial disclosure statement. If the security interest being added is in the consumer's principal dwelling, the creditor must also give the consumer the right to rescind the security interest. (*See* the commentary to § 226.15 concerning the right of rescission.)

3. *Closed-end credit—subsequent changes.* A closed-end loan for over $25,000 may later be rewritten for $25,000 or less, or a security interest in real property or in personal property used or expected to be used as the consumer's principal dwelling may be added to an extension of credit for over $25,000. Such a transaction is consumer credit requiring disclosures only if the existing obligation is satisfied and replaced by a new obligation made for consumer purposes undertaken by the same obligor. (*See* the commentary to § 226.23(a)(1) regarding the right of rescission when a security interest in a

consumer's principal dwelling is added to a previously exempt transaction.)

3(c) Public utility credit.

1. *Examples.* Examples of public utility services include:

i. *General.*

A. Gas, water, or electrical services.

B. Cable television services.

C. Installation of new sewer lines, water lines, conduits, telephone poles, or metering equipment in an area not already serviced by the utility.

ii. *Extensions of credit not covered.* The exemption does not apply to extensions of credit, for example:

A. To purchase appliances such as gas or electric ranges, grills, or telephones.

B. To finance home improvements such as new heating or air conditioning systems.

3(d) Securities or commodities accounts.

1. *Coverage.* This exemption does not apply to a transaction with a broker registered solely with the State, or to a separate credit extension in which the proceeds are used to purchase securities.

3(e) Home fuel budget plans.

1. *Definition.* Under a typical home fuel budget plan, the fuel dealer estimates the total cost of fuel for the season, bills the customer for an average monthly payment, and makes an adjustment in the final payment for any difference between the estimated and the actual cost of the fuel. Fuel is delivered as needed, no finance charge is assessed, and the customer may withdraw from the plan at any time. Under these circumstances, the arrangement is exempt from the regulation, even if a charge to cover the billing costs is imposed.

3(f) Student loan programs.

1. *Coverage.* This exemption applies to loans made, insured, or guaranteed under title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 *et seq.*). This exemption does not apply to private education loans as defined by § 226.46(b)(5).

§ 226.4 Finance Charge.

4(a) Definition.

1. *Charges in comparable cash transactions.* Charges imposed uniformly in cash and credit transactions are not finance charges. In determining whether an item is a finance charge, the creditor should compare the credit transaction in question with a similar cash transaction. A creditor financing the sale of property or services may compare charges with those payable in a similar cash transaction by the seller of the property or service.

i. For example, the following items are not finance charges:

A. Taxes, license fees, or registration fees paid by both cash and credit customers.

B. Discounts that are available to cash and credit customers, such as quantity discounts.

C. Discounts available to a particular group of consumers because they meet certain criteria, such as being members of an organization or having accounts at a particular financial institution. This is the case even if an individual must pay cash to obtain the discount, provided that credit customers who are members of the group and do not qualify for the discount pay no more than the nonmember cash customers.

D. Charges for a service policy, auto club membership, or policy of insurance against latent defects offered to or required of both cash and credit customers for the same price.

ii. In contrast, the following items are finance charges:

A. Inspection and handling fees for the staged disbursement of construction-loan proceeds.

B. Fees for preparing a Truth in Lending disclosure statement, if permitted by law (for example, the Real Estate Settlement Procedures Act prohibits such charges in certain transactions secured by real property).

C. Charges for a required maintenance or service contract imposed only in a credit transaction.

iii. If the charge in a credit transaction exceeds the charge imposed in a comparable cash transaction, only the difference is a finance charge. For example:

A. If an escrow agent is used in both cash and credit sales of real estate and the agent's charge is $100 in a cash transaction and $150 in a credit transaction, only $50 is a finance charge.

2. *Costs of doing business.* Charges absorbed by the creditor as a cost of doing business are not finance charges, even though the creditor may take such costs into consideration in determining the interest rate to be charged or the cash price of the property or service sold. However, if the creditor separately imposes a charge on the consumer to cover certain costs, the charge is a finance charge if it otherwise meets the definition. For example:

i. A discount imposed on a credit obligation when it is assigned by a seller-creditor to another party is not a finance charge as long as the discount is not separately imposed on the consumer. (*See* § 226.4(b)(6).)

ii. A tax imposed by a State or other governmental body on a creditor is not a finance charge if the creditor absorbs the tax as a cost of doing business and does not separately impose the tax on the consumer. (For additional discussion of the treatment of taxes, *see* other commentary to § 226.4(a).)

3. *Forfeitures of interest.* If the creditor reduces the interest rate it pays or stops paying interest on the consumer's deposit account or any portion of it for the term of a credit transaction (including, for example, an overdraft on a checking account or a loan secured by a certificate of deposit), the interest lost is a finance charge. (*See* the commentary to § 226.4(c)(6).) For example:

A. A consumer borrows $5,000 for 90 days and secures it with a $10,000 certificate of deposit paying 15% interest. The creditor charges the consumer an interest rate of 6% on the loan and stops paying interest on $5,000 of the $10,000 certificate for the term of the loan. The interest lost is a finance charge and must be reflected in the annual percentage rate on the loan.

B. However, the consumer must be entitled to the interest that is not paid in order for the lost interest to be a finance charge. For example:

iii. A consumer wishes to buy from a financial institution a $10,000 certificate of deposit paying 15% interest but has only $4,000. The financial institution offers to lend the consumer $6,000 at an interest rate of 6% but will pay the 15% interest only on the amount of the consumer's deposit, $4,000. The creditor's failure to pay interest on the $6,000 does not result in an additional finance charge on the extension of credit, provided the consumer is entitled by the deposit agreement with the financial institution to interest only on the amount of the consumer's deposit.

iv. A consumer enters into a combined time deposit/credit agreement with a financial institution that establishes a time deposit account and an open-end line of credit. The line of credit may be used to borrow against the funds in the time deposit. The agreement provides for an interest rate on any credit extension of, for example, 1%. In addition, the agreement states that the creditor will pay 0% interest on the amount of the time deposit that corresponds to the amount of the credit extension(s). The interest that is not paid on the time deposit by the financial institution is not a finance charge (and therefore does not affect the annual percentage rate computation).

4. *Treatment of transaction fees on credit card plans.* Any transaction charge imposed on a cardholder by a card issuer is a finance charge, regardless of whether the issuer imposes the same, greater, or lesser charge on

withdrawals of funds from an asset account such as a checking or savings account. For example:

i. Any charge imposed on a credit cardholder by a card issuer for the use of an automated teller machine (ATM) to obtain a cash advance (whether in a proprietary, shared, interchange, or other system) is a finance charge regardless of whether the card issuer imposes a charge on its debit cardholders for using the ATM to withdraw cash from a consumer asset account, such as a checking or savings account.

ii. Any charge imposed on a credit cardholder for making a purchase or obtaining a cash advance outside the United States, with a foreign merchant, or in a foreign currency is a finance charge, regardless of whether a charge is imposed on debit cardholders for such transactions. The following principles apply in determining what is a foreign transaction fee and the amount of the fee:

A. Included are (1) fees imposed when transactions are made in a foreign currency and converted to U.S. dollars; (2) fees imposed when transactions are made in U.S. dollars outside the U.S.; and (3) fees imposed when transactions are made (whether in a foreign currency or in U.S. dollars) with a foreign merchant, such as via a merchant's Web site. For example, a consumer may use a credit card to make a purchase in Bermuda, in U.S. dollars, and the card issuer may impose a fee because the transaction took place outside the United States.

B. Included are fees imposed by the card issuer and fees imposed by a third party that performs the conversion, such as a credit card network or the card issuer's corporate parent. (For example, in a transaction processed through a credit card network, the network may impose a 1 percent charge and the card-issuing bank may impose an additional 2 percent charge, for a total of a 3 percentage point foreign transaction fee being imposed on the consumer.)

C. Fees imposed by a third party are included only if they are directly passed on to the consumer. For example, if a credit card network imposes a 1 percent fee on the card issuer, but the card issuer absorbs the fee as a cost of doing business (and only passes it on to consumers in the general sense that the interest and fees are imposed on all its customers to recover its costs), then the fee is not a foreign transaction fee and need not be disclosed. In another example, if the credit card network imposes a 1 percent fee for a foreign transaction on the card issuer, and the card issuer imposes this same fee on the consumer who engaged in the foreign transaction, then the fee is a foreign transaction fee and a finance charge.

D. A card issuer is not required to disclose a fee imposed by a merchant. For example, if the merchant itself performs the currency conversion and adds a fee, this fee need not be disclosed by the card issuer. Under § 226.9(d), a card issuer is not obligated to disclose finance charges imposed by a party honoring a credit card, such as a merchant, although the merchant is required to disclose such a finance charge if the merchant is subject to the Truth in Lending Act and Regulation Z.

E. The foreign transaction fee is determined by first calculating the dollar amount of the transaction by using a currency conversion rate outside the card issuer's and third party's control. Any amount in excess of that dollar amount is a foreign transaction fee. Conversion rates outside the card issuer's and third party's control include, for example, a rate selected from the range of rates available in the wholesale currency exchange markets, an average of the highest and lowest rates available in such markets, or a government-mandated or government-managed exchange rate (or a rate selected from a range of such rates).

F. The rate used for a particular transaction need not be the same rate that the card issuer (or third party) itself obtains in its currency conversion operations. In addition, the rate used for a particular transaction need not be the rate in effect on the date of the transaction (purchase or cash advance).

5. *Taxes.*

i. Generally, a tax imposed by a State or other governmental body solely on a creditor is a finance charge if the creditor separately imposes the charge on the consumer.

ii. In contrast, a tax is not a finance charge (even if it is collected by the creditor) if applicable law imposes the tax:

A. Solely on the consumer;

B. On the creditor and the consumer jointly;

C. On the credit transaction, without indicating which party is liable for the tax; or

D. On the creditor, if applicable law directs or authorizes the creditor to pass the tax on to the consumer. (For purposes of this section, if applicable law is silent as to passing on the tax, the law is deemed not to authorize passing it on.)

iii. For example, a stamp tax, property tax, intangible tax, or any other State or local tax imposed on the consumer, or on the credit transaction, is not a finance charge even if the tax is collected by the creditor.

iv. In addition, a tax is not a finance charge if it is excluded from the finance charge by another provision of the regulation or commentary (for example, if the tax is imposed uniformly in cash and credit transactions).

4(a)(1) Charges by third parties.

1. *Choosing the provider of a required service.* An example of a third-party charge included in the finance charge is the cost of required mortgage insurance, even if the consumer is allowed to choose the insurer.

2. *Annuities associated with reverse mortgages.* Some creditors offer annuities in connection with a reverse-mortgage transaction. The amount of the premium is a finance charge if the creditor requires the purchase of the annuity incident to the credit. Examples include the following:

i. The credit documents reflect the purchase of an annuity from a specific provider or providers.

ii. The creditor assesses an additional charge on consumers who do not purchase an annuity from a specific provider.

iii. The annuity is intended to replace in whole or in part the creditor's payments to the consumer either immediately or at some future date.

4(a)(2) Special rule; closing agent charges.

1. *General.* This rule applies to charges by a third party serving as the closing agent for the particular loan. An example of a closing agent charge included in the finance charge is a courier fee where the creditor requires the use of a courier.

2. *Required closing agent.* If the creditor requires the use of a closing agent, fees charged by the closing agent are included in the finance charge only if the creditor requires the particular service, requires the imposition of the charge, or retains a portion of the charge. Fees charged by a third-party closing agent may be otherwise excluded from the finance charge under § 226.4. For example, a fee that would be paid in a comparable cash transaction may be excluded under § 226.4(a). A charge for conducting or attending a closing is a finance charge and may be excluded only if the charge is included in and is incidental to a lump-sum fee excluded under § 226.4(c)(7).

4(a)(3) Special rule; mortgage broker fees.

1. *General.* A fee charged by a mortgage broker is excluded from the finance charge if it is the type of fee that is also excluded when charged by the creditor. For example, to exclude an

application fee from the finance charge under § 226.4(c)(1), a mortgage broker must charge the fee to all applicants for credit, whether or not credit is extended.

2. *Coverage.* This rule applies to charges paid by consumers to a mortgage broker in connection with a consumer credit transaction secured by real property or a dwelling.

3. *Compensation by lender.* The rule requires all mortgage broker fees to be included in the finance charge. Creditors sometimes compensate mortgage brokers under a separate arrangement with those parties. Creditors may draw on amounts paid by the consumer, such as points or closing costs, to fund their payment to the broker. Compensation paid by a creditor to a mortgage broker under an agreement is not included as a separate component of a consumer's total finance charge (although this compensation may be reflected in the finance charge if it comes from amounts paid by the consumer to the creditor that are finance charges, such as points and interest).

4(b) Examples of finance charges.

1. *Relationship to other provisions.* Charges or fees shown as examples of finance charges in § 226.4(b) may be excludable under § 226.4(c), (d), or (e). For example:

i. Premiums for credit life insurance, shown as an example of a finance charge under § 226.4(b)(7), may be excluded if the requirements of § 226.4(d)(1) are met.

ii Appraisal fees mentioned in § 226.4(b)(4) are excluded for real property or residential mortgage transactions under § 226.4(c)(7).

Paragraph 4(b)(2).

1. *Checking account charges.* A checking or transaction account charge imposed in connection with a credit feature is a finance charge under § 226.4(b)(2) to the extent the charge exceeds the charge for a similar account without a credit feature. If a charge for an account with a credit feature does not exceed the charge for an account without a credit feature, the charge is not a finance charge under § 226.4(b)(2). To illustrate:

i. A $5 service charge is imposed on an account with an overdraft line of credit (where the institution has agreed in writing to pay an overdraft), while a $3 service charge is imposed on an account without a credit feature; the $2 difference is a finance charge. (If the difference is not related to account activity, however, it may be excludable as a participation fee. *See* the commentary to § 226.4(c)(4).)

ii. A $5 service charge is imposed for each item that results in an overdraft on an account with an overdraft line of credit, while a $25 service charge is imposed for paying or returning each item on a similar account without a credit feature; the $5 charge is not a finance charge.

Paragraph 4(b)(3).

1. *Assumption fees.* The assumption fees mentioned in § 226.4(b)(3) are finance charges only when the assumption occurs and the fee is imposed on the new buyer. The assumption fee is a finance charge in the new buyer's transaction.

Paragraph 4(b)(5).

1. *Credit loss insurance.* Common examples of the insurance against credit loss mentioned in § 226.4(b)(5) are mortgage guaranty insurance, holder in due course insurance, and repossession insurance. Such premiums must be included in the finance charge only for the period that the creditor requires the insurance to be maintained.

2. *Residual value insurance.* Where a creditor requires a consumer to maintain residual value insurance or where the creditor is a beneficiary of a residual value insurance policy written in connection with an extension of credit (as is the case in some forms of automobile balloon-payment financing, for example), the premiums for the insurance must be included in the finance charge for the period that the insurance is to be maintained. If a creditor pays for residual value insurance and absorbs the payment as a cost of doing business, such costs are not considered finance charges. (*See* comment 4(a)–2.)

Paragraphs 4(b)(7) and (b)(8).

1. *Pre-existing insurance policy.* The insurance discussed in § 226.4(b)(7) and (b)(8) does not include an insurance policy (such as a life or an automobile collision insurance policy) that is already owned by the consumer, even if the policy is assigned to or otherwise made payable to the creditor to satisfy an insurance requirement. Such a policy is not ''written in connection with'' the transaction, as long as the insurance was not purchased for use in that credit extension, since it was previously owned by the consumer.

2. *Insurance written in connection with a transaction.* Credit insurance sold before or after an open-end (not home-secured) plan is opened is considered ''written in connection with a credit transaction.'' Insurance sold after consummation in closed-end credit transactions or after the opening of a home-equity plan subject to the requirements of § 226.5b is not considered ''written in connection with'' the credit transaction if the insurance is written because of the consumer's default (for example, by failing to obtain or maintain required property insurance) or because the consumer requests insurance after consummation or the opening of a home-equity plan subject to the requirements of § 226.5b (although credit-sale disclosures may be required for the insurance sold after consummation if it is financed).

3. *Substitution of life insurance.* The premium for a life insurance policy purchased and assigned to satisfy a credit life insurance requirement must be included in the finance charge, but only to the extent of the cost of the credit life insurance if purchased from the creditor or the actual cost of the policy (if that is less than the cost of the insurance available from the creditor). If the creditor does not offer the required insurance, the premium to be included in the finance charge is the cost of a policy of insurance of the type, amount, and term required by the creditor.

4. *Other insurance.* Fees for required insurance not of the types described in § 226.4(b)(7) and (b)(8) are finance charges and are not excludable. For example:

i. The premium for a hospitalization insurance policy, if it is required to be purchased only in a credit transaction, is a finance charge.

Paragraph 4(b)(9).

1. *Discounts for payment by other than credit.* The discounts to induce payment by other than credit mentioned in § 226.4(b)(9) include, for example, the following situation:

i. The seller of land offers individual tracts for $10,000 each. If the purchaser pays cash, the price is $9,000, but if the purchaser finances the tract with the seller the price is $10,000. The $1,000 difference is a finance charge for those who buy the tracts on credit.

2. *Exception for cash discounts.*

i. Creditors may exclude from the finance charge discounts offered to consumers for using cash or another means of payment instead of using a credit card or an open-end plan. The discount may be in whatever amount the seller desires, either as a percentage of the regular price (as defined in section 103(z) of the act, as amended) or a dollar amount. Pursuant to section 167(b) of the act, this provision applies only to transactions involving an open-end credit plan or a credit card (whether open-end or closed-end credit is extended on the card). The merchant must offer the discount to prospective buyers whether or not they are cardholders or members of the open-end credit plan. The merchant may, however, make other distinctions. For example:

A. The merchant may limit the discount to payment by cash and not offer it for payment by check or by use of a debit card.

B. The merchant may establish a discount plan that allows a 15% discount for payment by cash, a 10% discount for payment by check, and a 5% discount for payment by a particular credit card. None of these discounts is a finance charge.

ii. Pursuant to section 171(c) of the act, discounts excluded from the finance charge under this paragraph are also excluded from treatment as a finance charge or other charge for credit under any State usury or disclosure laws.

3. *Determination of the regular price.*

i. The *regular price* is critical in determining whether the difference between the price charged to cash customers and credit customers is a *discount* or a *surcharge,* as these terms are defined in amended section 103 of the act. The *regular price* is defined in section 103 of the act as—

* * * the tag or posted price charged for the property or service if a single price is tagged or posted, or the price charged for the property or service when payment is made by use of an open-end credit account or a credit card if either (1) no price is tagged or posted, or (2) two prices are tagged or posted. * * *

ii. For example, in the sale of motor vehicle fuel, the tagged or posted price is the price displayed at the pump. As a result, the higher price (the open-end credit or credit card price) must be displayed at the pump, either alone or along with the cash price. Service station operators may designate separate pumps or separate islands as being for either cash or credit purchases and display only the appropriate prices at the various pumps. If a pump is capable of displaying on its meter either a cash or a credit price depending upon the consumer's means of payment, both the cash price and the credit price must be displayed at the pump. A service station operator may display the cash price of fuel by itself on a curb sign, as long as the sign clearly indicates that the price is limited to cash purchases.

4(b)(10) Debt cancellation and debt suspension fees.

1. *Definition.* Debt cancellation coverage provides for payment or satisfaction of all or part of a debt when a specified event occurs. The term ''debt cancellation coverage'' includes guaranteed automobile protection, or ''GAP,'' agreements, which pay or satisfy the remaining debt after property insurance benefits are exhausted. Debt suspension coverage provides for suspension of the obligation to make one or more payments on the date(s) otherwise required by the credit agreement, when a specified event occurs. The term ''debt suspension'' does not include loan payment deferral arrangements in which the triggering event is the bank's unilateral decision to allow a deferral of payment and the borrower's unilateral election to do so, such as by skipping or reducing one or more payments (''skip payments'').

2. *Coverage written in connection with a transaction.* Coverage sold after consummation in closed-end credit transactions or after the opening of a home-equity plan subject to the requirements of § 226.5b is not ''written in connection with'' the credit transaction if the coverage is written because the consumer requests coverage after consummation or the opening of a home-equity plan subject to the requirements of § 226.5b (although credit-sale disclosures may be required for the coverage sold after consummation if it is financed). Coverage sold before or after an open-end (not home-secured) plan is opened is considered ''written in connection with a credit transaction.''

4(c) Charges excluded from the finance charge.

Paragraph 4(c)(1).

1. *Application fees.* An application fee that is excluded from the finance charge is a charge to recover the costs associated with processing applications for credit. The fee may cover the costs of services such as credit reports, credit investigations, and appraisals. The creditor is free to impose the fee in only certain of its loan programs, such as mortgage loans. However, if the fee is to be excluded from the finance charge under § 226.4(c)(1), it must be charged to all applicants, not just to applicants who are approved or who actually receive credit.

Paragraph 4(c)(2).

1. *Late payment charges.*

i. Late payment charges can be excluded from the finance charge under § 226.4(c)(2) whether or not the person imposing the charge continues to extend credit on the account or continues to provide property or services to the consumer. In determining whether a charge is for actual unanticipated late payment on a 30-day account, for example, factors to be considered include:

A. The terms of the account. For example, is the consumer required by the account terms to pay the account balance in full each month? If not, the charge may be a finance charge.

B. The practices of the creditor in handling the accounts. For example, regardless of the terms of the account, does the creditor allow consumers to pay the accounts over a period of time without demanding payment in full or taking other action to collect? If no effort is made to collect the full amount due, the charge may be a finance charge.

ii. Section 226.4(c)(2) applies to late payment charges imposed for failure to make payments as agreed, as well as failure to pay an account in full when due.

2. *Other excluded charges.* Charges for ''delinquency, default, or a similar occurrence'' include, for example, charges for reinstatement of credit privileges or for submitting as payment a check that is later returned unpaid.

Paragraph 4(c)(3).

1. *Assessing interest on an overdraft balance.* A charge on an overdraft balance computed by applying a rate of interest to the amount of the overdraft is not a finance charge, even though the consumer agrees to the charge in the account agreement, unless the financial institution agrees in writing that it will pay such items.

Paragraph 4(c)(4).

1. *Participation fees—periodic basis.* The participation fees described in § 226.4(c)(4) do not necessarily have to be formal membership fees, nor are they limited to credit card plans. The provision applies to any credit plan in which payment of a fee is a condition of access to the plan itself, but it does not apply to fees imposed separately on individual closed-end transactions. The fee may be charged on a monthly, annual, or other periodic basis; a one-time, non-recurring fee imposed at the time an account is opened is not a fee that is charged on a periodic basis, and may not be treated as a participation fee.

2. *Participation fees—exclusions.* Minimum monthly charges, charges for non-use of a credit card, and other charges based on either account activity or the amount of credit available under the plan are not excluded from the finance charge by § 226.4(c)(4). Thus, for example, a fee that is charged and then refunded to the consumer based on the extent to which the consumer uses the credit available would be a finance charge. (*See* the commentary to § 226.4(b)(2). Also, *see* comment 14(c)–2 for treatment of certain types of fees excluded in determining the annual percentage rate for the periodic statement.)

Paragraph 4(c)(5).

1. *Seller's points.* The seller's points mentioned in § 226.4(c)(5) include any charges imposed by the creditor upon the noncreditor seller of property for providing credit to the buyer or for providing credit on certain terms. These charges are excluded from the finance charge even if they are passed on to the

buyer, for example, in the form of a higher sales price. Seller's points are frequently involved in real estate transactions guaranteed or insured by governmental agencies. A *commitment fee* paid by a noncreditor seller (such as a real estate developer) to the creditor should be treated as seller's points. Buyer's points (that is, points charged to the buyer by the creditor), however, are finance charges.

2. *Other seller-paid amounts.* Mortgage insurance premiums and other finance charges are sometimes paid at or before consummation or settlement on the borrower's behalf by a noncreditor seller. The creditor should treat the payment made by the seller as seller's points and exclude it from the finance charge if, based on the seller's payment, the consumer is not legally bound to the creditor for the charge. A creditor who gives disclosures before the payment has been made should base them on the best information reasonably available.

Paragraph 4(c)(6).

1. *Lost interest.* Certain Federal and State laws mandate a percentage differential between the interest rate paid on a deposit and the rate charged on a loan secured by that deposit. In some situations, because of usury limits the creditor must reduce the interest rate paid on the deposit and, as a result, the consumer loses some of the interest that would otherwise have been earned. Under § 226.4(c)(6), such ''lost interest'' need not be included in the finance charge. This rule applies only to an interest reduction imposed because a rate differential is required by law and a usury limit precludes compliance by any other means. If the creditor imposes a differential that exceeds that required, only the lost interest attributable to the excess amount is a finance charge. (*See* the commentary to § 226.4(a).)

Paragraph 4(c)(7).

1. *Real estate or residential mortgage transaction charges.* The list of charges in § 226.4(c)(7) applies both to residential mortgage transactions (which may include, for example, the purchase of a mobile home) and to other transactions secured by real estate. The fees are excluded from the finance charge even if the services for which the fees are imposed are performed by the creditor's employees rather than by a third party. In addition, the cost of verifying or confirming information connected to the item is also excluded. For example, credit-report fees cover not only the cost of the report but also the cost of verifying information in the report. In all cases, charges excluded under § 226.4(c)(7) must be bona fide and reasonable.

2. *Lump-sum charges.* If a lump sum charged for several services includes a charge that is not excludable, a portion of the total should be allocated to that service and included in the finance charge. However, a lump sum charged for conducting or attending a closing (for example, by a lawyer or a title company) is excluded from the finance charge if the charge is primarily for services related to items listed in § 226.4(c)(7) (for example, reviewing or completing documents), even if other incidental services such as explaining various documents or disbursing funds for the parties are performed. The entire charge is excluded even if a fee for the incidental services would be a finance charge if it were imposed separately.

3. *Charges assessed during the loan term.* Real estate or residential mortgage transaction charges excluded under § 226.4(c)(7) are those charges imposed solely in connection with the initial decision to grant credit. This would include, for example, a fee to search for tax liens on the property or to determine if flood insurance is required. The exclusion does not apply to fees for services to be performed periodically during the loan term, regardless of when the fee is collected. For example, a fee for one or more determinations during the loan term of the current tax-lien status or flood-insurance requirements is a finance charge, regardless of whether the fee is imposed at closing, or when the service is performed. If a creditor is uncertain about what portion of a fee to be paid at consummation or loan closing is related to the initial decision to grant credit, the entire fee may be treated as a finance charge.

4(d) Insurance and debt cancellation and debt suspension coverage.

1. *General.* Section 226.4(d) permits insurance premiums and charges and debt cancellation and debt suspension charges to be excluded from the finance charge. The required disclosures must be made in writing, except as provided in § 226.4(d)(4). The rules on location of insurance and debt cancellation and debt suspension disclosures for closed-end transactions are in § 226.17(a). For purposes of § 226.4(d), all references to insurance also include debt cancellation and debt suspension coverage unless the context indicates otherwise.

2. *Timing of disclosures.* If disclosures are given early, for example under § 226.17(f) or § 226.19(a), the creditor need not redisclose if the actual premium is different at the time of consummation. If insurance disclosures are not given at the time of early disclosure and insurance is in fact written in connection with the transaction, the disclosures under § 226.4(d) must be made in order to exclude the premiums from the finance charge.

3. *Premium rate increases.* The creditor should disclose the premium amount based on the rates currently in effect and need not designate it as an estimate even if the premium rates may increase. An increase in insurance rates after consummation of a closed-end credit transaction or during the life of an open-end credit plan does not require redisclosure in order to exclude the additional premium from treatment as a finance charge.

4. *Unit-cost disclosures.*

i. *Open-end credit.* The premium or fee for insurance or debt cancellation or debt suspension for the initial term of coverage may be disclosed on a unit-cost basis in open-end credit transactions. The cost per unit should be based on the initial term of coverage, unless one of the options under comment 4(d)–12 is available.

ii. *Closed-end credit.* One of the transactions for which unit-cost disclosures (such as 50 cents per year for each $100 of the amount financed) may be used in place of the total insurance premium involves a particular kind of insurance plan. For example, a consumer with a current indebtedness of $8,000 is covered by a plan of credit life insurance coverage with a maximum of $10,000. The consumer requests an additional $4,000 loan to be covered by the same insurance plan. Since the $4,000 loan exceeds, in part, the maximum amount of indebtedness that can be covered by the plan, the creditor may properly give the insurance-cost disclosures on the $4,000 loan on a unit-cost basis.

5. *Required credit life insurance; debt cancellation or suspension coverage.* Credit life, accident, health, or loss-of-income insurance, and debt cancellation and suspension coverage described in § 226.4(b)(10), must be voluntary in order for the premium or charges to be excluded from the finance charge. Whether the insurance or coverage is in fact required or optional is a factual question. If the insurance or coverage is required, the premiums must be included in the finance charge, whether the insurance or coverage is purchased from the creditor or from a third party. If the consumer is required to elect one of several options—such as to purchase credit life insurance, or to assign an existing life insurance policy, or to pledge security such as a certificate of deposit—and the consumer purchases the credit life insurance policy, the premium must be included in the finance charge. (If the consumer assigns a preexisting policy or pledges security

instead, no premium is included in the finance charge. The security interest would be disclosed under § 226.6(a)(4), § 226.6(b)(5)(ii), or § 226.18(m). *See* the commentary to § 226.4(b)(7) and (b)(8).)

6. *Other types of voluntary insurance.* Insurance is not credit life, accident, health, or loss-of-income insurance if the creditor or the credit account of the consumer is not the beneficiary of the insurance coverage. If the premium for such insurance is not imposed by the creditor as an incident to or a condition of credit, it is not covered by § 226.4.

7. *Signatures.* If the creditor offers a number of insurance options under § 226.4(d), the creditor may provide a means for the consumer to sign or initial for each option, or it may provide for a single authorizing signature or initial with the options selected designated by some other means, such as a check mark. The insurance authorization may be signed or initialed by any consumer, as defined in § 226.2(a)(11), or by an authorized user on a credit card account.

8. *Property insurance.* To exclude property insurance premiums or charges from the finance charge, the creditor must allow the consumer to choose the insurer and disclose that fact. This disclosure must be made whether or not the property insurance is available from or through the creditor. The requirement that an option be given does not require that the insurance be readily available from other sources. The premium or charge must be disclosed only if the consumer elects to purchase the insurance from the creditor; in such a case, the creditor must also disclose the term of the property insurance coverage if it is less than the term of the obligation.

9. *Single-interest insurance.* Blanket and specific single-interest coverage are treated the same for purposes of the regulation. A charge for either type of single-interest insurance may be excluded from the finance charge if:

i. The insurer waives any right of subrogation.

ii. The other requirements of § 226.4(d)(2) are met. This includes, of course, giving the consumer the option of obtaining the insurance from a person of the consumer's choice. The creditor need not ascertain whether the consumer is able to purchase the insurance from someone else.

10. *Single-interest insurance defined.* The term *single-interest insurance* as used in the regulation refers only to the types of coverage traditionally included in the term *vendor's single-interest insurance* (or *VSI*), that is, protection of tangible property against normal property damage, concealment, confiscation, conversion, embezzlement, and skip. Some comprehensive insurance policies may include a variety of additional coverages, such as repossession insurance and holder-in-due-course insurance. These types of coverage do not constitute single-interest insurance for purposes of the regulation, and premiums for them do not qualify for exclusion from the finance charge under § 226.4(d). If a policy that is primarily VSI also provides coverages that are not VSI or other property insurance, a portion of the premiums must be allocated to the nonexcludable coverages and included in the finance charge. However, such allocation is not required if the total premium in fact attributable to all of the non-VSI coverages included in the policy is $1.00 or less (or $5.00 or less in the case of a multiyear policy).

11. *Initial term.*

i. The initial term of insurance or debt cancellation or debt suspension coverage determines the period for which a premium amount must be disclosed, unless one of the options discussed under comment 4(d)–12 is available. For purposes of § 226.4(d), the initial term is the period for which the insurer or creditor is obligated to provide coverage, even though the consumer may be allowed to cancel the coverage or coverage may end due to nonpayment before that term expires.

ii. For example:

A. The initial term of a property insurance policy on an automobile that is written for one year is one year even though premiums are paid monthly and the term of the credit transaction is four years.

B. The initial term of an insurance policy is the full term of the credit transaction if the consumer pays or finances a single premium in advance.

12. *Initial term; alternative.*

i. *General.* A creditor has the option of providing cost disclosures on the basis of one year of insurance or debt cancellation or debt suspension coverage instead of a longer initial term (provided the premium or fee is clearly labeled as being for one year) if:

A. The initial term is indefinite or not clear, or

B. The consumer has agreed to pay a premium or fee that is assessed periodically but the consumer is under no obligation to continue the coverage, whether or not the consumer has made an initial payment.

ii. *Open-end plans.* For open-end plans, a creditor also has the option of providing unit-cost disclosure on the basis of a period that is less than one year if the consumer has agreed to pay a premium or fee that is assessed periodically, for example monthly, but the consumer is under no obligation to continue the coverage.

iii. *Examples.* To illustrate:

A. A credit life insurance policy providing coverage for a 30-year mortgage loan has an initial term of 30 years, even though premiums are paid monthly and the consumer is not required to continue the coverage. Disclosures may be based on the initial term, but the creditor also has the option of making disclosures on the basis of coverage for an assumed initial term of one year.

13. *Loss-of-income insurance.* The loss-of-income insurance mentioned in § 226.4(d) includes involuntary unemployment insurance, which provides that some or all of the consumer's payments will be made if the consumer becomes unemployed involuntarily.

4(d)(3) Voluntary debt cancellation or debt suspension fees.

1. *General.* Fees charged for the specialized form of debt cancellation agreement known as guaranteed automobile protection (''GAP'') agreements must be disclosed according to § 226.4(d)(3) rather than according to § 226.4(d)(2) for property insurance.

2. *Disclosures.* Creditors can comply with § 226.4(d)(3) by providing a disclosure that refers to debt cancellation or debt suspension coverage whether or not the coverage is considered insurance. Creditors may use the model credit insurance disclosures only if the debt cancellation or debt suspension coverage constitutes insurance under State law. (*See* Model Clauses and Samples at G–16 and H–17 in appendix G and appendix H to part 226 for guidance on how to provide the disclosure required by § 226.4(d)(3)(iii) for debt suspension products.)

3. *Multiple events.* If debt cancellation or debt suspension coverage for two or more events is provided at a single charge, the entire charge may be excluded from the finance charge if at least one of the events is accident or loss of life, health, or income and the conditions specified in § 226.4(d)(3) or, as applicable, § 226.4(d)(4), are satisfied.

4. *Disclosures in programs combining debt cancellation and debt suspension features.* If the consumer's debt can be cancelled under certain circumstances, the disclosure may be modified to reflect that fact. The disclosure could, for example, state (in addition to the language required by § 226.4(d)(3)(iii)) that ''In some circumstances, my debt may be cancelled.'' However, the disclosure would not be permitted to list the specific events that would result in debt cancellation.

4(d)(4) Telephone purchases.

1. *Affirmative request.* A creditor would not satisfy the requirement to obtain a consumer's affirmative request if the ''request'' was a response to a script that uses leading questions or negative consent. A question asking whether the consumer wishes to enroll in the credit insurance or debt cancellation or suspension plan and seeking a yes-or-no response (such as ''Do you want to enroll in this optional debt cancellation plan?'') would not be considered leading.

4(e) Certain security interest charges.

1. *Examples.*

i. *Excludable charges.* Sums must be actually paid to public officials to be excluded from the finance charge under § 226.4(e)(1) and (e)(3). Examples are charges or other fees required for filing or recording security agreements, mortgages, continuation statements, termination statements, and similar documents, as well as intangible property or other taxes even when the charges or fees are imposed by the State solely on the creditor and charged to the consumer (if the tax must be paid to record a security agreement). (*See* comment 4(a)–5 regarding the treatment of taxes, generally.)

ii. *Charges not excludable.* If the obligation is between the creditor and a third party (an assignee, for example), charges or other fees for filing or recording security agreements, mortgages, continuation statements, termination statements, and similar documents relating to that obligation are not excludable from the finance charge under this section.

2. *Itemization.* The various charges described in § 226.4(e)(1) and (e)(3) may be totaled and disclosed as an aggregate sum, or they may be itemized by the specific fees and taxes imposed. If an aggregate sum is disclosed, a general term such as security interest fees or filing fees may be used.

3. *Notary fees.* In order for a notary fee to be excluded under § 226.4(e)(1), all of the following conditions must be met:

i. The document to be notarized is one used to perfect, release, or continue a security interest.

ii. The document is required by law to be notarized.

iii. A notary is considered a public official under applicable law.

iv. The amount of the fee is set or authorized by law.

4. *Nonfiling insurance.* The exclusion in § 226.4(e)(2) is available only if nonfiling insurance is purchased. If the creditor collects and simply retains a fee as a sort of ''self-insurance'' against nonfiling, it may not be excluded from the finance charge. If the nonfiling insurance premium exceeds the amount of the fees excludable from the finance charge under § 226.4(e)(1), only the excess is a finance charge. For example:

i. The fee for perfecting a security interest is $5.00 and the fee for releasing the security interest is $3.00. The creditor charges $10.00 for nonfiling insurance. Only $8.00 of the $10.00 is excludable from the finance charge.

4(f) Prohibited offsets.

1. *Earnings on deposits or investments.* The rule that the creditor shall not deduct any earnings by the consumer on deposits or investments applies whether or not the creditor has a security interest in the property.

Subpart B—Open-end Credit

§ 226.5 General Disclosure Requirements.

5(a) Form of disclosures.

5(a)(1) General.

1. *Clear and conspicuous standard.* The ''clear and conspicuous'' standard generally requires that disclosures be in a reasonably understandable form. Disclosures for credit card applications and solicitations under § 226.5a, highlighted account-opening disclosures under § 226.6(b)(1), highlighted disclosure on checks that access a credit card under § 226.9(b)(3), highlighted change-in-terms disclosures under § 226.9(c)(2)(iv)(C), and highlighted disclosures when a rate is increased due to delinquency, default or for a penalty under § 226.9(g)(3)(ii) must also be readily noticeable to the consumer.

2. *Clear and conspicuous—reasonably understandable form.* Except where otherwise provided, the reasonably understandable form standard does not require that disclosures be segregated from other material or located in any particular place on the disclosure statement, or that numerical amounts or percentages be in any particular type size. For disclosures that are given orally, the standard requires that they be given at a speed and volume sufficient for a consumer to hear and comprehend them. (*See* comment 5(b)(1)(ii)–1.) Except where otherwise provided, the standard does not prohibit:

i. Pluralizing required terminology (''finance charge'' and ''annual percentage rate'').

ii. Adding to the required disclosures such items as contractual provisions, explanations of contract terms, State disclosures, and translations.

iii. Sending promotional material with the required disclosures.

iv. Using commonly accepted or readily understandable abbreviations (such as ''mo.'' for ''month'' or ''Tx.'' for ''Texas'') in making any required disclosures.

v. Using codes or symbols such as ''APR'' (for annual percentage rate), ''FC'' (for finance charge), or ''Cr'' (for credit balance), so long as a legend or description of the code or symbol is provided on the disclosure statement.

3. *Clear and conspicuous—readily noticeable standard.* To meet the readily noticeable standard, disclosures for credit card applications and solicitations under § 226.5a, highlighted account-opening disclosures under § 226.6(b)(1), highlighted disclosures on checks that access a credit card account under § 226.9(b)(3), highlighted change-in-terms disclosures under § 226.9(c)(2)(iv)(C), and highlighted disclosures when a rate is increased due to delinquency, default or penalty pricing under § 226.9(g)(3)(ii) must be given in a minimum of 10-point font. (*See* special rule for font size requirements for the annual percentage rate for purchases under §§ 226.5a(b)(1) and 226.6(b)(2)(i).)

4. *Integrated document.* The creditor may make both the account-opening disclosures (§ 226.6) and the periodic-statement disclosures (§ 226.7) on more than one page, and use both the front and the reverse sides, except where otherwise indicated, so long as the pages constitute an integrated document. An integrated document would not include disclosure pages provided to the consumer at different times or disclosures interspersed on the same page with promotional material. An integrated document would include, for example:

i. Multiple pages provided in the same envelope that cover related material and are folded together, numbered consecutively, or clearly labeled to show that they relate to one another; or

ii. A brochure that contains disclosures and explanatory material about a range of services the creditor offers, such as credit, checking account, and electronic fund transfer features.

5. *Disclosures covered.* Disclosures that must meet the ''clear and conspicuous'' standard include all required communications under this subpart. Therefore, disclosures made by a person other than the card issuer, such as disclosures of finance charges imposed at the time of honoring a consumer's credit card under § 226.9(d), and notices, such as the correction notice required to be sent to the consumer under § 226.13(e), must also be clear and conspicuous.

Paragraph 5(a)(1)(ii)(A).

1. *Electronic disclosures.* Disclosures that need not be provided in writing under § 226.5(a)(1)(ii)(A) may be provided in writing, orally, or in

electronic form. If the consumer requests the service in electronic form, such as on the creditor's Web site, the specified disclosures may be provided in electronic form without regard to the consumer consent or other provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*).

Paragraph 5(a)(1)(iii).

1. *Disclosures not subject to E-Sign Act. See* the commentary to § 226.5(a)(1)(ii)(A) regarding disclosures (in addition to those specified under § 226.5(a)(1)(iii)) that may be provided in electronic form without regard to the consumer consent or other provisions of the E-Sign Act.

5(a)(2) Terminology.

1. *When disclosures must be more conspicuous.* For home-equity plans subject to § 226.5b, the terms *finance charge* and *annual percentage rate,* when required to be used with a number, must be disclosed more conspicuously than other required disclosures, except in the cases provided in § 226.5(a)(2)(ii). At the creditor's option, *finance charge* and *annual percentage rate* may also be disclosed more conspicuously than the other required disclosures even when the regulation does not so require. The following examples illustrate these rules:

i. In disclosing the annual percentage rate as required by § 226.6(a)(1)(ii), the term *annual percentage rate* is subject to the *more conspicuous* rule.

ii. In disclosing the amount of the finance charge, required by § 226.7(a)(6)(i), the term *finance charge* is subject to the *more conspicuous* rule.

iii. Although neither *finance charge* nor *annual percentage rate* need be emphasized when used as part of general informational material or in textual descriptions of other terms, emphasis is permissible in such cases. For example, when the terms appear as part of the explanations required under § 226.6(a)(1)(iii) and (a)(1)(iv), they may be equally conspicuous as the disclosures required under §§ 226.6(a)(1)(ii) and 226.7(a)(7).

2. *Making disclosures more conspicuous.* In disclosing the terms *finance charge* and *annual percentage rate* more conspicuously for home-equity plans subject to § 226.5b, only the words *finance charge* and *annual percentage rate* should be accentuated. For example, if the term *total finance charge* is used, only *finance charge* should be emphasized. The disclosures may be made more conspicuous by, for example:

i. Capitalizing the words when other disclosures are printed in lower case.

ii. Putting them in bold print or a contrasting color.

iii. Underlining them.

iv. Setting them off with asterisks.

v. Printing them in larger type.

3. *Disclosure of figures—exception to more conspicuous rule.* For home-equity plans subject to § 226.5b, the terms *annual percentage rate* and *finance charge* need not be more conspicuous than figures (including, for example, numbers, percentages, and dollar signs).

4. *Consistent terminology.* Language used in disclosures required in this subpart must be close enough in meaning to enable the consumer to relate the different disclosures; however, the language need not be identical.

5(b) Time of disclosures.

5(b)(1) Account-opening disclosures.

5(b)(1)(i) General rule.

1. *Disclosure before the first transaction.* When disclosures must be furnished ''before the first transaction,'' account-opening disclosures must be delivered before the consumer becomes obligated on the plan. Examples include:

i. *Purchases.* The consumer makes the first purchase, such as when a consumer opens a credit plan and makes purchases contemporaneously at a retail store, except when the consumer places a telephone call to make the purchase and opens the plan contemporaneously (*see* commentary to § 226.5(b)(1)(iii) below).

ii. *Advances.* The consumer receives the first advance. If the consumer receives a cash advance check at the same time the account-opening disclosures are provided, disclosures are still timely if the consumer can, after receiving the disclosures, return the cash advance check to the creditor without obligation (for example, without paying finance charges).

2. *Reactivation of suspended account.* If an account is temporarily suspended (for example, because the consumer has exceeded a credit limit, or because a credit card is reported lost or stolen) and then is reactivated, no new account-opening disclosures are required.

3. *Reopening closed account.* If an account has been closed (for example, due to inactivity, cancellation, or expiration) and then is reopened, new account-opening disclosures are required. No new account-opening disclosures are required, however, when the account is closed merely to assign it a new number (for example, when a credit card is reported lost or stolen) and the ''new'' account then continues on the same terms.

4. *Converting closed-end to open-end credit.* If a closed-end credit transaction is converted to an open-end credit account under a written agreement with the consumer, account-opening disclosures under § 226.6 must be given before the consumer becomes obligated on the open-end credit plan. (*See* the commentary to § 226.17 on converting open-end credit to closed-end credit.)

5. *Balance transfers.* A creditor that solicits the transfer by a consumer of outstanding balances from an existing account to a new open-end plan must furnish the disclosures required by § 226.6 so that the consumer has an opportunity, after receiving the disclosures, to contact the creditor before the balance is transferred and decline the transfer. For example, assume a consumer responds to a card issuer's solicitation for a credit card account subject to § 226.5a that offers a range of balance transfer annual percentage rates, based on the consumer's creditworthiness. If the creditor opens an account for the consumer, the creditor would comply with the timing rules of this section by providing the consumer with the annual percentage rate (along with the fees and other required disclosures) that would apply to the balance transfer in time for the consumer to contact the creditor and withdraw the request. A creditor that permits consumers to withdraw the request by telephone has met this timing standard if the creditor does not effect the balance transfer until 10 days after the creditor has sent account-opening disclosures to the consumer, assuming the consumer has not contacted the creditor to withdraw the request. Card issuers that are subject to the requirements of § 226.5a may establish procedures that comply with both §§ 226.5a and 226.6 in a single disclosure statement.

6. *Substitution or replacement of credit card accounts.*

i. *Generally.* When a card issuer substitutes or replaces an existing credit card account with another credit card account, the card issuer must either provide notice of the terms of the new account consistent with § 226.6(b) or provide notice of the changes in the terms of the existing account consistent with § 226.9(c)(2). Whether a substitution or replacement results in the opening of a new account or a change in the terms of an existing account for purposes of the disclosure requirements in §§ 226.6(b) and 226.9(c)(2) is determined in light of all the relevant facts and circumstances. For additional requirements and limitations related to the substitution or replacement of credit card accounts, *see* §§ 226.12(a) and 226.55(d) and comments 12(a)(1)–1 through –8,

12(a)(2)–1 through –9, 55(b)(3)–3, and 55(d)–1 through –3.

ii. *Relevant facts and circumstances.* Listed below are facts and circumstances that are relevant to whether a substitution or replacement results in the opening of a new account or a change in the terms of an existing account for purposes of the disclosure requirements in §§ 226.6(b) and 226.9(c)(2). When most of the facts and circumstances listed below are present, the substitution or replacement likely constitutes the opening of a new account for which § 226.6(b) disclosures are appropriate. When few of the facts and circumstances listed below are present, the substitution or replacement likely constitutes a change in the terms of an existing account for which § 226.9(c)(2) disclosures are appropriate.

A. Whether the card issuer provides the consumer with a new credit card;

B. Whether the card issuer provides the consumer with a new account number;

C. Whether the account provides new features or benefits after the substitution or replacement (such as rewards on purchases);

D. Whether the account can be used to conduct transactions at a greater or lesser number of merchants after the substitution or replacement;

E. Whether the card issuer implemented the substitution or replacement on an individualized basis; and

F. Whether the account becomes a different type of open-end plan after the substitution or replacement (such as when a charge card is replaced by a credit card).

5(b)(1)(ii) Charges imposed as part of an open-end (not home-secured) plan.

1. *Disclosing charges before the fee is imposed.* Creditors may disclose charges imposed as part of an open-end (not home-secured) plan orally or in writing at any time before a consumer agrees to pay the fee or becomes obligated for the charge, unless the charge is specified under § 226.6(b)(2). (Charges imposed as part of an open-end (not home-secured plan) that are not specified under § 226.6(b)(2) may alternatively be disclosed in electronic form; *see* the commentary to § 226.5(a)(1)(ii)(A).) Creditors must provide such disclosures at a time and in a manner that a consumer would be likely to notice them. For example, if a consumer telephones a card issuer to discuss a particular service, a creditor would meet the standard if the creditor clearly and conspicuously discloses the fee associated with the service that is the topic of the telephone call orally to the consumer. Similarly, a creditor providing marketing materials in writing to a consumer about a particular service would meet the standard if the creditor provided a clear and conspicuous written disclosure of the fee for that service in those same materials. A creditor that provides written materials to a consumer about a particular service but provides a fee disclosure for another service not promoted in such materials would not meet the standard. For example, if a creditor provided marketing materials promoting payment by Internet, but included the fee for a replacement card on such materials with no explanation, the creditor would not be disclosing the fee at a time and in a manner that the consumer would be likely to notice the fee.

5(b)(1)(iii) Telephone purchases.

1. *Return policies.* In order for creditors to provide disclosures in accordance with the timing requirements of this paragraph, consumers must be permitted to return merchandise purchased at the time the plan was established without paying mailing or return-shipment costs. Creditors may impose costs to return subsequent purchases of merchandise under the plan, or to return merchandise purchased by other means such as a credit card issued by another creditor. A reasonable return policy would be of sufficient duration that the consumer is likely to have received the disclosures and had sufficient time to make a decision about the financing plan before his or her right to return the goods expires. Return policies need not provide a right to return goods if the consumer consumes or damages the goods, or for installed appliances or fixtures, provided there is a reasonable repair or replacement policy to cover defective goods or installations. If the consumer chooses to reject the financing plan, creditors comply with the requirements of this paragraph by permitting the consumer to pay for the goods with another reasonable form of payment acceptable to the merchant and keep the goods although the creditor cannot require the consumer to do so.

5(b)(1)(iv) Membership fees.

1. *Membership fees. See* § 226.5a(b)(2) and related commentary for guidance on fees for issuance or availability of a credit or charge card.

2. *Rejecting the plan.* If a consumer has paid or promised to pay a membership fee including an application fee excludable from the finance charge under § 226.4(c)(1) before receiving account-opening disclosures, the consumer may, after receiving the disclosures, reject the plan and not be obligated for the membership fee, application fee, or any other fee or charge. A consumer who has received the disclosures and uses the account, or makes a payment on the account after receiving a billing statement, is deemed not to have rejected the plan.

3. *Using the account.* A consumer uses an account by obtaining an extension of credit after receiving the account-opening disclosures, such as by making a purchase or obtaining an advance. A consumer does not ''use'' the account by activating the account. A consumer also does not ''use'' the account when the creditor assesses fees on the account (such as start-up fees or fees associated with credit insurance or debt cancellation or suspension programs agreed to as a part of the application and before the consumer receives account-opening disclosures). For example, the consumer does not ''use'' the account when a creditor sends a billing statement with start-up fees, there is no other activity on the account, the consumer does not pay the fees, and the creditor subsequently assesses a late fee or interest on the unpaid fee balances. A consumer also does not ''use'' the account by paying an application fee excludable from the finance charge under § 226.4(c)(1) prior to receiving the account-opening disclosures.

4. *Home-equity plans.* Creditors offering home-equity plans subject to the requirements of § 226.5b are subject to the requirements of § 226.5b(h) regarding the collection of fees.

5(b)(2) Periodic statements.

Paragraph 5(b)(2)(i).

1. *Periodic statements not required.* Periodic statements need not be sent in the following cases:

i. If the creditor adjusts an account balance so that at the end of the cycle the balance is less than $1—so long as no finance charge has been imposed on the account for that cycle.

ii. If a statement was returned as undeliverable. If a new address is provided, however, within a reasonable time before the creditor must send a statement, the creditor must resume sending statements. Receiving the address at least 20 days before the end of a cycle would be a reasonable amount of time to prepare the statement for that cycle. For example, if an address is received 22 days before the end of the June cycle, the creditor must send the periodic statement for the June cycle. (*See* § 226.13(a)(7).)

2. *Termination of draw privileges.* When a consumer's ability to draw on an open-end account is terminated without being converted to closed-end credit under a written agreement, the creditor must continue to provide

periodic statements to those consumers entitled to receive them under § 226.5(b)(2)(i), for example, when the draw period of an open-end credit plan ends and consumers are paying off outstanding balances according to the account agreement or under the terms of a workout agreement that is not converted to a closed-end transaction. In addition, creditors must continue to follow all of the other open-end credit requirements and procedures in subpart B.

3. *Uncollectible accounts.* An account is deemed uncollectible for purposes of § 226.5(b)(2)(i) when a creditor has ceased collection efforts, either directly or through a third party.

4. *Instituting collection proceedings.* Creditors institute a delinquency collection proceeding by filing a court action or initiating an adjudicatory process with a third party. Assigning a debt to a debt collector or other third party would not constitute instituting a collection proceeding.

Paragraph 5(b)(2)(ii).

1. *Reasonable procedures.* A creditor is not required to determine the specific date on which periodic statements are mailed or delivered to each individual consumer. A creditor complies with § 226.5(b)(2)(ii) if it has adopted reasonable procedures designed to ensure that periodic statements are mailed or delivered to consumers no later than a certain number of days after the closing date of the billing cycle and adds that number of days to the 21-day period required by § 226.5(b)(2)(ii) when determining the payment due date and the date on which any grace period expires. For example, if a creditor has adopted reasonable procedures designed to ensure that periodic statements are mailed or delivered to consumers no later than three days after the closing date of the billing cycle, the payment due date and the date on which any grace period expires must be no less than 24 days after the closing date of the billing cycle.

2. *Treating a payment as late for any purpose and collecting any finance or other charges.* Treating a payment as late for any purpose includes increasing the annual percentage rate as a penalty, reporting the consumer as delinquent to a credit reporting agency, or assessing a late fee or any other fee based on the consumer's failure to make a payment within a specified amount of time or by a specified date. The prohibition in § 226.5(b)(2)(ii) on treating a payment as late for any purpose or collecting finance or other charges applies only during the 21-day period following mailing or delivery of the periodic statement. When an account is not eligible for a grace period, imposing a finance charge due to a periodic interest rate does not constitute treating a payment as late or collecting finance or other charges as a result of a failure to comply with § 226.5(b)(2)(ii).

3. *Payment due date.* For purposes of § 226.5(b)(2)(ii), ''payment due date'' means the date by which the creditor requires the consumer to make the required minimum periodic payment in order to avoid being treated as late for any purpose, except as set forth in paragraphs i. and ii. below.

i. *Courtesy period following payment due date.* Although the terms of the account agreement may require that payment be made by a certain date, some creditors provide an additional period of time after that date during which a late payment fee will not be assessed. In some cases, this period is set forth in the account agreement while in others it is provided as an informal policy or practice. Regardless, for purposes of § 226.5(b)(2)(ii), the payment due date is the due date according to the legal obligation between the parties, not the end of the additional period of time. For example, if an account agreement for a home equity plan subject to the requirements of § 226.5b provides that payment is due on the first day of the month but a late payment fee will not be assessed if the payment is received by the fifteenth day of the month, the payment due date for purposes of § 226.5(b)(2)(ii) is the first day of the month. Similarly, if a cardholder agreement provides that payment is due on the fifteenth day of the month but, under the creditor's informal ''courtesy'' period, a late payment fee will not be assessed if the payment is received by the eighteenth day of the month, the payment due date for purposes of § 226.5(b)(2)(ii) is the fifteenth day of the month.

ii. *Laws affecting assessment of late payment and other fees.* Some State or other laws require that a certain number of days must elapse following a due date before a late payment or other fee may be imposed. For example, assume that the account agreement provides that payment is due on the fifteenth day of the month but, under State law, the creditor is prohibited from assessing a late payment fee until the twenty-sixth day of the month. For purposes of § 226.5(b)(2)(ii), the payment due date is the due date according to the legal obligation between the parties (the fifteenth day of the month), not the date before which State law prohibits the imposition of a late payment fee (the twenty-sixth day of the month).

4. *Definition of grace period.* For purposes of § 226.5(b)(2)(ii), ''grace period'' means a period within which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate. A deferred interest or similar promotional program under which the consumer is not obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time is not a grace period for purposes of § 226.5(b)(2)(ii). Similarly, a courtesy period following the payment due date is not a grace period for purposes of § 226.5(b)(2)(ii). *See* comment 5(b)(2)(ii)–3.i.

5. *Consumer request to pick up periodic statements.* When a consumer initiates a request, the creditor may permit, but may not require, the consumer to pick up periodic statements. If the consumer wishes to pick up a statement, the statement must be made available in accordance with § 226.5(b)(2)(ii).

6. *Deferred interest and similar promotional programs. See* comment 7(b)–1.iv.

Paragraph 5(b)(2)(iii).

1. *Computer malfunction.* The exceptions identified in § 226.5(b)(2)(iii) of this section do not extend to the failure to provide a periodic statement because of computer malfunction.

2. *Calling for periodic statements.* When the consumer initiates a request, the creditor may permit, but may not require, consumers to pick up their periodic statements. If the consumer wishes to pick up the statement and the plan has a grace period, the statement must be made available in accordance with the 14-day rule.

5(c) Basis of disclosures and use of estimates.

1. *Legal obligation.* The disclosures should reflect the credit terms to which the parties are legally bound at the time of giving the disclosures.

i. The legal obligation is determined by applicable State or other law.

ii. The fact that a term or contract may later be deemed unenforceable by a court on the basis of equity or other grounds does not, by itself, mean that disclosures based on that term or contract did not reflect the legal obligation.

iii. The legal obligation normally is presumed to be contained in the contract that evidences the agreement. But this may be rebutted if another agreement between the parties legally modifies that contract.

2. *Estimates—obtaining information.* Disclosures may be estimated when the exact information is unknown at the time disclosures are made. Information is unknown if it is not reasonably available to the creditor at the time

disclosures are made. The reasonably available standard requires that the creditor, acting in good faith, exercise due diligence in obtaining information. In using estimates, the creditor is not required to disclose the basis for the estimated figures, but may include such explanations as additional information. The creditor normally may rely on the representations of other parties in obtaining information. For example, the creditor might look to insurance companies for the cost of insurance.

3. *Estimates—redisclosure.* If the creditor makes estimated disclosures, redisclosure is not required for that consumer, even though more accurate information becomes available before the first transaction. For example, in an open-end plan to be secured by real estate, the creditor may estimate the appraisal fees to be charged; such an estimate might reasonably be based on the prevailing market rates for similar appraisals. If the exact appraisal fee is determinable after the estimate is furnished but before the consumer receives the first advance under the plan, no new disclosure is necessary.

5(d) Multiple creditors; multiple consumers.

1. *Multiple creditors.* Under § 226.5(d):

i. Creditors must choose which of them will make the disclosures.

ii. A single, complete set of disclosures must be provided, rather than partial disclosures from several creditors.

iii. All disclosures for the open-end credit plan must be given, even if the disclosing creditor would not otherwise have been obligated to make a particular disclosure.

2. *Multiple consumers.* Disclosures may be made to either obligor on a joint account. Disclosure responsibilities are not satisfied by giving disclosures to only a surety or guarantor for a principal obligor or to an authorized user. In rescindable transactions, however, separate disclosures must be given to each consumer who has the right to rescind under § 226.15.

3. *Card issuer and person extending credit not the same person.* Section 127(c)(4)(D) of the Truth in Lending Act (15 U.S.C. 1637(c)(4)(D)) contains rules pertaining to charge card issuers with plans that allow access to an open-end credit plan that is maintained by a person other than the charge card issuer. These rules are not implemented in Regulation Z (although they were formerly implemented in § 226.5a(f)). However, the statutory provisions remain in effect and may be used by charge card issuers with plans meeting the specified criteria.

5(e) Effect of subsequent events.

1. *Events causing inaccuracies.* Inaccuracies in disclosures are not violations if attributable to events occurring after disclosures are made. For example, when the consumer fails to fulfill a prior commitment to keep the collateral insured and the creditor then provides the coverage and charges the consumer for it, such a change does not make the original disclosures inaccurate. The creditor may, however, be required to provide a new disclosure(s) under § 226.9(c).

2. *Use of inserts.* When changes in a creditor's plan affect required disclosures, the creditor may use inserts with outdated disclosure forms. Any insert:

i. Should clearly refer to the disclosure provision it replaces.

ii. Need not be physically attached or affixed to the basic disclosure statement.

iii. May be used only until the supply of outdated forms is exhausted.

§ 226.5a Credit and Charge Card Applications and Solicitations.

1. *General.* Section 226.5a generally requires that credit disclosures be contained in application forms and solicitations initiated by a card issuer to open a credit or charge card account. (*See* § 226.5a(a)(5) and (e)(2) for exceptions; *see* § 226.5a(a)(1) and accompanying commentary for the definition of solicitation; *see* also § 226.2(a)(15) and accompanying commentary for the definition of charge card.)

2. *Substitution of account-opening summary table for the disclosures required by § 226.5a.* In complying with § 226.5a(c), (e)(1) or (f), a card issuer may provide the account-opening summary table described in § 226.6(b)(1) in lieu of the disclosures required by § 226.5a, if the issuer provides the disclosures required by § 226.6 on or with the application or solicitation.

3. *Clear and conspicuous standard. See* comment 5(a)(1)–1 for the clear and conspicuous standard applicable to § 226.5a disclosures.

5a(a) General rules.

5a(a)(1) Definition of solicitation.

1. *Invitations to apply.* A card issuer may contact a consumer who has not been preapproved for a card account about opening an account (whether by direct mail, telephone, or other means) and invite the consumer to complete an application. Such a contact does not meet the definition of *solicitation,* nor is it covered by this section, unless the contact itself includes an application form in a direct mailing, electronic communication or ''take-one''; an oral application in a telephone contact initiated by the card issuer; or an application in an in-person contact initiated by the card issuer.

5a(a)(2) Form of disclosures; tabular format.

1. *Location of table.* i. *General.* Except for disclosures given electronically, disclosures in § 226.5a(b) that are required to be provided in a table must be prominently located on or with the application or solicitation. Disclosures are deemed to be prominently located, for example, if the disclosures are on the same page as an application or solicitation reply form. If the disclosures appear elsewhere, they are deemed to be prominently located if the application or solicitation reply form contains a clear and conspicuous reference to the location of the disclosures and indicates that they contain rate, fee, and other cost information, as applicable.

ii. *Electronic disclosures.* If the table is provided electronically, the table must be provided in close proximity to the application or solicitation. Card issuers have flexibility in satisfying this requirement. Methods card issuers could use to satisfy the requirement include, but are not limited to, the following examples:

A. The disclosures could automatically appear on the screen when the application or reply form appears;

B. The disclosures could be located on the same Web page as the application or reply form (whether or not they appear on the initial screen), if the application or reply form contains a clear and conspicuous reference to the location of the disclosures and indicates that the disclosures contain rate, fee, and other cost information, as applicable;

C. Card issuers could provide a link to the electronic disclosures on or with the application (or reply form) as long as consumers cannot bypass the disclosures before submitting the application or reply form. The link would take the consumer to the disclosures, but the consumer need not be required to scroll completely through the disclosures; or

D. The disclosures could be located on the same Web page as the application or reply form without necessarily appearing on the initial screen, immediately preceding the button that the consumer will click to submit the application or reply.

Whatever method is used, a card issuer need not confirm that the consumer has read the disclosures.

2. *Multiple accounts.* If a tabular format is required to be used, card issuers offering several types of accounts may disclose the various terms

for the accounts in a single table or may provide a separate table for each account.

3. *Information permitted in the table. See* the commentary to § 226.5a(b), (d)(2)(ii) and (e)(1) for guidance on additional information permitted in the table.

4. *Deletion of inapplicable disclosures.* Generally, disclosures need only be given as applicable. Card issuers may, therefore, omit inapplicable headings and their corresponding boxes in the table. For example, if no foreign transaction fee is imposed on the account, the heading *Foreign transaction* and disclosure may be deleted from the table or the disclosure form may contain the heading *Foreign transaction* and a disclosure showing *none*. There is an exception for the grace period disclosure; even if no grace period exists, that fact must be stated.

5. *Highlighting of annual percentage rates and fee amounts.* i. *In general. See* Samples G–10(B) and G–10(C) for guidance on providing the disclosures described in § 226.5a(a)(2)(iv) in bold text. Other annual percentage rates or fee amounts disclosed in the table may not be in bold text. Samples G–10(B) and G–10(C) also provide guidance to issuers on how to disclose the rates and fees described in § 226.5a(a)(2)(iv) in a clear and conspicuous manner, by including these rates and fees generally as the first text in the applicable rows of the table so that the highlighted rates and fees generally are aligned vertically in the table.

ii. *Maximum limits on fees.* Section 226.5a(a)(2)(iv) provides that any maximum limits on fee amounts unrelated to fees that vary by State may not be disclosed in bold text. For example, assume an issuer will charge a cash advance fee of $5 or 3 percent of the cash advance transaction amount, whichever is greater, but the fee will not exceed $100. The maximum limit of $100 for the cash advance fee must not be highlighted in bold. Nonetheless, assume that the amount of the late fee varies by State, and the range of amount of late fees disclosed is $15–$25. In this case, the maximum limit of $25 on the late fee amounts must be highlighted in bold. In both cases, the minimum fee amount (*e.g.* $5 or $15) must be disclosed in bold text.

iii. *Periodic fees.* Section 226.5a(a)(2)(iv) provides that any periodic fee disclosed pursuant to § 226.5a(b)(2) that is not an annualized amount must not be disclosed in bold. For example, if an issuer imposes a $10 monthly maintenance fee for a card account, the issuer must disclose in the table that there is a $10 monthly maintenance fee, and that the fee is $120 on an annual basis. In this example, the $10 fee disclosure would not be disclosed in bold, but the $120 annualized amount must be disclosed in bold. In addition, if an issuer must disclose any annual fee in the table, the amount of the annual fee must be disclosed in bold.

6. *Form of disclosures.* Whether disclosures must be in electronic form depends upon the following:

i. If a consumer accesses a credit card application or solicitation electronically (other than as described under ii. below), such as on-line at a home computer, the card issuer must provide the disclosures in electronic form (such as with the application or solicitation on its Web site) in order to meet the requirement to provide disclosures in a timely manner on or with the application or solicitation. If the issuer instead mailed paper disclosures to the consumer, this requirement would not be met.

ii. In contrast, if a consumer is physically present in the card issuer's office, and accesses a credit card application or solicitation electronically, such as via a terminal or kiosk (or if the consumer uses a terminal or kiosk located on the premises of an affiliate or third party that has arranged with the card issuer to provide applications or solicitations to consumers), the issuer may provide disclosures in either electronic or paper form, provided the issuer complies with the timing and delivery (''on or with'') requirements of the regulation.

7. *Terminology.* Section 226.5a(a)(2)(i) generally requires that the headings, content and format of the tabular disclosures be substantially similar, but need not be identical, to the applicable tables in appendix G–10 to part 226; but *see* § 226.5(a)(2) for terminology requirements applicable to § 226.5a disclosures.

5a(a)(4) Fees that vary by State.

1. *Manner of disclosing range.* If the card issuer discloses a range of fees instead of disclosing the amount of the specific fee applicable to the consumer's account, the range may be stated as the lowest authorized fee (zero, if there are one or more states where no fee applies) to the highest authorized fee.

5a(a)(5) Exceptions.

1. *Noncoverage of consumer-initiated requests.* Applications provided to a consumer upon request are not covered by § 226.5a, even if the request is made in response to the card issuer's invitation to apply for a card account. To illustrate, if a card issuer invites consumers to call a toll-free number or to return a response card to obtain an application, the application sent in response to the consumer's request need not contain the disclosures required under § 226.5a. Similarly, if the card issuer invites consumers to call and make an oral application on the telephone, § 226.5a does not apply to the application made by the consumer. If, however, the card issuer calls a consumer or initiates a telephone discussion with a consumer about opening a card account and contemporaneously takes an oral application, such applications are subject to § 226.5a, specifically § 226.5a(d). Likewise, if the card issuer initiates an in-person discussion with a consumer about opening a card account and contemporaneously takes an application, such applications are subject to § 226.5a, specifically § 226.5a(f).

5a(b) Required disclosures.

1. *Tabular format.* Provisions in § 226.5a(b) and its commentary provide that certain information must appear or is permitted to appear in a table. The tabular format is required for § 226.5a(b) disclosures given pursuant to § 226.5a(c), (d)(2), (e)(1) and (f). The tabular format does not apply to oral disclosures given pursuant to § 226.5a(d)(1). (*See* § 226.5a(a)(2).)

2. *Accuracy.* Rules concerning accuracy of the disclosures required by § 226.5a(b), including variable rate disclosures, are stated in § 226.5a(c), (d), and (e), as applicable.

5a(b)(1) Annual percentage rate.

1. *Variable-rate accounts—definition.* For purposes of § 226.5a(b)(1), a variable-rate account exists when rate changes are part of the plan and are tied to an index or formula. (*See* the commentary to § 226.6(b)(4)(ii) for examples of variable-rate plans.)

2. *Variable-rate accounts—fact that rate varies and how the rate will be determined.* In describing how the applicable rate will be determined, the card issuer must identify in the table the type of index or formula used, such as the prime rate. In describing the index, the issuer may not include in the table details about the index. For example, if the issuer uses a prime rate, the issuer must disclose the rate as a ''prime rate'' and may not disclose in the table other details about the prime rate, such as the fact that it is the highest prime rate published in the *Wall Street Journal* two business days before the closing date of the statement for each billing period. The issuer may not disclose in the table the current value of the index (such as that the prime rate is currently 7.5 percent) or the amount of the margin or spread added to the index or formula in setting the applicable rate. A card issuer

may not disclose any applicable limitations on rate increases or decreases in the table, such as describing that the rate will not go below a certain rate or higher than a certain rate. (*See* Samples G–10(B) and G–10(C) for guidance on how to disclose the fact that the applicable rate varies and how it is determined.)

3. *Discounted initial rates*. i. *Immediate proximity*. If the term ''introductory'' is in the same phrase as the introductory rate, as that term is defined in § 226.16(g)(2)(ii), it will be deemed to be in immediate proximity of the listing. For example, an issuer that uses the phrase ''introductory balance transfer APR X percent'' has used the word ''introductory'' within the same phrase as the rate. (*See* Sample G–10(C) for guidance on how to disclose clearly and conspicuously the expiration date of the introductory rate and the rate that will apply after the introductory rate expires, if an introductory rate is disclosed in the table.)

ii. *Subsequent changes in terms*. The fact that an issuer may reserve the right to change a rate subsequent to account opening, pursuant to the notice requirements of § 226.9(c) and the limitations in § 226.55, does not, by itself, make that rate an introductory rate. For example, assume an issuer discloses an annual percentage rate for purchases of 12.99% but does not specify a time period during which that rate will be in effect. Even if that issuer subsequently increases the annual percentage rate for purchases to 15.99%, pursuant to a change-in-terms notice provided under § 226.9(c), the 12.99% is not an introductory rate.

iii. *More than one introductory rate*. If more than one introductory rate may apply to a particular balance in succeeding periods, the term ''introductory'' need only be used to describe the first introductory rate. For example, if an issuer offers a rate of 8.99% on purchases for six months, 10.99% on purchases for the following six months, and 14.99% on purchases after the first year, the term ''introductory'' need only be used to describe the 8.99% rate.

4. *Premium initial rates—subsequent changes in terms*. The fact that an issuer may reserve the right to change a rate subsequent to account opening, pursuant to the notice requirements of § 226.9(c) and the limitations in § 226.55 (as applicable), does not, by itself, make that rate a premium initial rate. For example, assume an issuer discloses an annual percentage rate for purchases of 18.99% but does not specify a time period during which that rate will be in effect. Even if that issuer subsequently reduces the annual percentage rate for purchases to 15.99%, the 18.99% is not a premium initial rate. If the rate decrease is the result of a change from a non-variable rate to a variable rate or from a variable rate to a non-variable rate, *see* comments 9(c)(2)(v)–3 and 9(c)(2)(v)–4 for guidance on the notice requirements under § 226.9(c).

5. *Increased penalty rates*. i. *In general*. For rates that are not introductory rates, if a rate may increase as a penalty for one or more events specified in the account agreement, such as a late payment or an extension of credit that exceeds the credit limit, the card issuer must disclose the increased rate that would apply, a brief description of the event or events that may result in the increased rate, and a brief description of how long the increased rate will remain in effect. The description of the specific event or events that may result in an increased rate should be brief. For example, if an issuer may increase a rate to the penalty rate because the consumer does not make the minimum payment by 5 p.m., Eastern Time, on its payment due date, the issuer should describe this circumstance in the table as ''make a late payment.'' Similarly, if an issuer may increase a rate that applies to a particular balance because the account is more than 30 days late, the issuer should describe this circumstance in the table as ''make a late payment.'' An issuer may not distinguish between the events that may result in an increased rate for existing balances and the events that may result in an increased rate for new transactions. (*See* Samples G–10(B) and G–10(C) (in the row labeled ''Penalty APR and When it Applies'') for additional guidance on the level of detail in which the specific event or events should be described.) The description of how long the increased rate will remain in effect also should be brief. If a card issuer reserves the right to apply the increased rate indefinitely, that fact should be stated. (*See* Samples G–10(B) and G–10(C) (in the row labeled ''Penalty APR and When it Applies'') for additional guidance on the level of detail which the issuer should use to describe how long the increased rate will remain in effect.) A card issuer will be deemed to meet the standard to clearly and conspicuously disclose the information required by § 226.5a(b)(1)(iv)(A) if the issuer uses the format shown in Samples G–10(B) and G–10(C) (in the row labeled ''Penalty APR and When it Applies'') to disclose this information.

ii. *Introductory rates—general*. An issuer is required to disclose directly beneath the table the circumstances under which an introductory rate, as that term is defined in § 226.16(g)(2)(ii), may be revoked, and the rate that will apply after the revocation. This information about revocation of an introductory rate and the rate that will apply after revocation must be provided even if the rate that will apply after the introductory rate is revoked is the rate that would have applied at the end of the promotional period. In a variable-rate account, the rate that would have applied at the end of the promotional period is a rate based on the applicable index or formula in accordance with the accuracy requirements set forth in § 226.5a(c) or (e). In describing the rate that will apply after revocation of the introductory rate, if the rate that will apply after revocation of the introductory rate is already disclosed in the table, the issuer is not required to repeat the rate, but may refer to that rate in a clear and conspicuous manner. For example, if the rate that will apply after revocation of an introductory rate is the standard rate that applies to that type of transaction (such as a purchase or balance transfer transaction), and the standard rates are labeled in the table as ''standard APRs,'' the issuer may refer to the ''standard APR'' when describing the rate that will apply after revocation of an introductory rate. (*See* Sample G–10(C) in the disclosure labeled ''Loss of Introductory APR'' directly beneath the table.) The description of the circumstances in which an introductory rate could be revoked should be brief. For example, if an issuer may increase an introductory rate because the account is more than 60 days late, the issuer should describe this circumstance in the table as ''make a late payment.'' In addition, if the circumstances in which an introductory rate could be revoked are already listed elsewhere in the table, the issuer is not required to repeat the circumstances again, but may refer to those circumstances in a clear and conspicuous manner. For example, if the circumstances in which an introductory rate could be revoked are the same as the event or events that may trigger a ''penalty rate'' as described in § 226.5a(b)(1)(iv)(A), the issuer may refer to the actions listed in the Penalty APR row, in describing the circumstances in which the introductory rate could be revoked. (*See* Sample G–10(C) in the disclosure labeled ''Loss of Introductory APR'' directly beneath the table for additional guidance on the level of detail in which to describe the circumstances in which an introductory rate could be revoked.) A card issuer will be deemed to meet the standard to clearly and

conspicuously disclose the information required by § 226.5a(b)(1)(iv)(B) if the issuer uses the format shown in Sample G–10(C) to disclose this information.

iii. *Introductory rates—limitations on revocation.* Issuers that are disclosing an introductory rate are prohibited by § 226.55 from increasing or revoking the introductory rate before it expires unless the consumer fails to make a required minimum periodic payment within 60 days after the due date for the payment. In making the required disclosure pursuant to § 226.5a(b)(1)(iv)(B), issuers should describe this circumstance directly beneath the table as ''make a late payment.''

6. *Rates that depend on consumer's creditworthiness.* i. *In general.* The card issuer, at its option, may disclose the possible rates that may apply as either specific rates, or a range of rates. For example, if there are three possible rates that may apply (9.99, 12.99 or 17.99 percent), an issuer may disclose specific rates (9.99, 12.99 or 17.99 percent) or a range of rates (9.99 to 17.99 percent). The card issuer may not disclose only the lowest, highest or median rate that could apply. (*See* Samples G–10(B) and G–10(C) for guidance on how to disclose a range of rates.)

ii. *Penalty rates.* If the rate is a penalty rate, as described in § 226.5a(b)(1)(iv), the card issuer at its option may disclose the highest rate that could apply, instead of disclosing the specific rates or the range of rates that could apply. For example, if the penalty rate could be up to 28.99 percent, but the issuer may impose a penalty rate that is less than that rate depending on factors at the time the penalty rate is imposed, the issuer may disclose the penalty rate as ''up to'' 28.99 percent. The issuer also must include a statement that the penalty rate for which the consumer may qualify will depend on the consumer's creditworthiness, and other factors if applicable.

iii. *Other factors.* Section 226.5a(b)(1)(v) applies even if other factors are used in combination with a consumer's creditworthiness to determine the rate for which a consumer may qualify at account opening. For example, § 226.5a(b)(1)(v) would apply if the issuer considers the type of purchase the consumer is making at the time the consumer opens the account, in combination with the consumer's creditworthiness, to determine the rate for which the consumer may qualify at account opening. If other factors are considered, the issuer should amend the statement about creditworthiness, to indicate that the rate for which the consumer may qualify at account opening will depend on the consumer's creditworthiness and other factors. Nonetheless, § 226.5a(b)(1)(v) does not apply if a consumer's creditworthiness is not one of the factors that will determine the rate for which the consumer may qualify at account opening (for example, if the rate is based solely on the type of purchase that the consumer is making at the time the consumer opens the account, or is based solely on whether the consumer has other banking relationships with the card issuer).

7. *Rate based on another rate on the account.* In some cases, one rate may be based on another rate on the account. For example, assume that a penalty rate as described in § 226.5a(b)(1)(iv)(A) is determined by adding 5 percentage points to the current purchase rate, which is 10 percent. In this example, the card issuer in disclosing the penalty rate must disclose 15 percent as the current penalty rate. If the purchase rate is a variable rate, then the penalty rate also is a variable rate. In that case, the card issuer also must disclose the fact that the penalty rate may vary and how the rate is determined, such as ''This APR may vary with the market based on the Prime Rate.'' In describing the penalty rate, the issuer shall not disclose in the table the amount of the margin or spread added to the current purchase rate to determine the penalty rate, such as describing that the penalty rate is determined by adding 5 percentage points to the purchase rate. (*See* § 226.5a(b)(1)(i) and comment 5a(b)(1)–2 for further guidance on describing a variable rate.)

8. *Rates.* The only rates that shall be disclosed in the table are annual percentage rates determined under § 226.14(b). Periodic rates shall not be disclosed in the table.

9. *Deferred interest or similar transactions.* An issuer offering a deferred interest or similar plan, such as a promotional program that provides that a consumer will not be obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time, may not disclose a 0% rate as the rate applicable to deferred interest or similar transactions if there are any circumstances under which the consumer will be obligated for interest on such transactions for the deferred interest or similar period.

5a(b)(2) Fees for issuance or availability.

1. *Membership fees.* Membership fees for opening an account must be disclosed under this paragraph. A membership fee to join an organization that provides a credit or charge card as a privilege of membership must be disclosed only if the card is issued automatically upon membership. Such a fee shall not be disclosed in the table if membership results merely in eligibility to apply for an account.

2. *Enhancements.* Fees for optional services in addition to basic membership privileges in a credit or charge card account (for example, travel insurance or card-registration services) shall not be disclosed in the table if the basic account may be opened without paying such fees. Issuing a card to each primary cardholder (not authorized users) is considered a basic membership privilege and fees for additional cards, beyond the first card on the account, must be disclosed as a fee for issuance or availability. Thus, a fee to obtain an additional card on the account beyond the first card (so that each cardholder would have his or her own card) must be disclosed in the table as a fee for issuance or availability under § 226.5a(b)(2). This fee must be disclosed even if the fee is optional; that is, if the fee is charged only if the cardholder requests one or more additional cards. (*See* the available credit disclosure in § 226.5a(b)(14).)

3. *One-time fees.* Disclosure of non-periodic fees is limited to fees related to opening the account, such as one-time membership or participation fees, or an application fee that is excludable from the finance charge under § 226.4(c)(1). The following are examples of fees that shall not be disclosed in the table:

i. Fees for reissuing a lost or stolen card.

ii. Statement reproduction fees.

4. *Waived or reduced fees.* If fees required to be disclosed are waived or reduced for a limited time, the introductory fees or the fact of fee waivers may be provided in the table in addition to the required fees if the card issuer also discloses how long the reduced fees or waivers will remain in effect.

5. *Periodic fees and one-time fees.* A card issuer disclosing a periodic fee must disclose the amount of the fee, how frequently it will be imposed, and the annualized amount of the fee. A card issuer disclosing a non-periodic fee must disclose that the fee is a one-time fee. (*See* Sample G–10(C) for guidance on how to meet these requirements.)

5a(b)(3) Fixed finance charge; minimum interest charge.

1. *Example of brief statement. See* Samples G–10(B) and G–10(C) for guidance on how to provide a brief description of a minimum interest charge.

2. *Adjustment of $1.00 threshold amount.* Consistent with § 226.5a(b)(3), the Board will publish adjustments to

the $1.00 threshold amount, as appropriate.

5a(b)(4) Transaction charges.

1. *Charges imposed by person other than card issuer.* Charges imposed by a third party, such as a seller of goods, shall not be disclosed in the table under this section; the third party would be responsible for disclosing the charge under § 226.9(d)(1).

2. *Foreign transaction fees.* A transaction charge imposed by the card issuer for the use of the card for purchases includes any fee imposed by the issuer for purchases in a foreign currency or that take place outside the United States or with a foreign merchant. (*See* comment 4(a)–4 for guidance on when a foreign transaction fee is considered charged by the card issuer.) If an issuer charges the same foreign transaction fee for purchases and cash advances in a foreign currency, or that take place outside the United States or with a foreign merchant, the issuer may disclose this foreign transaction fee as shown in Samples G–10(B) and G–10(C). Otherwise, the issuer must revise the foreign transaction fee language shown in Samples G–10(B) and G–10(C) to disclose clearly and conspicuously the amount of the foreign transaction fee that applies to purchases and the amount of the foreign transaction fee that applies to cash advances.

5a(b)(5) Grace period.

1. *How grace period disclosure is made.* The card issuer must state any conditions on the applicability of the grace period. An issuer that offers a grace period on all purchases and conditions the grace period on the consumer paying his or her outstanding balance in full by the due date each billing cycle, or on the consumer paying the outstanding balance in full by the due date in the previous and/or the current billing cycle(s) will be deemed to meet these requirements by providing the following disclosure, as applicable: ''Your due date is [at least] ___ days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month.''

2. *No grace period.* The issuer may use the following language to describe that no grace period on any purchases is offered, as applicable: ''We will begin charging interest on purchases on the transaction date.''

3. *Grace period on some purchases.* If the issuer provides a grace period on some types of purchases but no grace period on others, the issuer may combine and revise the language in comments 5a(b)(5)–1 and –2 as appropriate to describe to which types of purchases a grace period applies and to which types of purchases no grace period is offered.

5a(b)(6) Balance computation method.

1. *Form of disclosure.* In cases where the card issuer uses a balance computation method that is identified by name in the regulation, the card issuer must disclose below the table only the name of the method. In cases where the card issuer uses a balance computation method that is not identified by name in the regulation, the disclosure below the table must clearly explain the method in as much detail as set forth in the descriptions of balance methods in § 226.5a(g). The explanation need not be as detailed as that required for the disclosures under § 226.6(b)(4)(i)(D). (*See* the commentary to § 226.5a(g) for guidance on particular methods.)

2. *Determining the method.* In determining which balance computation method to disclose for purchases, the card issuer must assume that a purchase balance will exist at the end of any grace period. Thus, for example, if the average daily balance method will include new purchases only if purchase balances are not paid within the grace period, the card issuer would disclose the name of the average daily balance method that includes new purchases. The card issuer must not assume the existence of a purchase balance, however, in making other disclosures under § 226.5a(b).

5a(b)(7) Statement on charge card payments.

1. *Applicability and content.* The disclosure that charges are payable upon receipt of the periodic statement is applicable only to charge card accounts. In making this disclosure, the card issuer may make such modifications as are necessary to more accurately reflect the circumstances of repayment under the account. For example, the disclosure might read, ''Charges are due and payable upon receipt of the periodic statement and must be paid no later than 15 days after receipt of such statement.''

5a(b)(8) Cash advance fee.

1. *Content. See* Samples G–10(B) and G–10(C) for guidance on how to disclose clearly and conspicuously the cash advance fee.

2. *Foreign cash advances.* Cash advance fees required to be disclosed under § 226.5a(b)(8) include any charge imposed by the card issuer for cash advances in a foreign currency or that take place outside the United States or with a foreign merchant. (*See* comment 4(a)–4 for guidance on when a foreign transaction fee is considered charged by the card issuer.) If an issuer charges the same foreign transaction fee for purchases and cash advances in a foreign currency or that take place outside the United States or with a foreign merchant, the issuer may disclose this foreign transaction fee as shown in Samples G–10(B) and (C). Otherwise, the issuer must revise the foreign transaction fee language shown in Samples G–10(B) and (C) to disclose clearly and conspicuously the amount of the foreign transaction fee that applies to purchases and the amount of the foreign transaction fee that applies to cash advances.

3. *ATM fees.* An issuer is not required to disclose pursuant to § 226.5a(b)(8) any charges imposed on a cardholder by an institution other than the card issuer for the use of the other institution's ATM in a shared or interchange system.

5a(b)(9) Late payment fee.

1. *Applicability.* The disclosure of the fee for a late payment includes only those fees that will be imposed for actual, unanticipated late payments. (*See* the commentary to § 226.4(c)(2) for additional guidance on late payment fees. *See* Samples G–10(B) and G–10(C) for guidance on how to disclose clearly and conspicuously the late payment fee.)

5a(b)(10) Over-the-limit fee.

1. *Applicability.* The disclosure of fees for exceeding a credit limit does not include fees for other types of default or for services related to exceeding the limit. For example, no disclosure is required of fees for reinstating credit privileges or fees for the dishonor of checks on an account that, if paid, would cause the credit limit to be exceeded. (*See* Samples G–10(B) and G–10(C) for guidance on how to disclose clearly and conspicuously the over-the-limit fee.)

5a(b)(13) Required insurance, debt cancellation, or debt suspension coverage.

1. *Content. See* Sample G–10(B) for guidance on how to comply with the requirements in § 226.5a(b)(13).

5a(b)(14) Available credit.

1. *Calculating available credit.* If the 15 percent threshold test is met, the issuer must disclose the available credit excluding optional fees, and the available credit including optional fees. In calculating the available credit to disclose in the table, the issuer must consider all fees for the issuance or availability of credit described in § 226.5a(b)(2), and any security deposit, that will be imposed and charged to the account when the account is opened, such as one-time issuance and set-up fees. For example, in calculating the available credit, issuers must consider the first year's annual fee and the first month's maintenance fee (as applicable)

if they are charged to the account on the first billing statement. In calculating the amount of the available credit including optional fees, if optional fees could be charged multiple times, the issuer shall assume that the optional fee is only imposed once. For example, if an issuer charges a fee for each additional card issued on the account, the issuer in calculating the amount of the available credit including optional fees may assume that the cardholder requests only one additional card. In disclosing the available credit, the issuer shall round down the available credit amount to the nearest whole dollar.

2. *Content. See* Sample G–10(C) for guidance on how to provide the disclosure required by § 226.5a(b)(14) clearly and conspicuously.

5a(b)(15) Web site reference.

1. *Content. See* Samples G–10(B) and G–10(C) for guidance on disclosing a reference to the Web site established by the Board and a statement that consumers may obtain on the Web site information about shopping for and using credit card accounts.

5a(c) Direct mail and electronic applications and solicitations.

1. *Mailed publications.* Applications or solicitations contained in generally available publications mailed to consumers (such as subscription magazines) are subject to the requirements applicable to *take-ones* in § 226.5a(e), rather than the direct mail requirements of § 226.5a(c). However, if a primary purpose of a card issuer's mailing is to offer credit or charge card accounts—for example, where a card issuer ''prescreens'' a list of potential cardholders using credit criteria, and then mails to the targeted group its catalog containing an application or a solicitation for a card account—the direct mail rules apply. In addition, a card issuer may use a single application form as a *take-one* (in racks in public locations, for example) and for direct mailings, if the card issuer complies with the requirements of § 226.5a(c) even when the form is used as a *take-one*—that is, by presenting the required § 226.5a disclosures in a tabular format. When used in a direct mailing, the credit term disclosures must be accurate as of the mailing date whether or not the § 226.5a(e)(1)(ii) and (e)(1)(iii) disclosures are included; when used in a *take-one,* the disclosures must be accurate for as long as the *take-one* forms remain available to the public if the § 226.5a(e)(1)(ii) and (e)(1)(iii) disclosures are omitted. (If those disclosures are included in the take-one, the credit term disclosures need only be accurate as of the printing date.)

5a(d) Telephone applications and solicitations.

1. *Coverage.* i. This paragraph applies if:

A. A telephone conversation between a card issuer and consumer may result in the issuance of a card as a consequence of an issuer-initiated offer to open an account for which the issuer does not require any application (that is, a *prescreened* telephone solicitation).

B. The card issuer initiates the contact and at the same time takes application information over the telephone.

ii. This paragraph does not apply to:

A. Telephone applications initiated by the consumer.

B. Situations where no card will be issued—because, for example, the consumer indicates that he or she does not want the card, or the card issuer decides either during the telephone conversation or later not to issue the card.

2. *Right to reject the plan.* The right to reject the plan referenced in this paragraph is the same as the right to reject the plan described in § 226.5(b)(1)(iv). If an issuer substitutes the account-opening summary table described in § 226.6(b)(1) in lieu of the disclosures specified in § 226.5a(d)(2)(ii), the disclosure specified in § 226.5a(d)(2)(ii)(B) must appear in the table, if the issuer is required to do so pursuant to § 226.6(b)(2)(xiii). Otherwise, the disclosure specified in § 226.5a(d)(2)(ii)(B) may appear either in or outside the table containing the required credit disclosures.

3. *Substituting account-opening table for alternative written disclosures.* An issuer may substitute the account-opening summary table described in § 226.6(b)(1) in lieu of the disclosures specified in § 226.5a(d)(2)(ii).

5a(e) Applications and solicitations made available to general public.

1. *Coverage.* Applications and solicitations made available to the general public include what are commonly referred to as *take-one* applications typically found at counters in banks and retail establishments, as well as applications contained in catalogs, magazines and other generally available publications. In the case of credit unions, this paragraph applies to applications and solicitations to open card accounts made available to those in the general field of membership.

2. *In-person applications and solicitations.* In-person applications and solicitations initiated by a card issuer are subject to § 226.5a(f), not § 226.5a(e). (*See* § 226.5a(f) and accompanying commentary for rules relating to in-person applications and solicitations.)

3. *Toll-free telephone number.* If a card issuer, in complying with any of the disclosure options of § 226.5a(e), provides a telephone number for consumers to call to obtain credit information, the number must be toll-free for nonlocal calls made from an area code other than the one used in the card issuer's dialing area. Alternatively, a card issuer may provide any telephone number that allows a consumer to call for information and reverse the telephone charges.

5a(e)(1) Disclosure of required credit information.

1. *Date of printing.* Disclosure of the month and year fulfills the requirement to disclose the date an application was printed.

2. *Form of disclosures.* The disclosures specified in § 226.5a(e)(1)(ii) and (e)(1)(iii) may appear either in or outside the table containing the required credit disclosures.

5a(e)(2) No disclosure of credit information.

1. *When disclosure option available.* A card issuer may use this option only if the issuer does not include on or with the application or solicitation any statement that refers to the credit disclosures required by § 226.5a(b). Statements such as *no annual fee*, *low interest rate*, *favorable rates*, and *low costs* are deemed to refer to the required credit disclosures and, therefore, may not be included on or with the solicitation or application, if the card issuer chooses to use this option.

5a(e)(3) Prompt response to requests for information.

1. *Prompt disclosure.* Information is promptly disclosed if it is given within 30 days of a consumer's request for information but in no event later than delivery of the credit or charge card.

2. *Information disclosed.* When a consumer requests credit information, card issuers need not provide all the required credit disclosures in all instances. For example, if disclosures have been provided in accordance with § 226.5a(e)(1) and a consumer calls or writes a card issuer to obtain information about changes in the disclosures, the issuer need only provide the items of information that have changed from those previously disclosed on or with the application or solicitation. If a consumer requests information about particular items, the card issuer need only provide the requested information. If, however, the card issuer has made disclosures in accordance with the option in § 226.5a(e)(2) and a consumer calls or writes the card issuer requesting information about costs, all the required disclosure information must be given.

3. *Manner of response.* A card issuer's response to a consumer's request for credit information may be provided orally or in writing, regardless of the manner in which the consumer's request is received by the issuer. Furthermore, the card issuer must provide the information listed in § 226.5a(e)(1). Information provided in writing need not be in a tabular format.

5a(f) In-person applications and solicitations.

1. *Coverage.* i. This paragraph applies if:

A. An in-person conversation between a card issuer and a consumer may result in the issuance of a card as a consequence of an issuer-initiated offer to open an account for which the issuer does not require any application (that is, a *preapproved* in-person solicitation).

B. The card issuer initiates the contact and at the same time takes application information in person. For example, the following are covered:

1. A consumer applies in person for a car loan at a financial institution and the loan officer invites the consumer to apply for a credit or charge card account; the consumer accepts the invitation and submits an application.

2. An employee of a retail establishment, in the course of processing a sales transaction using a bank credit card, asks a customer if he or she would like to apply for the retailer's credit or charge card; the customer responds affirmatively and submits an application.

ii. This paragraph does not apply to:

A. In-person applications initiated by the consumer.

B. Situations where no card will be issued—because, for example, the consumer indicates that he or she does not want the card, or the card issuer decides during the in-person conversation not to issue the card.

§ 226.5b Requirements for Home-equity Plans.

* * * * *

5b(a) Form of Disclosure.

5b(a)(1) General.

1. *Written disclosures.* The disclosures required under this section must be clear and conspicuous and in writing, but need not be in a form the consumer can keep. (*See* the commentary to § 226.6(a)(3) for special rules when disclosures required under § 226.5b(d) are given in a retainable form.)

* * * * *

5b(f) Limitations on Home-equity Plans.

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Paragraph 5b(f)(3)(vi).

* * * * *

4. *Reinstatement of credit privileges.* Creditors are responsible for ensuring that credit privileges are restored as soon as reasonably possible after the condition that permitted the creditor's action ceases to exist. One way a creditor can meet this responsibility is to monitor the line on an ongoing basis to determine when the condition ceases to exist. The creditor must investigate the condition frequently enough to assure itself that the condition permitting the freeze continues to exist. The frequency with which the creditor must investigate to determine whether a condition continues to exist depends upon the specific condition permitting the freeze. As an alternative to such monitoring, the creditor may shift the duty to the consumer to request reinstatement of credit privileges by providing a notice in accordance with § 226.9(c)(1)(iii). A creditor may require a reinstatement request to be in writing if it notifies the consumer of this requirement on the notice provided under § 226.9(c)(1)(iii). Once the consumer requests reinstatement, the creditor must promptly investigate to determine whether the condition allowing the freeze continues to exist. Under this alternative, the creditor has a duty to investigate only upon the consumer's request.

* * * * *

§ 226.6 Account-opening Disclosures.

6(a) Rules affecting home-equity plans.

(a) *Rules affecting home-equity plans.* The requirements of paragraph (a) of this section apply only to home-equity plans subject to the requirements of § 226.5b. A creditor shall disclose the items in this section, to the extent applicable:

(1) *Finance charge.* The circumstances under which a finance charge will be imposed and an explanation of how it will be determined, as follows.

(i) A statement of when finance charges begin to accrue, including an explanation of whether or not any time period exists within which any credit extended may be repaid without incurring a finance charge. If such a time period is provided, a creditor may, at its option and without disclosure, impose no finance charge when payment is received after the time period's expiration.

(ii) A disclosure of each periodic rate that may be used to compute the finance charge, the range of balances to which it is applicable,[11] and the corresponding annual percentage rate.[12] If a creditor offers a variable-rate plan, the creditor shall also disclose: the circumstances under which the rate(s) may increase; any limitations on the increase; and the effect(s) of an increase. When different periodic rates apply to different types of transactions, the types of transactions to which the periodic rates shall apply shall also be disclosed. A creditor is not required to adjust the range of balances disclosure to reflect the balance below which only a minimum charge applies.

[11] [Reserved]

[12] [Reserved]

(iii) An explanation of the method used to determine the balance on which the finance charge may be computed.

(iv) An explanation of how the amount of any finance charge will be determined,[13] including a description of how any finance charge other than the periodic rate will be determined.

[13] [Reserved]

(2) *Other charges.* The amount of any charge other than a finance charge that may be imposed as part of the plan, or an explanation of how the charge will be determined.

(3) *Home-equity plan information.* The following disclosures described in § 226.5b(d), as applicable:

(i) A statement of the conditions under which the creditor may take certain action, as described in § 226.5b(d)(4)(i), such as terminating the plan or changing the terms.

(ii) The payment information described in § 226.5b(d)(5)(i) and (ii) for both the draw period and any repayment period.

(iii) A statement that negative amortization may occur as described in § 226.5b(d)(9).

(iv) A statement of any transaction requirements as described in § 226.5b(d)(10).

(v) A statement regarding the tax implications as described in § 226.5b(d)(11).

(vi) A statement that the annual percentage rate imposed under the plan does not include costs other than interest as described in § 226.5b(d)(6) and (d)(12)(ii).

(vii) The variable-rate disclosures described in § 226.5b(d)(12)(viii), (d)(12)(x), (d)(12)(xi), and (d)(12)(xii), as well as the disclosure described in § 226.5b(d)(5)(iii), unless the disclosures provided with the application were in a form the consumer could keep and included a representative payment example for the category of payment option chosen by the consumer.

(4) *Security interests.* The fact that the creditor has or will acquire a security interest in the property purchased under the plan, or in other property identified by item or type.

(5) *Statement of billing rights.* A statement that outlines the consumer's rights and the creditor's responsibilities

under §§ 226.12(c) and 226.13 and that is substantially similar to the statement found in Model Form G–3 or, at the creditor's option G–3(A), in Appendix G to this part.

6(b) Rules affecting open-end (not home-secured) plans.

6(b)(1) Form of disclosures; tabular format for open-end (not home-secured) plans.

1. *Relation to tabular summary for applications and solicitations. See* commentary to § 226.5a(a), (b), and (c) regarding format and content requirements, except for the following:

i. Creditors must use the accuracy standard for annual percentage rates in § 226.6(b)(4)(ii)(G).

ii. Generally, creditors must disclose the specific rate for each feature that applies to the account. If the rates on an open-end (not home-secured) plan vary by State and the creditor is providing the account-opening table in person at the time the plan is established in connection with financing the purchase of goods or services the creditor may, at its option, disclose in the account-opening table (A) the rate applicable to the consumer's account, or (B) the range of rates, if the disclosure includes a statement that the rate varies by State and refers the consumer to the account agreement or other disclosure provided with the account-opening table where the rate applicable to the consumer's account is disclosed.

iii. Creditors must explain whether or not a grace period exists for all features on the account. The row heading ''Paying Interest'' must be used if any one feature on the account does not have a grace period.

iv. Creditors must name the balance computation method used for each feature of the account and state that an explanation of the balance computation method(s) is provided in the account-opening disclosures.

v. Creditors must state that consumers' billing rights are provided in the account-opening disclosures.

vi. If fees on an open-end (not home-secured) plan vary by State and the creditor is providing the account-opening table in person at the time the plan is established in connection with financing the purchase of goods or services the creditor may, at its option, disclose in the account-opening table (A) the specific fee applicable to the consumer's account, or (B) the range of fees, if the disclosure includes a statement that the amount of the fee varies by State and refers the consumer to the account agreement or other disclosure provided with the account-opening table where the fee applicable to the consumer's account is disclosed.

vii. Creditors that must disclose the amount of available credit must state the initial credit limit provided on the account.

viii. Creditors must disclose directly beneath the table the circumstances under which an introductory rate may be revoked and the rate that will apply after the introductory rate is revoked. Issuers of credit card accounts under an open-end (not home-secured) consumer credit plan are subject to limitations on the circumstances under which an introductory rate may be revoked. (*See* comment 5a(b)(1)–4 for guidance on how a card issuer may disclose the circumstances under which an introductory rate may be revoked.)

ix. The applicable forms providing safe harbors for account-opening tables are under appendix G–17 to part 226.

2. *Clear and conspicuous standard. See* comment 5(a)(1)–1 for the clear and conspicuous standard applicable to § 226.6 disclosures.

3. *Terminology.* Section 226.6(b)(1) generally requires that the headings, content, and format of the tabular disclosures be substantially similar, but need not be identical, to the tables in appendix G to part 226; but *see* § 226.5(a)(2) for terminology requirements applicable to § 226.6(b).

6(b)(2) Required disclosures for account-opening table for open-end (not home-secured) plans.

6(b)(2)(iii) Fixed finance charge; minimum interest charge.

1. *Example of brief statement. See* Samples G–17(B), G–17(C), and G–17(D) for guidance on how to provide a brief description of a minimum interest charge.

6(b)(2)(v) Grace period.

1. *Grace period.* Creditors must state any conditions on the applicability of the grace period. A creditor that offers a grace period on all types of transactions for the account and conditions the grace period on the consumer paying his or her outstanding balance in full by the due date each billing cycle, or on the consumer paying the outstanding balance in full by the due date in the previous and/or the current billing cycle(s) will be deemed to meet these requirements by providing the following disclosure, as applicable: ''Your due date is [at least] ___ days after the close of each billing cycle. We will not charge you any interest on your account if you pay your entire balance by the due date each month.''

2. *No grace period.* Creditors may use the following language to describe that no grace period is offered, as applicable: ''We will begin charging interest on [applicable transactions] on the transaction date.''

3. *Grace period on some features. See* Samples G–17(B) and G–17(C) for guidance on complying with § 226.6(b)(2)(v) when a creditor offers a grace period for purchases but no grace period on balance transfers and cash advances.

6(b)(2)(vi) Balance computation method.

1. *Content. See* Samples G–17(B) and G–17(C) for guidance on how to disclose the balance computation method where the same method is used for all features on the account.

6(b)(2)(xiii) Available credit.

1. *Right to reject the plan.* Creditors may use the following language to describe consumers' right to reject a plan after receiving account-opening disclosures: ''You may still reject this plan, provided that you have not yet used the account or paid a fee after receiving a billing statement. If you do reject the plan, you are not responsible for any fees or charges.''

6(b)(3) Disclosure of charges imposed as part of open-end (not home-secured) plans.

1. *When finance charges accrue.* Creditors are not required to disclose a specific date when a cost that is a finance charge under § 226.4 will begin to accrue.

2. *Grace periods.* In disclosing in the account agreement or disclosure statement whether or not a grace period exists, the creditor need not use any particular descriptive phrase or term. However, the descriptive phrase or term must be sufficiently similar to the disclosures provided pursuant to §§ 226.5a(b)(5) and 226.6(b)(2)(v) to satisfy a creditor's duty to provide consistent terminology under § 226.5(a)(2).

3. *No finance charge imposed below certain balance.* Creditors are not required to disclose the fact that no finance charge is imposed when the outstanding balance is less than a certain amount or the balance below which no finance charge will be imposed.

Paragraph 6(b)(3)(ii).

1. *Failure to use the plan as agreed.* Late payment fees, over-the-limit fees, and fees for payments returned unpaid are examples of charges resulting from consumers' failure to use the plan as agreed.

2. *Examples of fees that affect the plan.* Examples of charges the payment, or nonpayment, of which affects the consumer's account are:

i. *Access to the plan.* Fees for using the card at the creditor's ATM to obtain a cash advance, fees to obtain additional cards including replacements for lost or stolen cards, fees to expedite delivery of

cards or other credit devices, application and membership fees, and annual or other participation fees identified in § 226.4(c)(4).

ii. *Amount of credit extended.* Fees for increasing the credit limit on the account, whether at the consumer's request or unilaterally by the creditor.

iii. *Timing or method of billing or payment.* Fees to pay by telephone or via the Internet.

3. *Threshold test.* If the creditor is unsure whether a particular charge is a cost imposed as part of the plan, the creditor may at its option consider such charges as a cost imposed as part of the plan for purposes of the Truth in Lending Act.

Paragraph 6(b)(3)(iii)(B).

1. *Fees for package of services.* A fee to join a credit union is an example of a fee for a package of services that is not imposed as part of the plan, even if the consumer must join the credit union to apply for credit. In contrast, a membership fee is an example of a fee for a package of services that is considered to be imposed as part of a plan where the primary benefit of membership in the organization is the opportunity to apply for a credit card, and the other benefits offered (such as a newsletter or a member information hotline) are merely incidental to the credit feature.

6(b)(4) Disclosure of rates for open-end (not home-secured) plans.

Paragraph 6(b)(4)(i)(B).

1. *Range of balances.* Creditors are not required to disclose the range of balances:

i. If only one periodic interest rate may be applied to the entire account balance.

ii. If only one periodic interest rate may be applied to the entire balance for a feature (for example, cash advances), even though the balance for another feature (purchases) may be subject to two rates (a 1.5% monthly periodic interest rate on purchase balances of $0–$500, and a 1% periodic interest rate for balances above $500). In this example, the creditor must give a range of balances disclosure for the purchase feature.

Paragraph 6(b)(4)(i)(D).

1. *Explanation of balance computation method.* Creditors do not provide a sufficient explanation of a balance computation method by using a shorthand phrase such as ''previous balance method'' or the name of a balance computation method listed in § 226.5a(g). (*See* Model Clauses G–1(A) in appendix G to part 226. *See* § 226.6(b)(2)(vi) regarding balance computation descriptions in the account-opening summary.)

2. *Allocation of payments.* Creditors may, but need not, explain how payments and other credits are allocated to outstanding balances.

6(b)(4)(ii) Variable-rate accounts.

1. *Variable-rate disclosures—coverage.*

i. *Examples.* Examples of open-end plans that permit the rate to change and are considered variable-rate plans include:

A. Rate changes that are tied to the rate the creditor pays on its six-month certificates of deposit.

B. Rate changes that are tied to Treasury bill rates.

C. Rate changes that are tied to changes in the creditor's commercial lending rate.

ii. Examples of open-end plans that permit the rate to change and are not considered variable-rate include:

A. Rate changes that are invoked under a creditor's contract reservation to increase the rate without reference to such an index or formula (for example, a plan that simply provides that the creditor reserves the right to raise its rates).

B. Rate changes that are triggered by a specific event such as an open-end credit plan in which the employee receives a lower rate contingent upon employment, and the rate increases upon termination of employment.

2. *Variable-rate plan—circumstances for increase.*

i. The following are examples that comply with the requirement to disclose circumstances under which the rate(s) may increase:

A. ''The Treasury bill rate increases.''

B. ''The Federal Reserve discount rate increases.''

ii. Disclosing the frequency with which the rate may increase includes disclosing when the increase will take effect; for example:

A. ''An increase will take effect on the day that the Treasury bill rate increases.''

B. ''An increase in the Federal Reserve discount rate will take effect on the first day of the creditor's billing cycle.''

3. *Variable-rate plan—limitations on increase.* In disclosing any limitations on rate increases, limitations such as the maximum increase per year or the maximum increase over the duration of the plan must be disclosed. When there are no limitations, the creditor may, but need not, disclose that fact. Legal limits such as usury or rate ceilings under State or Federal statutes or regulations need not be disclosed. Examples of limitations that must be disclosed include:

i. ''The rate on the plan will not exceed 25% annual percentage rate.''

ii. ''Not more than ½ of 1% increase in the annual percentage rate per year will occur.''

4. *Variable-rate plan—effects of increase.* Examples of effects of rate increases that must be disclosed include:

i. Any requirement for additional collateral if the annual percentage rate increases beyond a specified rate.

ii. Any increase in the scheduled minimum periodic payment amount.

5. *Discounted variable-rate plans.* In some variable-rate plans, creditors may set an initial interest rate that is not determined by the index or formula used to make later interest rate adjustments. Typically, this initial rate is lower than the rate would be if it were calculated using the index or formula.

i. For example, a creditor may calculate interest rates according to a formula using the six-month Treasury bill rate plus a 2 percent margin. If the current Treasury bill rate is 10 percent, the creditor may forgo the 2 percent spread and charge only 10 percent for a limited time, instead of setting an initial rate of 12 percent, or the creditor may disregard the index or formula and set the initial rate at 9 percent.

ii. When creditors disclose in the account-opening disclosures an initial rate that is not calculated using the index or formula for later rate adjustments, the disclosure should reflect:

A. The initial rate (expressed as a periodic rate and a corresponding annual percentage rate), together with a statement of how long the initial rate will remain in effect;

B. The current rate that would have been applied using the index or formula (also expressed as a periodic rate and a corresponding annual percentage rate); and

C. The other variable-rate information required by § 226.6(b)(4)(ii).

6(b)(4)(iii) Rate changes not due to index or formula.

1. *Events that cause the initial rate to change.*

i. *Changes based on expiration of time period.* If the initial rate will change at the expiration of a time period, creditors that disclose the initial rate in the account-opening disclosure must identify the expiration date and the fact that the initial rate will end at that time.

ii. *Changes based on specified contract terms.* If the account agreement provides that the creditor may change the initial rate upon the occurrence of specified event or events, the creditor must identify the events or events. Examples include the consumer not making the required minimum payment when due, or the termination of an

employee preferred rate when the employment relationship is terminated.

2. *Rate that will apply after initial rate changes.*

i. *Increased margins.* If the initial rate is based on an index and the rate may increase due to a change in the margin applied to the index, the creditor must disclose the increased margin. If more than one margin could apply, the creditor may disclose the highest margin.

ii. *Risk-based pricing.* In some plans, the amount of the rate change depends on how the creditor weighs the occurrence of events specified in the account agreement that authorize the creditor to change rates, as well as other factors. Creditors must state the increased rate that may apply. At the creditor's option, the creditor may state the possible rates as a range, or by stating only the highest rate that could be assessed. The creditor must disclose the period for which the increased rate will remain in effect, such as ''until you make three timely payments,'' or if there is no limitation, the fact that the increased rate may remain indefinitely.

3. *Effect of rate change on balances.* Creditors must disclose information to consumers about the balance to which the new rate will apply and the balance to which the current rate at the time of the change will apply. Card issuers subject to § 226.55 may be subject to certain restrictions on the application of increased rates to certain balances.

6(b)(5) Additional disclosures for open-end (not home-secured) plans.

6(b)(5)(i) Voluntary credit insurance, debt cancellation or debt suspension.

1. *Timing.* Under § 226.4(d), disclosures required to exclude the cost of voluntary credit insurance or debt cancellation or debt suspension coverage from the finance charge must be provided before the consumer agrees to the purchase of the insurance or coverage. Creditors comply with § 226.6(b)(5)(i) if they provide those disclosures in accordance with § 226.4(d). For example, if the disclosures required by § 226.4(d) are provided at application, creditors need not repeat those disclosures at account opening.

6(b)(5)(ii) Security interests.

1. *General.* Creditors are not required to use specific terms to describe a security interest, or to explain the type of security or the creditor's rights with respect to the collateral.

2. *Identification of property.* Creditors sufficiently identify collateral by type by stating, for example, *motor vehicle* or *household appliances.* (Creditors should be aware, however, that the Federal credit practices rules, as well as some State laws, prohibit certain security interests in household goods.) The creditor may, at its option, provide a more specific identification (for example, a model and serial number.)

3. *Spreader clause.* If collateral for preexisting credit with the creditor will secure the plan being opened, the creditor must disclose that fact. (Such security interests may be known as ''spreader'' or ''dragnet'' clauses, or as ''cross-collateralization'' clauses.) The creditor need not specifically identify the collateral; a reminder such as ''collateral securing other loans with us may also secure this loan'' is sufficient. At the creditor's option, a more specific description of the property involved may be given.

4. *Additional collateral.* If collateral is required when advances reach a certain amount, the creditor should disclose the information available at the time of the account-opening disclosures. For example, if the creditor knows that a security interest will be taken in household goods if the consumer's balance exceeds $1,000, the creditor should disclose accordingly. If the creditor knows that security will be required if the consumer's balance exceeds $1,000, but the creditor does not know what security will be required, the creditor must disclose on the initial disclosure statement that security will be required if the balance exceeds $1,000, and the creditor must provide a change-in-terms notice under § 226.9(c) at the time the security is taken. (*See* comment 6(b)(5)(ii)–2.)

5. *Collateral from third party.* Security interests taken in connection with the plan must be disclosed, whether the collateral is owned by the consumer or a third party.

6(b)(5)(iii) Statement of billing rights.

1. *See* the commentary to Model Forms G–3(A) and G–4(A).

§ 226.7 Periodic Statement.

1. *Multifeatured plans.* Some plans involve a number of different features, such as purchases, cash advances, or overdraft checking. Groups of transactions subject to different finance charge terms because of the dates on which the transactions took place are treated like different features for purposes of disclosures on the periodic statements. The commentary includes additional guidance for multifeatured plans.

7(a) Rules affecting home-equity plans.

The requirements of paragraph (a) of this section apply only to home-equity plans subject to the requirements of § 226.5b. Alternatively, a creditor subject to this paragraph may, at its option, comply with any of the requirements of paragraph (b) of this section; however, any creditor that chooses not to provide a disclosure under paragraph (a)(7) of this section must comply with paragraph (b)(6) of this section.

(1) *Previous balance.* The account balance outstanding at the beginning of the billing cycle.

(2) *Identification of transactions.* An identification of each credit transaction in accordance with § 226.8.

(3) *Credits.* Any credit to the account during the billing cycle, including the amount and the date of crediting. The date need not be provided if a delay in accounting does not result in any finance or other charge.

(4) *Periodic rates.* (i) Except as provided in paragraph (a)(4)(ii) of this section, each periodic rate that may be used to compute the finance charge, the range of balances to which it is applicable,[14] and the corresponding annual percentage rate.[15] If no finance charge is imposed when the outstanding balance is less than a certain amount, the creditor is not required to disclose that fact, or the balance below which no finance charge will be imposed. If different periodic rates apply to different types of transactions, the types of transactions to which the periodic rates apply shall also be disclosed. For variable-rate plans, the fact that the periodic rate(s) may vary.

[14] [Reserved]

[15] [Reserved]

(ii) *Exception.* An annual percentage rate that differs from the rate that would otherwise apply and is offered only for a promotional period need not be disclosed except in periods in which the offered rate is actually applied.

(5) *Balance on which finance charge computed.* The amount of the balance to which a periodic rate was applied and an explanation of how that balance was determined. When a balance is determined without first deducting all credits and payments made during the billing cycle, the fact and the amount of the credits and payments shall be disclosed.

(6) *Amount of finance charge and other charges.* Creditors may comply with paragraphs (a)(6) of this section, or with paragraph (b)(6) of this section, at their option.

(i) *Finance charges.* The amount of any finance charge debited or added to the account during the billing cycle, using the term finance charge. The components of the *finance charge* shall be individually itemized and identified to show the amount(s) due to the application of any periodic rates and the amounts(s) of any other type of finance

charge. If there is more than one periodic rate, the amount of the finance charge attributable to each rate need not be separately itemized and identified.

(ii) *Other charges*. The amounts, itemized and identified by type, of any charges other than finance charges debited to the account during the billing cycle.

(7) *Annual percentage rate*. At a creditor's option, when a finance charge is imposed during the billing cycle, the annual percentage rate(s) determined under § 226.14(c) using the term *annual percentage rate*.

(8) *Grace period*. The date by which or the time period within which the new balance or any portion of the new balance must be paid to avoid additional finance charges. If such a time period is provided, a creditor may, at its option and without disclosure, impose no finance charge if payment is received after the time period's expiration.

(9) *Address for notice of billing errors*. The address to be used for notice of billing errors. Alternatively, the address may be provided on the billing rights statement permitted by § 226.9(a)(2).

(10) *Closing date of billing cycle; new balance*. The closing date of the billing cycle and the account balance outstanding on that date.

7(b) Rules affecting open-end (not home-secured) plans.

1. *Deferred interest or similar transactions.* Creditors offer a variety of payment plans for purchases that permit consumers to avoid interest charges if the purchase balance is paid in full by a certain date. The following provides guidance for a deferred interest or similar plan where, for example, no interest charge is imposed on a $500 purchase made in January if the $500 balance is paid by March 31.

i. *Annual percentage rates.* Under § 226.7(b)(4), creditors must disclose each annual percentage rate that may be used to compute the interest charge. Under some plans with a deferred interest or similar feature, if the deferred interest balance is not paid by a certain date, March 31 in this example, interest charges applicable to the billing cycles between the date of purchase in January and March 31 may be imposed. Annual percentage rates that may apply to the deferred interest balance ($500 in this example) if the balance is not paid in full by March 31 must appear on periodic statements for the billing cycles between the date of purchase and March 31. However, if the consumer does not pay the deferred interest balance by March 31, the creditor is not required to identify, on the periodic statement disclosing the interest charge for the deferred interest balance, annual percentage rates that have been disclosed in previous billing cycles between the date of purchase and March 31.

ii. *Balances subject to periodic rates.* Under § 226.7(b)(5), creditors must disclose the balances subject to interest during a billing cycle. The deferred interest balance ($500 in this example) is not subject to interest for billing cycles between the date of purchase and March 31 in this example. Periodic statements sent for those billing cycles should not include the deferred interest balance in the balance disclosed under § 226.7(b)(5). This amount must be separately disclosed on periodic statements and identified by a term other than the term used to identify the balance disclosed under § 226.7(b)(5) (such as ''deferred interest balance''). During any billing cycle in which an interest charge on the deferred interest balance is debited to the account, the balance disclosed under § 226.7(b)(5) should include the deferred interest balance for that billing cycle.

iii. *Amount of interest charge.* Under § 226.7(b)(6)(ii), creditors must disclose interest charges imposed during a billing cycle. For some deferred interest purchases, the creditor may impose interest from the date of purchase if the deferred interest balance ($500 in this example) is not paid in full by March 31 in this example, but otherwise will not impose interest for billing cycles between the date of purchase and March 31. Periodic statements for billing cycles preceding March 31 in this example should not include in the interest charge disclosed under § 226.7(b)(6)(ii) the amounts a consumer may owe if the deferred interest balance is not paid in full by March 31. In this example, the February periodic statement should not identify as interest charges interest attributable to the $500 January purchase. This amount must be separately disclosed on periodic statements and identified by a term other than ''interest charge'' (such as ''contingent interest charge'' or ''deferred interest charge''). The interest charge on a deferred interest balance should be reflected on the periodic statement under § 226.7(b)(6)(ii) for the billing cycle in which the interest charge is debited to the account.

iv. *Due date to avoid obligation for finance charges under a deferred interest or similar program.* Section 226.7(b)(14) requires disclosure on periodic statements of the date by which any outstanding balance subject to a deferred interest or similar program must be paid in full in order to avoid the obligation for finance charges on such balance. This disclosure must appear on the front of the periodic statement for two billing cycles immediately preceding the billing cycle in which the disclosed date occurs. However, if the duration of the deferred interest period is such that the reminder cannot be given for the last two billing cycles immediately preceding the disclosed date, the disclosure must be included on all periodic statements during the deferred interest period. Assuming monthly billing cycles ending at month-end and a payment due date of the 25th of the following month for balances not subject to the deferred interest program, the following examples illustrate how a creditor may comply with the requirement in § 226.7(b)(14) to disclose the date by which payment in full of balances subject to the deferred interest program must occur in order to avoid the obligation to pay finance charges applicable to a deferred interest balance ($500 in this example):

A. If the creditor identifies March 31 as the payment-due date for the $500 purchase, the creditor must include the $500 purchase and its due date on the periodic statement reflecting activity for January sent on February 1, and the periodic statement reflecting activity for February sent on March 1. (For the periodic statement reflecting account activity for February sent on March 1, the creditor could also identify March 31 as the payment-due date for any other amounts that would normally be due on March 25.)

B. If the creditor opts to delay the end of the deferred interest period to coincide with the end of the grace period for balances not subject to the deferred interest program by permitting the consumer to avoid finance charges if the $500 is paid in full by April 25, the creditor must include the $500 purchase and its due date on the periodic statement reflecting activity for February sent on March 1, and the periodic statement reflecting activity for March sent on April 1. The creditor could also include the $500 purchase and its due date on the periodic statement reflecting activity for January sent on February 1.

C. If the purchase was made in December (instead of January), the creditor must include the $500 purchase and its due date on the periodic statement reflecting activity for January sent on February 1 and the periodic statement reflecting activity for February sent on March 1. The creditor also could include the $500 purchase and its due date on the periodic statement reflecting activity for December sent on January 1.

D. If the due date for the deferred interest balance is February 20 (instead of March 31), the creditor must include the $500 purchase and its due date on the periodic statement reflecting activity for January and sent on February 1.

7(b)(1) Previous balance.

1. *Credit balances.* If the previous balance is a credit balance, it must be disclosed in such a way so as to inform the consumer that it is a credit balance, rather than a debit balance.

2. *Multifeatured plans.* In a multifeatured plan, the previous balance may be disclosed either as an aggregate balance for the account or as separate balances for each feature (for example, a previous balance for purchases and a previous balance for cash advances). If separate balances are disclosed, a total previous balance is optional.

3. *Accrued finance charges allocated from payments.* Some open-end credit plans provide that the amount of the finance charge that has accrued since the consumer's last payment is directly deducted from each new payment, rather than being separately added to each statement and reflected as an increase in the obligation. In such a plan, the previous balance need not reflect finance charges accrued since the last payment.

7(b)(2) Identification of transactions.

1. *Multifeatured plans.* Creditors may, but are not required to, arrange transactions by feature (such as disclosing purchase transactions separately from cash advance transactions). Pursuant to § 226.7(b)(6), however, creditors must group all fees and all interest separately from transactions and may not disclose any fees or interest charges with transactions.

2. *Automated teller machine (ATM) charges imposed by other institutions in shared or interchange systems.* A charge imposed on the cardholder by an institution other than the card issuer for the use of the other institution's ATM in a shared or interchange system and included by the terminal-operating institution in the amount of the transaction need not be separately disclosed on the periodic statement.

7(b)(3) Credits.

1. *Identification—sufficiency.* The creditor need not describe each credit by type (returned merchandise, rebate of finance charge, *etc.*)—''credit'' would suffice—except if the creditor is using the periodic statement to satisfy the billing-error correction notice requirement. (*See* the commentary to § 226.13(e) and (f).) Credits may be distinguished from transactions in any way that is clear and conspicuous, for example, by use of debit and credit columns or by use of plus signs and/or minus signs.

2. *Date.* If only one date is disclosed (that is, the crediting date as required by the regulation), no further identification of that date is necessary. More than one date may be disclosed for a single entry, as long as it is clear which date represents the date on which credit was given.

3. *Totals.* A total of amounts credited during the billing cycle is not required.

7(b)(4) Periodic rates.

1. *Disclosure of periodic interest rates—whether or not actually applied.* Except as provided in § 226.7(b)(4)(ii), any periodic interest rate that may be used to compute finance charges, expressed as and labeled ''Annual Percentage Rate,'' must be disclosed whether or not it is applied during the billing cycle. For example:

i. If the consumer's account has both a purchase feature and a cash advance feature, the creditor must disclose the annual percentage rate for each, even if the consumer only makes purchases on the account during the billing cycle.

ii. If the annual percentage rate varies (such as when it is tied to a particular index), the creditor must disclose each annual percentage rate in effect during the cycle for which the statement was issued.

2. *Disclosure of periodic interest rates required only if imposition possible.* With regard to the periodic interest rate disclosure (and its corresponding annual percentage rate), only rates that *could have* been imposed during the billing cycle reflected on the periodic statement need to be disclosed. For example:

i. If the creditor is changing annual percentage rates effective during the next billing cycle (either because it is changing terms or because of a variable-rate plan), the annual percentage rates required to be disclosed under § 226.7(b)(4) are only those in effect during the billing cycle reflected on the periodic statement. For example, if the annual percentage rate applied during May was 18%, but the creditor will increase the rate to 21% effective June 1, 18% is the only required disclosure under § 226.7(b)(4) for the periodic statement reflecting the May account activity.

ii. If the consumer has an overdraft line that might later be expanded upon the consumer's request to include secured advances, the rates for the secured advance feature need not be given until such time as the consumer has requested and received access to the additional feature.

iii. If annual percentage rates applicable to a particular type of transaction changed after a certain date and the old rate is only being applied to transactions that took place prior to that date, the creditor need not continue to disclose the old rate for those consumers that have no outstanding balances to which that rate could be applied.

3. *Multiple rates—same transaction.* If two or more periodic rates are applied to the same balance for the same type of transaction (for example, if the interest charge consists of a monthly periodic interest rate of 1.5% applied to the outstanding balance and a required credit life insurance component calculated at 0.1% per month on the same outstanding balance), creditors must disclose the interest periodic rate, expressed as an 18% annual percentage rate and the range of balances to which it is applicable. Costs attributable to the credit life insurance component must be disclosed as a fee under § 226.7(b)(6)(iii).

4. *Fees.* Creditors that identify fees in accordance with § 226.7(b)(6)(iii) need not identify the periodic rate at which a fee would accrue if the fee remains unpaid. For example, assume a fee is imposed for a late payment in the previous cycle and that the fee, unpaid, would be included in the purchases balance and accrue interest at the rate for purchases. The creditor need not separately disclose that the purchase rate applies to the portion of the purchases balance attributable to the unpaid fee.

5. *Ranges of balances. See* comment 6(b)(4)(i)(B)–1. A creditor is not required to adjust the range of balances disclosure to reflect the balance below which only a minimum charge applies.

6. *Deferred interest transactions. See* comment 7(b)–1.iv.

7(b)(5) Balance on which finance charge computed.

1. *Split rates applied to balance ranges.* If split rates were applied to a balance because different portions of the balance fall within two or more balance ranges, the creditor need not separately disclose the portions of the balance subject to such different rates since the range of balances to which the rates apply has been separately disclosed. For example, a creditor could disclose a balance of $700 for purchases even though a monthly periodic rate of 1.5% applied to the first $500, and a monthly periodic rate of 1% to the remainder. This option to disclose a combined balance does not apply when the interest charge is computed by applying the split rates to each day's balance (in contrast, for example, to applying the rates to the average daily balance). In that case, the balances must be

disclosed using any of the options that are available if two or more daily rates are imposed. (*See* comment 7(b)(5)–4.)

2. *Monthly rate on average daily balance.* Creditors may apply a monthly periodic rate to an average daily balance.

3. *Multifeatured plans.* In a multifeatured plan, the creditor must disclose a separate balance (or balances, as applicable) to which a periodic rate was applied for each feature. Separate balances are not required, however, merely because a grace period is available for some features but not others. A total balance for the entire plan is optional. This does not affect how many balances the creditor must disclose—or may disclose—within each feature. (*See,* for example, comments 7(b)(5)–4 and 7(b)(4)–5.)

4. *Daily rate on daily balance.* i. If a finance charge is computed on the balance each day by application of one or more daily periodic interest rates, the balance on which the interest charge was computed may be disclosed in any of the following ways for each feature:

ii. If a single daily periodic interest rate is imposed, the balance to which it is applicable may be stated as:

A. A balance for each day in the billing cycle.

B. A balance for each day in the billing cycle on which the balance in the account changes.

C. The sum of the daily balances during the billing cycle.

D. The average daily balance during the billing cycle, in which case the creditor may, at its option, explain that the average daily balance is or can be multiplied by the number of days in the billing cycle and the periodic rate applied to the product to determine the amount of interest.

iii. If two or more daily periodic interest rates may be imposed, the balances to which the rates are applicable may be stated as:

A. A balance for each day in the billing cycle.

B. A balance for each day in the billing cycle on which the balance in the account changes.

C. Two or more average daily balances, each applicable to the daily periodic interest rates imposed for the time that those rates were in effect. The creditor may, at its option, explain that interest is or may be determined by (*1*) multiplying each of the average balances by the number of days in the billing cycle (or if the daily rate varied during the cycle, by multiplying by the number of days the applicable rate was in effect), (*2*) multiplying each of the results by the applicable daily periodic rate, and (*3*) adding these products together.

5. *Information to compute balance.* In connection with disclosing the interest charge balance, the creditor need not give the consumer all of the information necessary to compute the balance if that information is not otherwise required to be disclosed. For example, if current purchases are included from the date they are posted to the account, the posting date need not be disclosed.

6. *Non-deduction of credits.* The creditor need not specifically identify the total dollar amount of credits not deducted in computing the finance charge balance. Disclosure of the amount of credits not deducted is accomplished by listing the credits (§ 226.7(b)(3)) and indicating which credits will not be deducted in determining the balance (for example, ''credits after the 15th of the month are not deducted in computing the interest charge.'').

7. *Use of one balance computation method explanation when multiple balances disclosed.* Sometimes the creditor will disclose more than one balance to which a periodic rate was applied, even though each balance was computed using the same balance computation method. For example, if a plan involves purchases and cash advances that are subject to different rates, more than one balance must be disclosed, even though the same computation method is used for determining the balance for each feature. In these cases, one explanation or a single identification of the name of the balance computation method is sufficient. Sometimes the creditor separately discloses the portions of the balance that are subject to different rates because different portions of the balance fall within two or more balance ranges, even when a combined balance disclosure would be permitted under comment 7(b)(5)–1. In these cases, one explanation or a single identification of the name of the balance computation method is also sufficient (assuming, of course, that all portions of the balance were computed using the same method).

8. *Deferred interest transactions. See* comment 7(b)–1.iv.

7(b)(6) Charges imposed.

1. *Examples of charges. See* commentary to § 226.6(b)(3).

2. *Fees.* Costs attributable to periodic rates other than interest charges shall be disclosed as a fee. For example, if a consumer obtains credit life insurance that is calculated at 0.1% per month on an outstanding balance and a monthly interest rate of 1.5% applies to the same balance, the creditor must disclose the dollar cost attributable to interest as an ''interest charge'' and the credit insurance cost as a ''fee.''

3. *Total fees for calendar year to date.*

i. *Monthly statements.* Some creditors send monthly statements but the statement periods do not coincide with the calendar month. For creditors sending monthly statements, the following comply with the requirement to provide calendar year-to-date totals.

A. A creditor may disclose a calendar-year-to-date total at the end of the calendar year by aggregating fees for 12 monthly cycles, starting with the period that begins during January and finishing with the period that begins during December. For example, if statement periods begin on the 10th day of each month, the statement covering December 10, 2011 through January 9, 2012, may disclose the year-to-date total for fees imposed from January 10, 2011, through January 9, 2012. Alternatively, the creditor could provide a statement for the cycle ending January 9, 2012, showing the year-to-date total for fees imposed January 1, 2011, through December 31, 2011.

B. A creditor may disclose a calendar-year-to-date total at the end of the calendar year by aggregating fees for 12 monthly cycles, starting with the period that begins during December and finishing with the period that begins during November. For example, if statement periods begin on the 10th day of each month, the statement covering November 10, 2011 through December 9, 2011, may disclose the year-to-date total for fees imposed from December 10, 2010, through December 9, 2011.

ii. *Quarterly statements.* Creditors issuing quarterly statements may apply the guidance set forth for monthly statements to comply with the requirement to provide calendar year-to-date totals on quarterly statements.

4. *Minimum charge in lieu of interest.* A minimum charge imposed if a charge would otherwise have been determined by applying a periodic rate to a balance except for the fact that such charge is smaller than the minimum must be disclosed as a fee. For example, assume a creditor imposes a minimum charge of $1.50 in lieu of interest if the calculated interest for a billing period is less than that minimum charge. If the interest calculated on a consumer's account for a particular billing period is 50 cents, the minimum charge of $1.50 would apply. In this case, the entire $1.50 would be disclosed as a fee; the periodic statement would reflect the $1.50 as a fee, and $0 in interest.

5. *Adjustments to year-to-date totals.* In some cases, a creditor may provide a statement for the current period reflecting that fees or interest charges

imposed during a previous period were waived or reversed and credited to the account. Creditors may, but are not required to, reflect the adjustment in the year-to-date totals, nor, if an adjustment is made, to provide an explanation about the reason for the adjustment. Such adjustments should not affect the total fees or interest charges imposed for the current statement period.

6. *Acquired accounts.* An institution that acquires an account or plan must include, as applicable, fees and charges imposed on the account or plan prior to the acquisition in the aggregate disclosures provided under § 226.7(b)(6) for the acquired account or plan. Alternatively, the institution may provide separate totals reflecting activity prior and subsequent to the account or plan acquisition. For example, a creditor that acquires an account or plan on August 12 of a given calendar year may provide one total for the period from January 1 to August 11 and a separate total for the period beginning on August 12 .

7. *Account upgrades.* A creditor that upgrades, or otherwise changes, a consumer's plan to a different open-end credit plan must include, as applicable, fees and charges imposed for that portion of the calendar year prior to the upgrade or change in the consumer's plan in the aggregate disclosures provided pursuant to § 226.7(b)(6) for the new plan. For example, assume a consumer has incurred $125 in fees for the calendar year to date for a retail credit card account, which is then replaced by a cobranded credit card account also issued by the creditor. In this case, the creditor must reflect the $125 in fees incurred prior to the replacement of the retail credit card account in the calendar year-to-date totals provided for the cobranded credit card account. Alternatively, the institution may provide two separate totals reflecting activity prior and subsequent to the plan upgrade or change.

7(b)(7) Change-in-terms and increased penalty rate summary for open-end (not home-secured) plans.

1. *Location of summary tables.* If a change-in-terms notice required by § 226.9(c)(2) is provided on or with a periodic statement, a tabular summary of key changes must appear on the front of the statement. Similarly, if a notice of a rate increase due to delinquency or default or as a penalty required by § 226.9(g)(1) is provided on or with a periodic statement, information required to be provided about the increase, presented in a table, must appear on the front of the statement.

7(b)(8) Grace period.

1. *Terminology.* In describing the grace period, the language used must be consistent with that used on the account-opening disclosure statement. (*See* § 226.5(a)(2)(i).)

2. *Deferred interest transactions. See* comment 7(b)–1.iv.

7(b)(9) Address for notice of billing errors.

1. *Terminology.* The periodic statement should indicate the general purpose for the address for billing-error inquiries, although a detailed explanation or particular wording is not required.

2. *Telephone number.* A telephone number, e-mail address, or Web site location may be included, but the mailing address for billing-error inquiries, which is the required disclosure, must be clear and conspicuous. The address is deemed to be clear and conspicuous if a precautionary instruction is included that telephoning or notifying the creditor by e-mail or Web site will not preserve the consumer's billing rights, unless the creditor has agreed to treat billing error notices provided by electronic means as written notices, in which case the precautionary instruction is required only for telephoning.

7(b)(10) Closing date of billing cycle; new balance.

1. *Credit balances. See* comment 7(b)(1)–1.

2. *Multifeatured plans.* In a multifeatured plan, the new balance may be disclosed for each feature or for the plan as a whole. If separate new balances are disclosed, a total new balance is optional.

3. *Accrued finance charges allocated from payments.* Some plans provide that the amount of the finance charge that has accrued since the consumer's last payment is directly deducted from each new payment, rather than being separately added to each statement and therefore reflected as an increase in the obligation. In such a plan, the new balance need not reflect finance charges accrued since the last payment.

7(b)(11) Due date; late payment costs.

1. *Informal periods affecting late payments.* Although the terms of the account agreement may provide that a card issuer may assess a late payment fee if a payment is not received by a certain date, the card issuer may have an informal policy or practice that delays the assessment of the late payment fee for payments received a brief period of time after the date upon which a card issuer has the contractual right to impose the fee. A card issuer must disclose the due date according to the legal obligation between the parties, and need not consider the end of an informal ''courtesy period'' as the due date under § 226.7(b)(11).

2. *Assessment of late payment fees.* Some State or other laws require that a certain number of days must elapse following a due date before a late payment fee may be imposed. In addition, a card issuer may be restricted by the terms of the account agreement from imposing a late payment fee until a payment is late for a certain number of days following a due date. For example, assume a payment is due on March 10 and the account agreement or State law provides that a late payment fee cannot be assessed before March 21. A card issuer must disclose the due date under the terms of the legal obligation (March 10 in this example), and not a date different than the due date, such as when the card issuer is restricted by the account agreement or State or other law from imposing a late payment fee unless a payment is late for a certain number of days following the due date (March 21 in this example). Consumers' rights under State law to avoid the imposition of late payment fees during a specified period following a due date are unaffected by the disclosure requirement. In this example, the card issuer would disclose March 10 as the due date for purposes of § 226.7(b)(11), but could not, under State law, assess a late payment fee before March 21.

3. *Fee or rate triggered by multiple events.* If a late payment fee or penalty rate is triggered after multiple events, such as two late payments in six months, the card issuer may, but is not required to, disclose the late payment and penalty rate disclosure each month. The disclosures must be included on any periodic statement for which a late payment could trigger the late payment fee or penalty rate, such as after the consumer made one late payment in this example. For example, if a cardholder has already made one late payment, the disclosure must be on each statement for the following five billing cycles.

4. *Range of late fees or penalty rates.* A card issuer that imposes a range of late payment fees or rates on a credit card account under an open-end (not home-secured) consumer credit plan may state the highest fee or rate along with an indication lower fees or rates could be imposed. For example, a phrase indicating the late payment fee could be ''up to $29'' complies with this requirement.

5. *Penalty rate in effect.* If the highest penalty rate has previously been triggered on an account, the card issuer may, but is not required to, delete the amount of the penalty rate and the warning that the rate may be imposed

for an untimely payment, as not applicable. Alternatively, the card issuer may, but is not required to, modify the language to indicate that the penalty rate has been increased due to previous late payments (if applicable).

6. *Same day each month.* The requirement that the due date be the same day each month means that the due date must be the same numerical date. For example, a consumer's due date could be the 25th of every month. In contrast, a due date that is the same relative date but not numerical date each month, such as the third Tuesday of the month, would not comply with this requirement.

7. *Change in due date.* A creditor may adjust a consumer's due date from time to time provided that the new due date will be the same numerical date each month on an ongoing basis. For example, a creditor may choose to honor a consumer's request to change from a due date that is the 20th of each month to the 5th of each month, or may choose to change a consumer's due date from time to time for operational reasons. *See* comment 2(a)(4)–3 for guidance on transitional billing cycles.

8. *Billing cycles longer than one month.* The requirement that the due date be the same day each month does not prohibit billing cycles that are two or three months, provided that the due date for each billing cycle is on the same numerical date of the month. For example, a creditor that establishes two-month billing cycles could send a consumer periodic statements disclosing due dates of January 25, March 25, and May 25.

9. *Payment due date when the creditor does not accept or receive payments by mail.* If due date in a given month falls on a day on which the creditor does not receive or accept payments by mail and the creditor is required to treat a payment received the next business day as timely pursuant to § 226.10(d), the creditor must disclose the due date according to the legal obligation between the parties, not the date as of which the creditor is permitted to treat the payment as late. For example, assume that the consumer's due date is the 4th of every month and the creditor does not accept or receive payments by mail on Thursday, July 4. Pursuant to § 226.10(d), the creditor may not treat a mailed payment received on the following business day, Friday, July 5, as late for any purpose. The creditor must nonetheless disclose July 4 as the due date on the periodic statement and may not disclose a July 5 due date.

7(b)(12) Repayment disclosures.

7(b)(12)(iv) Provision of information about credit counseling services.

1. *Approved credit counseling agencies.* Section 226.7(b)(12)(iv)(A) requires card issuers to provide information regarding at least three organizations that have been approved by the United States Trustee or a bankruptcy administrator pursuant to 11 U.S.C. 111(a)(1) to provide credit counseling services in the state in which the billing address for the account is located or the State specified by the consumer. The card issuer may use the billing address for the account or, at its option, allow the consumer to specify the State. A card issuer does not satisfy the requirements in § 226.7(b)(12)(iv)(A) by providing information regarding providers that have been approved pursuant to 11 U.S.C. 111(a)(2) to offer personal financial management courses.

2. *Information provided by United States Trustee or a bankruptcy administrator.* A card issuer complies with the requirements of § 226.7(b)(12)(iv) if it provides the consumer with information obtained from the United States Trustee or a bankruptcy administrator, including information obtained from the Web site operated by the United States Trustee. If, for example, the Web site address for an organization approved by the United States Trustee is not available from the Web site operated by the United States Trustee, a card issuer is not required to provide a Web site address for that organization. However, at least annually, the card issuer must verify and update the information it provides for consistency with the information provided by the United States Trustee or a bankruptcy administrator.

3. *Automated response systems or devices.* At their option, card issuers may use toll-free telephone numbers that connect consumers to automated systems, such as an interactive voice response system, through which consumers may obtain the information required by § 226.7(b)(12)(iv) by inputting information using a touch-tone telephone or similar device.

4. *Toll-free telephone number.* A card issuer may provide a toll-free telephone number that is designed to handle customer service calls generally, so long as the option to receive the information required by § 226.7(b)(12)(iv) is prominently disclosed to the consumer. For automated systems, the option to receive the information required by § 226.7(b)(12)(iv) is prominently disclosed to the consumer if it is listed as one of the options in the first menu of options given to the consumer, such as ''Press or say '3' if you would like information about credit counseling services.'' If the automated system permits callers to select the language in which the call is conducted and in which information is provided, the menu to select the language may precede the menu with the option to receive information about accessing credit counseling services.

5. *Third parties.* At their option, card issuers may use a third party to establish and maintain a toll-free telephone number for use by the issuer to provide the information required by § 226.7(b)(12)(iv).

6. *Web site address.* When making the repayment disclosures on the periodic statement pursuant to § 226.7(b)(12), a card issuer at its option may also include a reference to a Web site address (in addition to the toll-free telephone number) where its customers may obtain the information required by § 226.7(b)(12)(iv), so long as the information provided on the Web site complies with § 226.7(b)(12)(iv). The Web site address disclosed must take consumers directly to the Web page where information about accessing credit counseling may be obtained. In the alternative, the card issuer may disclose the Web site address for the Web page operated by the United States Trustee where consumers may obtain information about approved credit counseling organizations.

7. *Advertising or marketing information.* If a consumer requests information about credit counseling services, the card issuer may not provide advertisements or marketing materials to the consumer (except for providing the name of the issuer) prior to providing the information required by § 226.7(b)(12)(iv). Educational materials that do not solicit business are not considered advertisements or marketing materials for this purpose. Examples:

i. *Toll-free telephone number.* As described in comment 7(b)(12)(iv)–4, an issuer may provide a toll-free telephone number that is designed to handle customer service calls generally, so long as the option to receive the information required by § 226.7(b)(12)(iv) through that toll-free telephone number is prominently disclosed to the consumer. Once the consumer selects the option to receive the information required by § 226.7(b)(12)(iv), the issuer may not provide advertisements or marketing materials to the consumer (except for providing the name of the issuer) prior to providing the required information.

ii. *Web page.* If the issuer discloses a link to a Web site address as part of the repayment disclosures pursuant to comment 7(b)(12)(iv)–6, the issuer may not provide advertisements or marketing materials (except for providing the name

of the issuer) on the Web page accessed by the address prior to providing the information required by § 226.7(b)(12)(iv).

7(b)(13) Format requirements.

1. *Combined deposit account and credit account statements.* Some financial institutions provide information about deposit account and open-end credit account activity on one periodic statement. For purposes of providing disclosures on the front of the first page of the periodic statement pursuant to § 226.7(b)(13), the first page of such a combined statement shall be the page on which credit transactions first appear.

§ 226.8 Identifying Transactions on Periodic Statements.

8(a) Sale credit.

1. *Sale credit.* The term ''sale credit'' refers to a purchase in which the consumer uses a credit card or otherwise directly accesses an open-end line of credit (*see* comment 8(b)–1 if access is by means of a check) to obtain goods or services from a merchant, whether or not the merchant is the card issuer or creditor. ''Sale credit'' includes:

i. The purchase of funds-transfer services (such as a wire transfer) from an intermediary.

ii. The purchase of services from the card issuer or creditor. For the purchase of services that are costs imposed as part of the plan under § 226.6(b)(3), card issuers and creditors comply with the requirements for identifying transactions under this section by disclosing the fees in accordance with the requirements of § 226.7(b)(6). For the purchases of services that are not costs imposed as part of the plan, card issuers and creditors may, at their option, identify transactions under this section or in accordance with the requirements of § 226.7(b)(6).

2. *Amount—transactions not billed in full.* If sale transactions are not billed in full on any single statement, but are billed periodically in precomputed installments, the first periodic statement reflecting the transaction must show either the full amount of the transaction together with the date the transaction actually took place; or the amount of the first installment that was debited to the account together with the date of the transaction or the date on which the first installment was debited to the account. In any event, subsequent periodic statements should reflect each installment due, together with either any other identifying information required by § 226.8(a) (such as the seller's name and address in a three-party situation) or other appropriate identifying information relating the transaction to the first billing. The debiting date for the particular installment, or the date the transaction took place, may be used as the date of the transaction on these subsequent statements.

3. *Date—when a transaction takes place.*

i. If the consumer conducts the transaction in person, the date of the transaction is the calendar date on which the consumer made the purchase or order, or secured the advance.

ii. For transactions billed to the account on an ongoing basis (other than installments to pay a precomputed amount), the date of the transaction is the date on which the amount is debited to the account. This might include, for example, monthly insurance premiums.

iii. For mail, Internet, or telephone orders, a creditor may disclose as the transaction date either the invoice date, the debiting date, or the date the order was placed by telephone or via the Internet.

iv. In a foreign transaction, the debiting date may be considered the transaction date.

4. *Date—sufficiency of description.*

i. If the creditor discloses only the date of the transaction, the creditor need not identify it as the ''transaction date.'' If the creditor discloses more than one date (for example, the transaction date and the posting date), the creditor must identify each.

ii. The month and day sufficiently identify the transaction date, unless the posting of the transaction is delayed so long that the year is needed for a clear disclosure to the consumer.

5. *Same or related persons.* i. For purposes of identifying transactions, the term *same or related persons* refers to, for example:

A. Franchised or licensed sellers of a creditor's product or service.

B. Sellers who assign or sell open-end sales accounts to a creditor or arrange for such credit under a plan that allows the consumer to use the credit only in transactions with that seller.

ii. A seller is not related to the creditor merely because the seller and the creditor have an agreement authorizing the seller to honor the creditor's credit card.

6. *Brief identification—sufficiency of description.* The ''brief identification'' provision in § 226.8(a)(1)(i) requires a designation that will enable the consumer to reconcile the periodic statement with the consumer's own records. In determining the sufficiency of the description, the following rules apply:

i. While item-by-item descriptions are not necessary, reasonable precision is required. For example, ''merchandise,'' ''miscellaneous,'' ''second-hand goods,'' or ''promotional items'' would not suffice.

ii. A reference to a department in a sales establishment that accurately conveys the identification of the types of property or services available in the department is sufficient—for example, ''jewelry,'' or ''sporting goods.''

iii. A number or symbol that is related to an identification list printed elsewhere on the statement that reasonably identifies the transaction with the creditor is sufficient.

7. *Seller's name—sufficiency of description.* The requirement contemplates that the seller's name will appear on the periodic statement in essentially the same form as it appears on transaction documents provided to the consumer at the time of the sale. The seller's name may also be disclosed as, for example:

i. A more complete spelling of the name that was alphabetically abbreviated on the receipt or other credit document.

ii. An alphabetical abbreviation of the name on the periodic statement even if the name appears in a more complete spelling on the receipt or other credit document. Terms that merely indicate the form of a business entity, such as ''Inc.,'' ''Co.,'' or ''Ltd.,'' may always be omitted.

8. *Location of transaction.*

i. If the seller has multiple stores or branches within a city, the creditor need not identify the specific branch at which the sale occurred.

ii. When no meaningful address is available because the consumer did not make the purchase at any fixed location of the seller, the creditor may omit the address, or may provide some other identifying designation, such as ''aboard plane,'' ''ABC Airways Flight,'' ''customer's home,'' ''telephone order,'' ''Internet order'' or ''mail order.''

8(b) Nonsale credit.

1. *Nonsale credit.* The term ''nonsale credit'' refers to any form of loan credit including, for example:

i. A cash advance.

ii. An advance on a credit plan that is accessed by overdrafts on a checking account.

iii. The use of a ''supplemental credit device'' in the form of a check or draft or the use of the overdraft credit plan accessed by a debit card, even if such use is in connection with a purchase of goods or services.

iv. Miscellaneous debits to remedy mispostings, returned checks, and similar entries.

2. *Amount—overdraft credit plans.* If credit is extended under an overdraft credit plan tied to a checking account or by means of a debit card tied to an overdraft credit plan:

i. The amount to be disclosed is that of the credit extension, not the face amount of the check or the total amount of the debit/credit transaction.

ii. The creditor may disclose the amount of the credit extensions on a cumulative daily basis, rather than the amount attributable to each check or each use of the debit card that accesses the credit plan.

3. *Date of transaction. See* comment 8(a)–4.

4. *Nonsale transaction—sufficiency of identification.* The creditor sufficiently identifies a nonsale transaction by describing the type of advance it represents, such as cash advance, loan, overdraft loan, or any readily understandable trade name for the credit program.

§ 226.9 Subsequent Disclosure Requirements.

9(a) Furnishing statement of billing rights.

9(a)(1) Annual statement.

1. *General.* The creditor may provide the annual billing rights statement:

i. By sending it in one billing period per year to each consumer that gets a periodic statement for that period; or

ii. By sending a copy to all of its accountholders sometime during the calendar year but not necessarily all in one billing period (for example, sending the annual notice in connection with renewal cards or when imposing annual membership fees).

2. *Substantially similar. See* the commentary to Model Forms G–3 and G–3(A) in appendix G to part 226.

9(a)(2) Alternative summary statement.

1. *Changing from long-form to short form statement and vice versa.* If the creditor has been sending the long-form annual statement, and subsequently decides to use the alternative summary statement, the first summary statement must be sent no later than 12 months after the last long-form statement was sent. Conversely, if the creditor wants to switch to the long-form, the first long-form statement must be sent no later than 12 months after the last summary statement.

2. *Substantially similar. See* the commentary to Model Forms G–4 and G–4(A) in appendix G to part 226.

9(b) Disclosures for supplemental credit access devices and additional features.

1. *Credit access device—examples. Credit access device* includes, for example, a blank check, payee-designated check, blank draft or order, or authorization form for issuance of a check; it does not include a check issued payable to a consumer representing loan proceeds or the disbursement of a cash advance.

2. *Credit account feature—examples.* A new credit account *feature* would include, for example:

i. The addition of overdraft checking to an existing account (although the regular checks that could trigger the overdraft feature are not themselves ''devices'').

ii. The option to use an existing credit card to secure cash advances, when previously the card could only be used for purchases.

Paragraph 9(b)(2).

1. *Different finance charge terms.* Except as provided in § 226.9(b)(3) for checks that access a credit card account, if the finance charge terms are different from those previously disclosed, the creditor may satisfy the requirement to give the finance charge terms either by giving a complete set of new account-opening disclosures reflecting the terms of the added device or feature or by giving only the finance charge disclosures for the added device or feature.

9(b)(3) Checks that access a credit card account.

9(b)(3)(i) Disclosures.

1. *Front of the page containing the checks.* The following would comply with the requirement that the tabular disclosures provided pursuant to § 226.9(b)(3) appear on the front of the page containing the checks:

i. Providing the tabular disclosure on the front of the first page on which checks appear, for an offer where checks are provided on multiple pages;

ii. Providing the tabular disclosure on the front of a mini-book or accordion booklet containing the checks; or

iii. Providing the tabular disclosure on the front of the solicitation letter, when the checks are printed on the front of the same page as the solicitation letter even if the checks can be separated by the consumer from the solicitation letter using perforations.

Paragraph 9(b)(3)(i)(D).

1. *Grace period.* Creditors may use the following language to describe a grace period on check transactions: ''Your due date is [at least] ____ days after the close of each billing cycle. We will not charge you interest on check transactions if you pay your entire balance by the due date each month.'' Creditors may use the following language to describe that no grace period on check transactions is offered, as applicable: ''We will begin charging interest on these checks on the transaction date.''

9(c) Change in terms.

9(c)(1) Rules affecting home-equity plans.

For home-equity plans subject to the requirements of § 226.5b and other open-end plans that are not credit card accounts, whenever any term required to be disclosed under § 226.6 is changed or the required minimum periodic payment is increased, the creditor shall mail or deliver written notice of the change to each consumer who may be affected. The notice shall be mailed or delivered at least 15 days prior to the effective date of the change. The 15-day timing requirement does not apply if the change has been agreed to by the consumer, or if a periodic rate or other finance charge is increased because of the consumer's delinquency or default; the notice shall be given, however, before the effective date of the change.

(ii) *Notice not required.* For home-equity plans subject to the requirements of § 226.5b and other open-end plans that are not credit card accounts, no notice under this section is required when the change involves late payment charges, charges for documentary evidence, or over-the-limit charges; a reduction of any component of a finance or other charge; suspension of future credit privileges or termination of an account or plan; or when the change results from an agreement involving a court proceeding, or from the consumer's default or delinquency (other than an increase in the periodic rate or other finance charge).

(iii) *Notice for home equity plans.* If a creditor prohibits additional extensions of credit or reduces the credit limit applicable to a home equity plan pursuant to § 226.5b(f)(3)(i) or § 226.5b(f)(3)(vi), the creditor shall mail or deliver written notice of the action to each consumer who will be affected. The notice must be provided not later than three business days after the action is taken and shall contain specific reasons for the action. If the creditor requires the consumer to request reinstatement of credit privileges, the notice also shall state that fact.

9(c)(2) Rules affecting open-end (not home-secured) plans.

1. *Changes initially disclosed.* Except as provided in § 226.9(g)(1), no notice of a change in terms need be given if the specific change is set forth initially, such as rate increases under a properly disclosed variable-rate plan in accordance with § 226.9(c)(2)(v)(C). In contrast, notice must be given if the contract allows the creditor to increase the rate at its discretion.

2. *State law issues.* Some issues are not addressed by § 226.9(c)(2) because they are controlled by State or other applicable laws. These issues include the types of changes a creditor may make, to the extent otherwise permitted by this regulation.

3. *Change in billing cycle.* Whenever the creditor changes the consumer's billing cycle, it must give a change-in-terms notice if the change affects any of the terms described in § 226.9(c)(2)(i), unless an exception under § 226.9(c)(2)(v) applies; for example, the creditor must give advance notice if the creditor initially disclosed a 28-day grace period on purchases and the consumer will have fewer days during the billing cycle change. But *see* § 226.7(b)(11)(i)(A) regarding the general requirement that the payment due date for a credit card account under an open-end (not home-secured) consumer credit plan must be the same day each month.

4. *Relationship to § 226.9(b).* If a creditor adds a feature to the account on the type of terms otherwise required to be disclosed under § 226.6, the creditor must satisfy: the requirement to provide the finance charge disclosures for the added feature under § 226.9(b); and any applicable requirement to provide a change-in-terms notice under § 226.9(c), including any advance notice that must be provided. For example, if a creditor adds a balance transfer feature to an account more than 30 days after account-opening disclosures are provided, it must give the finance charge disclosures for the balance transfer feature under § 226.9(b) as well as comply with the change-in-terms notice requirements under § 226.9(c), including providing notice of the change at least 45 days prior to the effective date of the change. Similarly, if a creditor makes a balance transfer offer on finance charge terms that are higher than those previously disclosed for balance transfers, it would also generally be required to provide a change-in-terms notice at least 45 days in advance of the effective date of the change. A creditor may provide a single notice under § 226.9(c) to satisfy the notice requirements of both paragraphs (b) and (c) of § 226.9. For checks that access a credit card account subject to the disclosure requirements in § 226.9(b)(3), a creditor is not subject to the notice requirements under § 226.9(c) even if the applicable rate or fee is higher than those previously disclosed for such checks. Thus, for example, the creditor need not wait 45 days before applying the new rate or fee for transactions made using such checks, but the creditor must make the required disclosures on or with the checks in accordance with § 226.9(b)(3).

9(c)(2)(i) Changes where written advance notice is required.

1. *Affected consumers.* Change-in-terms notices need only go to those consumers who may be affected by the change. For example, a change in the periodic rate for check overdraft credit need not be disclosed to consumers who do not have that feature on their accounts. If a single credit account involves multiple consumers that may be affected by the change, the creditor should refer to § 226.5(d) to determine the number of notices that must be given.

2. *Timing—effective date of change.* The rule that the notice of the change in terms be provided at least 45 days before the change takes effect permits mid-cycle changes when there is clearly no retroactive effect, such as the imposition of a transaction fee. Any change in the balance computation method, in contrast, would need to be disclosed at least 45 days prior to the billing cycle in which the change is to be implemented.

3. *Timing—advance notice not required.* Advance notice of 45 days is not necessary—that is, a notice of change in terms is required, but it may be mailed or delivered as late as the effective date of the change if the consumer agrees to the particular change. This provision is solely intended for use in the unusual instance when a consumer substitutes collateral or when the creditor can advance additional credit only if a change relatively unique to that consumer is made, such as the consumer's providing additional security or paying an increased minimum payment amount. Therefore, the following are not ''agreements'' between the consumer and the creditor for purposes of § 226.9(c)(2)(i): The consumer's general acceptance of the creditor's contract reservation of the right to change terms; the consumer's use of the account (which might imply acceptance of its terms under State law); the consumer's acceptance of a unilateral term change that is not particular to that consumer, but rather is of general applicability to consumers with that type of account; and the consumer's request to reopen a closed account or to upgrade an existing account to another account offered by the creditor with different credit or other features. *See* also comment 5(b)(1)(i)–6.

4. *Form of change-in-terms notice.* Except if § 226.9(c)(2)(iv) applies, a complete new set of the initial disclosures containing the changed term complies with § 226.9(c)(2)(i) if the change is highlighted on the disclosure statement, or if the disclosure statement is accompanied by a letter or some other insert that indicates or draws attention to the term being changed.

5. *Security interest change—form of notice.* A copy of the security agreement that describes the collateral securing the consumer's account may be used as the notice, when the term change is the addition of a security interest or the addition or substitution of collateral.

6. *Examples. See* comment 55(a)–1 and 55(b)–3 for examples of how a card issuer that is subject to § 226.55 may comply with the timing requirements for notices required by § 226.9(c)(2)(i).

9(c)(2)(iii) Charges not covered by § 226.6(b)(1) and (b)(2).

1. *Applicability.* Generally, if a creditor increases any component of a charge, or introduces a new charge, that is imposed as part of the plan under § 226.6(b)(3) but is not required to be disclosed as part of the account-opening summary table under § 226.6(b)(1) and (b)(2), the creditor may either, at its option (i) provide at least 45 days' written advance notice before the change becomes effective to comply with the requirements of § 226.9(c)(2)(i), or (ii) provide notice orally or in writing, or electronically if the consumer requests the service electronically, of the amount of the charge to an affected consumer before the consumer agrees to or becomes obligated to pay the charge, at a time and in a manner that a consumer would be likely to notice the disclosure. (*See* the commentary under § 226.5(a)(1)(iii) regarding disclosure of such changes in electronic form.) For example, a fee for expedited delivery of a credit card is a charge imposed as part of the plan under § 226.6(b)(3) but is not required to be disclosed in the account-opening summary table under § 226.6(b)(1) and (b)(2). If a creditor changes the amount of that expedited delivery fee, the creditor may provide written advance notice of the change to affected consumers at least 45 days before the change becomes effective. Alternatively, the creditor may provide oral or written notice, or electronic notice if the consumer requests the service electronically, of the amount of the charge to an affected consumer before the consumer agrees to or becomes obligated to pay the charge, at a time and in a manner that the consumer would be likely to notice the disclosure. (*See* comment 5(b)(1)(ii)–1 for examples of disclosures given at a time and in a manner that the consumer would be likely to notice them.)

9(c)(2)(iv) Disclosure requirements.

9(c)(2)(iv) Significant changes to account terms.

1. *Changing margin for calculating a variable rate.* If a creditor is changing a margin used to calculate a variable rate, the creditor must disclose the amount of the new rate (as calculated using the new margin) in the table described in § 226.9(c)(2)(iv), and include a reminder that the rate is a variable rate. For example, if a creditor is changing the margin for a variable rate that uses the prime rate as an index, the creditor must disclose in the table the new rate (as calculated using the new margin) and indicate that the rate varies with the market based on the prime rate.

2. *Changing index for calculating a variable rate.* If a creditor is changing the index used to calculate a variable rate, the creditor must disclose the amount of the new rate (as calculated using the new index) and indicate that the rate varies and the how the rate is determined, as explained in § 226.6(b)(2)(i)(A). For example, if a creditor is changing from using a prime rate to using the LIBOR in calculating a variable rate, the creditor would disclose in the table the new rate (using the new index) and indicate that the rate varies with the market based on the LIBOR.

3. *Changing from a variable rate to a non-variable rate.* If a creditor is changing from a variable rate to a non-variable rate, the creditor must disclose the amount of the new rate (that is, the non-variable rate) in the table.

4. *Changing from a non-variable rate to a variable rate.* If a creditor is changing from a non-variable rate to a variable rate, the creditor must disclose the amount of the new rate (the variable rate using the index and margin), and indicate that the rate varies with the market based on the index used, such as the prime rate or the LIBOR.

5. *Changes in the penalty rate, the triggers for the penalty rate, or how long the penalty rate applies.* If a creditor is changing the amount of the penalty rate, the creditor must also redisclose the triggers for the penalty rate and the information about how long the penalty rate applies even if those terms are not changing. Likewise, if a creditor is changing the triggers for the penalty rate, the creditor must redisclose the amount of the penalty rate and information about how long the penalty rate applies. If a creditor is changing how long the penalty rate applies, the creditor must redisclose the amount of the penalty rate and the triggers for the penalty rate, even if they are not changing.

6. *Changes in fees.* If a creditor is changing part of how a fee that is disclosed in a tabular format under § 226.6(b)(1) and (b)(2) is determined, the creditor must redisclose all relevant information related to that fee regardless of whether this other information is changing. For example, if a creditor currently charges a cash advance fee of ''Either $5 or 3% of the transaction amount, whichever is greater. (Max: $100),'' and the creditor is only changing the minimum dollar amount from $5 to $10, the issuer must redisclose the other information related to how the fee is determined. For example, the creditor in this example would disclose the following: ''Either $10 or 3% of the transaction amount, whichever is greater. (Max: $100).''

7. *Combining a notice described in § 226.9(c)(2)(iv) with a notice described in § 226.9(g)(3).* If a creditor is required to provide a notice described in § 226.9(c)(2)(iv) and a notice described in § 226.9(g)(3) to a consumer, the creditor may combine the two notices. This would occur if penalty pricing has been triggered, and other terms are changing on the consumer's account at the same time.

8. *Content.* Sample G–20 contains an example of how to comply with the requirements in § 226.9(c)(2)(iv) when a variable rate is being changed to a non-variable rate on a credit card account. The sample explains when the new rate will apply to new transactions and to which balances the current rate will continue to apply. Sample G–21 contains an example of how to comply with the requirements in § 226.9(c)(2)(iv) when (i) the late payment fee on a credit card account is being increased in accordance with a formula that depends on the outstanding balance on the account, and (ii) the returned payment fee is also being increased. The sample discloses the consumer's right to reject the changes in accordance with § 226.9(h).

9. *Clear and conspicuous standard. See* comment 5(a)(1)–1 for the clear and conspicuous standard applicable to disclosures required under § 226.9(c)(2)(iv)(A)(*1*).

10. *Terminology. See* § 226.5(a)(2) for terminology requirements applicable to disclosures required under § 226.9(c)(2)(iv)(A)(*1*).

9(c)(2)(v) Notice not required.

1. *Changes not requiring notice.* The following are examples of changes that do not require a change-in-terms notice:

i. A change in the consumer's credit limit except as otherwise required by § 226.9(c)(2)(vi).

ii. A change in the name of the credit card or credit card plan.

iii. The substitution of one insurer for another.

iv. A termination or suspension of credit privileges.

v. Changes arising merely by operation of law; for example, if the creditor's security interest in a consumer's car automatically extends to the proceeds when the consumer sells the car.

2. *Skip features.* i. *General.* If a credit program allows consumers to skip or reduce one or more payments during the year, or involves temporary reductions in finance charges other than reductions in an interest rate (except if § 226.9(c)(2)(v)(B) or (c)(2)(v)(D) applies), no notice of the change in terms is required either prior to the reduction or upon resumption of the higher finance charges or payments if these features are explained on the account-opening disclosure statement (including an explanation of the terms upon resumption). For example, a merchant may allow consumers to skip the December payment to encourage holiday shopping, or a teacher's credit union may not require payments during summer vacation. Otherwise, the creditor must give notice prior to resuming the original schedule or finance charge, even though no notice is required prior to the reduction. The change-in-terms notice may be combined with the notice offering the reduction. For example, the periodic statement reflecting the reduction or skip feature may also be used to notify the consumer of the resumption of the original schedule or finance charge, either by stating explicitly when the higher payment or charges resume or by indicating the duration of the skip option. Language such as ''You may skip your October payment'' may serve as the change-in-terms notice.

ii. *Temporary reductions in interest rates.* If a credit program involves temporary reductions in an interest rate, no notice of the change in terms is required either prior to the reduction or upon resumption of the original rate if these features are disclosed in advance in accordance with the requirements of § 226.9(c)(2)(v)(B). Otherwise, the creditor must give notice prior to resuming the original rate, even though no notice is required prior to the reduction. The notice provided prior to resuming the original rate must comply with the timing requirements of § 226.9(c)(2)(i) and the content and format requirements of § 226.9(c)(2)(iv)(A), (B) (if applicable), and (C). *See* comment 55(b)–3 for guidance regarding the application of § 226.55 in these circumstances.

3. *Changing from a variable rate to a non-variable rate.* If a creditor is changing a rate applicable to a

consumer's account from a variable rate to a non-variable rate, the creditor must provide a notice as otherwise required under § 226.9(c) even if the variable rate at the time of the change is higher than the non-variable rate. (*See* comment 9(c)(2)(iv)(A)–3.)

4. *Changing from a non-variable rate to a variable rate.* If a creditor is changing a rate applicable to a consumer's account from a non-variable rate to a variable rate, the creditor must provide a notice as otherwise required under § 226.9(c) even if the non-variable rate is higher than the variable rate at the time of the change. (*See* comment 9(c)(2)(iv)(A)–4.)

5. *Telephone purchases.* The timing requirements of § 226.9(c)(2)(v)(B) are deemed to have been met, and written disclosures required by § 226.9(c)(2)(v)(B) may be provided as soon as reasonably practicable after the first transaction subject to a rate that will be in effect for a specified period of time (a temporary rate) if:

i. The first transaction subject to the temporary rate occurs when a consumer contacts a merchant by telephone to purchase goods and at the same time the consumer accepts an offer to finance the purchase at the temporary rate;

ii. The merchant or third-party creditor permits consumers to return any goods financed subject to the temporary rate and return the goods free of cost after the merchant or third-party creditor has provided the written disclosures required by § 226.9(c)(2)(v)(B); and

iii. The disclosures required by § 226.9(c)(2)(v)(B) and the consumer's right to reject the temporary rate offer and return the goods are disclosed to the consumer as part of the offer to finance the purchase.

6. *Disclosure of annual percentage rates.* If a rate disclosed pursuant to § 226.9(c)(2)(v)(B) or (c)(2)(v)(D) is a variable rate, the creditor must disclose the fact that the rate may vary and how the rate is determined. For example, a creditor could state ''After October 1, 2009, your APR will be 14.99%. This APR will vary with the market based on the Prime Rate.''

7. *Deferred interest or similar programs.* If the applicable conditions are met, the exception in § 226.9(c)(2)(v)(B) applies to deferred interest or similar promotional programs under which the consumer is not obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time. For such programs, a creditor must disclose pursuant to § 226.9(c)(2)(v)(B)(*1*) the length of the deferred interest period and the rate that will apply to the balance subject to the deferred interest program if that balance is not paid in full prior to expiration of the deferred interest period. Examples of language that a creditor may use to make the required disclosures under § 226.9(c)(2)(v)(B)(*1*) include:

i. ''No interest if paid in full in 6 months. If the balance is not paid in full in 6 months, interest will be imposed from the date of purchase at a rate of 15.99%.''

ii. ''No interest if paid in full by December 31, 2010. If the balance is not paid in full by that date, interest will be imposed from the transaction date at a rate of 15%.''

8. *Disclosure of the terms of a workout or temporary hardship arrangement.* In order for the exception in § 226.9(c)(2)(v)(D) to apply, the disclosure provided to the consumer pursuant to § 226.9(c)(2)(v)(D)(*2*) must set forth:

i. The annual percentage rate that will apply to balances subject to the workout or temporary hardship arrangement;

ii. The annual percentage rate that will apply to such balances if the consumer completes or fails to comply with the terms of, the workout or temporary hardship arrangement;

iii. Any reduced fee or charge of a type required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) that will apply to balances subject to the workout or temporary hardship arrangement, as well as the fee or charge that will apply if the consumer completes or fails to comply with the terms of the workout or temporary hardship arrangement; and

iv. If applicable, that the consumer must make timely minimum payments in order to remain eligible for the workout or temporary hardship arrangement.

9(d) Finance charge imposed at time of transaction.

1. *Disclosure prior to imposition.* A person imposing a finance charge at the time of honoring a consumer's credit card must disclose the amount of the charge, or an explanation of how the charge will be determined, prior to its imposition. This must be disclosed before the consumer becomes obligated for property or services that may be paid for by use of a credit card. For example, disclosure must be given before the consumer has dinner at a restaurant, stays overnight at a hotel, or makes a deposit guaranteeing the purchase of property or services.

9(e) Disclosures upon renewal of credit or charge card.

1. *Coverage.* This paragraph applies to credit and charge card accounts of the type subject to § 226.5a. (*See* § 226.5a(a)(5) and the accompanying commentary for discussion of the types of accounts subject to § 226.5a.) The disclosure requirements are triggered when a card issuer imposes any annual or other periodic fee on such an account or if the card issuer has changed or amended any term of a cardholder's account required to be disclosed under § 226.6(b)(1) and (b)(2) that has not previously been disclosed to the consumer, whether or not the card issuer originally was required to provide the application and solicitation disclosures described in § 226.5a.

2. *Form.* The disclosures under this paragraph must be clear and conspicuous, but need not appear in a tabular format or in a prominent location. The disclosures need not be in a form the cardholder can retain.

3. *Terms at renewal.* Renewal notices must reflect the terms actually in effect at the time of renewal. For example, a card issuer that offers a preferential annual percentage rate to employees during their employment must send a renewal notice to employees disclosing the lower rate actually charged to employees (although the card issuer also may show the rate charged to the general public).

4. *Variable rate.* If the card issuer cannot determine the rate that will be in effect if the cardholder chooses to renew a variable-rate account, the card issuer may disclose the rate in effect at the time of mailing or delivery of the renewal notice. Alternatively, the card issuer may use the rate as of a specified date within the last 30 days before the disclosure is provided.

5. *Renewals more frequent than annual.* If a renewal fee is billed more often than annually, the renewal notice should be provided each time the fee is billed. In this instance, the fee need not be disclosed as an annualized amount. Alternatively, the card issuer may provide the notice no less than once every 12 months if the notice explains the amount and frequency of the fee that will be billed during the time period covered by the disclosure, and also discloses the fee as an annualized amount. The notice under this alternative also must state the consequences of a cardholder's decision to terminate the account after the renewal-notice period has expired. For example, if a $2 fee is billed monthly but the notice is given annually, the notice must inform the cardholder that the monthly charge is $2, the annualized fee is $24, and $2 will be billed to the account each month for the coming year unless the cardholder notifies the card issuer. If the cardholder is obligated to pay an amount equal to

the remaining unpaid monthly charges if the cardholder terminates the account during the coming year but after the first month, the notice must disclose the fact.

6. *Terminating credit availability.* Card issuers have some flexibility in determining the procedures for how and when an account may be terminated. However, the card issuer must clearly disclose the time by which the cardholder must act to terminate the account to avoid paying a renewal fee, if applicable. State and other applicable law govern whether the card issuer may impose requirements such as specifying that the cardholder's response be in writing or that the outstanding balance be repaid in full upon termination.

7. *Timing of termination by cardholder.* When a card issuer provides notice under § 226.9(e)(1), a cardholder must be given at least 30 days or one billing cycle, whichever is less, from the date the notice is mailed or delivered to make a decision whether to terminate an account.

8. *Timing of notices.* A renewal notice is deemed to be provided when mailed or delivered. Similarly, notice of termination is deemed to be given when mailed or delivered.

9. *Prompt reversal of renewal fee upon termination.* In a situation where a cardholder has provided timely notice of termination and a renewal fee has been billed to a cardholder's account, the card issuer must reverse or otherwise withdraw the fee promptly. Once a cardholder has terminated an account, no additional action by the cardholder may be required.

9(e)(2) Notification on periodic statements.

1. *Combined disclosures.* If a single disclosure is used to comply with both §§ 226.9(e) and 226.7, the periodic statement must comply with the rules in §§ 226.5a and 226.7. For example, a description substantially similar to the heading describing the grace period required by § 226.5a(b)(5) must be used and the name of the balance-calculation method must be identified (if listed in § 226.5a(g)) to comply with the requirements of § 226.5a. A card issuer may include some of the renewal disclosures on a periodic statement and others on a separate document so long as there is some reference indicating that the disclosures relate to one another. All renewal disclosures must be provided to a cardholder at the same time.

2. *Preprinted notices on periodic statements.* A card issuer may preprint the required information on its periodic statements. A card issuer that does so, however, must make clear on the periodic statement when the preprinted renewal disclosures are applicable. For example, the card issuer could include a special notice (not preprinted) at the appropriate time that the renewal fee will be billed in the following billing cycle, or could show the renewal date as a regular (preprinted) entry on all periodic statements.

9(f) Change in credit card account insurance provider.

1. *Coverage.* This paragraph applies to credit card accounts of the type subject to § 226.5a if credit insurance (typically life, disability, and unemployment insurance) is offered on the outstanding balance of such an account. (Credit card accounts subject to § 226.9(f) are the same as those subject to § 226.9(e); *see* comment 9(e)–1.) Charge card accounts are not covered by this paragraph. In addition, the disclosure requirements of this paragraph apply only where the card issuer initiates the change in insurance provider. For example, if the card issuer's current insurance provider is merged into or acquired by another company, these disclosures would not be required. Disclosures also need not be given in cases where card issuers pay for credit insurance themselves and do not separately charge the cardholder.

2. *No increase in rate or decrease in coverage.* The requirement to provide the disclosure arises when the card issuer changes the provider of insurance, even if there will be no increase in the premium rate charged to the consumer and no decrease in coverage under the insurance policy.

3. *Form of notice.* If a substantial decrease in coverage will result from the change in provider, the card issuer either must explain the decrease or refer to an accompanying copy of the policy or group certificate for details of the new terms of coverage. (*See* the commentary to appendix G–13 to part 226.)

4. *Discontinuation of insurance.* In addition to stating that the cardholder may cancel the insurance, the card issuer may explain the effect the cancellation would have on the consumer's credit card plan.

5. *Mailing by third party.* Although the card issuer is responsible for the disclosures, the insurance provider or another third party may furnish the disclosures on the card issuer's behalf.

9(f)(3) Substantial decrease in coverage.

1. *Determination.* Whether a substantial decrease in coverage will result from the change in provider is determined by the two-part test in § 226.9(f)(3): First, whether the decrease is in a significant term of coverage; and second, whether the decrease might reasonably be expected to affect a cardholder's decision to continue the insurance. If both conditions are met, the decrease must be disclosed in the notice.

9(g) Increase in rates due to delinquency or default or as a penalty.

1. *Relationship between § 226.9(c) and (g) and § 226.55– examples.* Card issuers subject to § 226.55 are prohibited from increasing the annual percentage rate for a category of transactions on any consumer credit card account unless specifically permitted by one of the exceptions in § 226.55(b). *See* comments 55(a)–1 and 55(b)–3 and the commentary to § 226.55(b)(4) for examples that illustrate the relationship between the notice requirements of § 226.9(c) and (g) and § 226.55.

2. *Affected consumers.* If a single credit account involves multiple consumers that may be affected by the change, the creditor should refer to § 226.5(d) to determine the number of notices that must be given.

3. *Combining a notice described in § 226.9(g)(3) with a notice described in § 226.9(c)(2)(iv).* If a creditor is required to provide notices pursuant to both § 226.9(c)(2)(iv) and (g)(3) to a consumer, the creditor may combine the two notices. This would occur when penalty pricing has been triggered, and other terms are changing on the consumer's account at the same time.

4. *Content.* Sample G–22 contains an example of how to comply with the requirements in § 226.9(g)(3)(i) when the rate on a consumer's credit card account is being increased to a penalty rate as described in § 226.9(g)(1)(ii), based on a late payment that is not more than 60 days late Sample G–23 contains an example of how to comply with the requirements in § 226.9(g)(3)(i) when the rate increase is triggered by a delinquency of more than 60 days.

5. *Clear and conspicuous standard. See* comment 5(a)(1)–1 for the clear and conspicuous standard applicable to disclosures required under § 226.9(g).

6. *Terminology. See* § 226.5(a)(2) for terminology requirements applicable to disclosures required under § 226.9(g).

9(g)(4) Exception for decrease in credit limit.

1. The following illustrates the requirements of § 226.9(g)(4). Assume that a creditor decreased the credit limit applicable to a consumer's account and sent a notice pursuant to § 226.9(g)(4) on January 1, stating among other things that the penalty rate would apply if the consumer's balance exceeded the new credit limit as of February 16. If the consumer's balance exceeded the credit limit on February 16, the creditor could impose the penalty rate on that date. However, a creditor could not apply the

penalty rate if the consumer's balance did not exceed the new credit limit on February 16, even if the consumer's balance had exceeded the new credit limit on several dates between January 1 and February 15. If the consumer's balance did not exceed the new credit limit on February 16 but the consumer conducted a transaction on February 17 that caused the balance to exceed the new credit limit, the general rule in § 226.9(g)(1)(ii) would apply and the creditor would be required to give an additional 45 days' notice prior to imposition of the penalty rate (but under these circumstances the consumer would have no ability to cure the over-the-limit balance in order to avoid penalty pricing).

9(h) Consumer rejection of certain significant changes in terms.

1. *Circumstances in which § 226.9(h) does not apply.* Section 226.9(h) applies when § 226.9(c)(2)(iv)(B) requires disclosure of the consumer's right to reject a significant change to an account term. Thus, for example, § 226.9(h) does not apply to changes to the terms of home equity plans subject to the requirements of § 226.5b that are accessible by a credit or charge card because § 226.9(c)(2) does not apply to such plans. Similarly, § 226.9(h) does not apply in the following circumstances because § 226.9(c)(2)(iv)(B) does not require disclosure of the right to reject in those circumstances: (i) An increase in the required minimum periodic payment; (ii) an increase in an annual percentage rate applicable to a consumer's account; (iii) a change in the balance computation method necessary to comply with § 226.54; and (iv) when the change results from the creditor not receiving the consumer's required minimum periodic payment within 60 days after the due date for that payment.

9(h)(1) Right to reject.

1. *Reasonable requirements for submission of rejections.* A creditor may establish reasonable requirements for the submission of rejections pursuant to § 226.9(h)(1). For example:

i. It would be reasonable for a creditor to require that rejections be made by the primary account holder and that the consumer identify the account number.

ii. It would be reasonable for a creditor to require that rejections be made only using the toll-free telephone number disclosed pursuant to § 226.9(c). It would also be reasonable for a creditor to designate additional channels for the submission of rejections (such as an address for rejections submitted by mail) so long as the creditor does not require that rejections be submitted through such additional channels.

iii. It would be reasonable for a creditor to require that rejections be received before the effective date disclosed pursuant to § 226.9(c) and to treat the account as not subject to § 226.9(h) if a rejection is received on or after that date. It would not, however, be reasonable to require that rejections be submitted earlier than the day before the effective date. If a creditor is unable to process all rejections received before the effective date, the creditor may delay implementation of the change in terms until all rejections have been processed. In the alternative, the creditor could implement the change on the effective date and then, on any account for which a timely rejection was received, reverse the change and remove or credit any interest charges or fees imposed as a result of the change. For example, if the effective date for a change in terms is June 15 and the creditor cannot process all rejections received by telephone on June 14 until June 16, the creditor may delay imposition of the change until June 17. Alternatively, the creditor could implement the change for all affected accounts on June 15 and then, once all rejections have been processed, return any account for which a timely rejection was received to the prior terms and ensure that the account is not assessed any additional interest or fees as a result of the change or that the account is credited for such interest or fees.

2. *Use of account following provision of notice.* A consumer does not waive or forfeit the right to reject a significant change in terms by using the account for transactions prior to the effective date of the change. Similarly, a consumer does not revoke a rejection by using the account for transactions after the rejection is received.

9(h)(2)(ii) Prohibition on penalties.

1. *Termination or suspension of credit availability.* Section 226.9(h)(2)(ii) does not prohibit a creditor from terminating or suspending credit availability as a result of the consumer's rejection of a significant change in terms.

2. *Solely as a result of rejection.* A creditor is prohibited from imposing a fee or charge or treating an account as in default solely as a result of the consumer's rejection of a significant change in terms. For example, if credit availability is terminated or suspended as a result of the consumer's rejection of a significant change in terms, a creditor is prohibited from imposing a periodic fee that was not charged before the consumer rejected the change (such as a closed account fee). However, regardless of whether credit availability is terminated or suspended as a result of the consumer's rejection, a creditor is not prohibited from continuing to charge a periodic fee that was charged before the rejection. Similarly, a creditor that charged a fee for late payment before a change was rejected is not prohibited from charging that fee after rejection of the change.

9(h)(2)(iii) Repayment of outstanding balance.

1. *Relevant date for repayment methods.* Once a consumer has rejected a significant change in terms, § 226.9(h)(2)(iii) prohibits the creditor from requiring repayment of the balance on the account using a method that is less beneficial to the consumer than one of the methods listed in § 226.55(c)(2). When applying the methods listed in § 226.55(c)(2) pursuant to § 226.9(h)(2)(iii), a creditor may utilize the date on which the creditor was notified of the rejection or a later date (such as the date on which the change would have gone into effect but for the rejection). For example, assume that on April 16 a creditor provides a notice pursuant to § 226.9(c) informing the consumer that the monthly maintenance fee for the account will increase effective June 1. The notice also states that the consumer may reject the increase by calling a specified toll-free telephone number before June 1 but that, if the consumer does so, credit availability for the account will be terminated. On May 5, the consumer calls the toll-free number and exercises the right to reject. If the creditor chooses to establish a five-year amortization period for the balance on the account consistent with § 226.55(c)(2)(ii), that period may begin no earlier than the date on which the creditor was notified of the rejection (May 5). However, the creditor may also begin the amortization period on the date on which the change would have gone into effect but for the rejection (June 1).

2. *Balance on the account.*

i. *In general.* When applying the methods listed in § 226.55(c)(2) pursuant to § 226.9(h)(2)(iii), the provisions in § 226.55(c)(2) and the guidance in the commentary to § 226.55(c)(2) regarding protected balances also apply to a balance on the account subject to § 226.9(h)(2)(iii). If a creditor terminates or suspends credit availability based on a consumer's rejection of a significant change in terms, the balance on the account that is subject to § 226.9(h)(2)(iii) is the balance at the end of the day on which credit availability is terminated or suspended. However, if a creditor does not terminate or suspend credit availability based on the consumer's

rejection, the balance on the account subject to § 226.9(h)(2)(iii) is the balance at the end of the day on which the creditor was notified of the rejection or, at the creditor's option, a later date.

ii. *Example.* Assume that on June 16 a creditor provides a notice pursuant to § 226.9(c) informing the consumer that the annual fee for the account will increase effective August 1. The notice also states that the consumer may reject the increase by calling a specified toll-free telephone number before August 1 but that, if the consumer does so, credit availability for the account will be terminated. On July 20, the account has a purchase balance of $1,000 and the consumer calls the toll-free number and exercises the right to reject. On July 22, a $200 purchase is charged to the account. If the creditor terminates credit availability on July 25 as a result of the rejection, the balance subject to the repayment limitations in § 226.9(h)(2)(iii) is the $1,200 purchase balance at the end of the day on July 25. However, if the creditor does not terminate credit availability as a result of the rejection, the balance subject to the repayment limitations in § 226.9(h)(2)(iii) is the $1,000 purchase balance at the end of the day on the date the creditor was notified of the rejection (July 20), although the creditor may, at its option, treat the $200 purchase as part of the balance subject to § 226.9(h)(2)(iii).

9(h)(3) Exception.

1. *Examples.* Section 226.9(h)(3) provides that § 226.9(h) does not apply when the creditor has not received the consumer's required minimum periodic payment within 60 days after the due date for that payment. The following examples illustrate the application of this exception:

i. *Account becomes more than 60 days delinquent before notice provided.* Assume that a credit card account is opened on January 1 of year one and that the payment due date for the account is the fifteenth day of the month. On June 20 of year two, the creditor has not received the required minimum periodic payments due on April 15, May 15, and June 15. On June 20, the creditor provides a notice pursuant to § 226.9(c) informing the consumer that a monthly maintenance fee of $10 will be charged beginning on August 4. However, § 226.9(c)(2)(iv)(B) does not require the creditor to notify the consumer of the right to reject because the creditor has not received the April 15 minimum payment within 60 days after the due date. Furthermore, the exception in § 226.9(h)(3) applies and the consumer may not reject the fee.

ii. *Account becomes more than 60 days delinquent after rejection.* Assume that a credit card account is opened on January 1 of year one and that the payment due date for the account is the fifteenth day of the month. On April 20 of year two, the creditor has not received the required minimum periodic payment due on April 15. On April 20, the creditor provides a notice pursuant to § 226.9(c) informing the consumer that an annual fee of $100 will be charged beginning on June 4. The notice further states that the consumer may reject the fee by calling a specified toll-free telephone number before June 4 but that, if the consumer does so, credit availability for the account will be terminated. On May 5, the consumer calls the toll-free telephone number and rejects the fee. Section 226.9(h)(2)(i) prohibits the creditor from charging the $100 fee to the account. If, however, the creditor does not receive the minimum payments due on April 15 and May 15 by June 15, § 226.9(h)(3) permits the creditor to charge the $100 fee. The creditor must provide a second notice of the fee pursuant to § 226.9(c), but § 226.9(c)(2)(iv)(B) does not require the creditor to disclose the right to reject and § 226.9(h)(3) does not allow the consumer to reject the fee. Similarly, the restrictions in § 226.9(h)(2)(ii) and (iii) no longer apply.

§ 226.10 Payments.

10(a) General rule.

1. *Crediting date.* Section 226.10(a) does not require the creditor to post the payment to the consumer's account on a particular date; the creditor is only required to credit the payment *as of* the date of receipt.

2. *Date of receipt.* The ''date of receipt'' is the date that the payment instrument or other means of completing the payment reaches the creditor. For example:

i. Payment by check is received when the creditor gets it, not when the funds are collected.

ii. In a payroll deduction plan in which funds are deposited to an asset account held by the creditor, and from which payments are made periodically to an open-end credit account, payment is received on the date when it is debited to the asset account (rather than on the date of the deposit), provided the payroll deduction method is voluntary and the consumer retains use of the funds until the contractual payment date.

iii. If the consumer elects to have payment made by a third party payor such as a financial institution, through a preauthorized payment or telephone bill-payment arrangement, payment is received when the creditor gets the third party payor's check or other transfer medium, such as an electronic fund transfer, as long as the payment meets the creditor's requirements as specified under § 226.10(b).

iv. Payment made via the creditor's Web site is received on the date on which the consumer authorizes the creditor to effect the payment, even if the consumer gives the instruction authorizing that payment in advance of the date on which the creditor is authorized to effect the payment. If the consumer authorizes the creditor to effect the payment immediately, but the consumer's instruction is received after 5 p.m. or any later cut-off time specified by the creditor, the date on which the consumer authorizes the creditor to effect the payment is deemed to be the next business day.

10(b) Specific requirements for payments.

1. *Payment by electronic fund transfer.* A creditor may be prohibited from specifying payment by preauthorized electronic fund transfer. (*See* section 913 of the Electronic Fund Transfer Act.)

2. *Payment via creditor's Web site.* If a creditor promotes electronic payment via its Web site (such as by disclosing on the Web site itself that payments may be made via the Web site), any payments made via the creditor's Web site would generally be conforming payments for purposes of § 226.10(b).

3. *Acceptance of nonconforming payments.* If the creditor accepts a nonconforming payment (for example, payment mailed to a branch office, when the creditor had specified that payment be sent to a different location), finance charges may accrue for the period between receipt and crediting of payments.

4. *Implied guidelines for payments.* In the absence of specified requirements for making payments (*See* § 226.10(b)):

i. Payments may be made at any location where the creditor conducts business.

ii. Payments may be made any time during the creditor's normal business hours.

iii. Payment may be by cash, money order, draft, or other similar instrument in properly negotiable form, or by electronic fund transfer if the creditor and consumer have so agreed.

5. *Payments made at point of sale.* If a creditor that is a financial institution issues a credit card that can be used only for transactions with a particular merchant or merchants, and a consumer is able to make a payment on that credit card account at a retail location

maintained by such a merchant, that retail location is not considered to be a branch or office of the creditor for purposes of § 226.10(b)(3).

6. *In-person payments on credit card accounts.* For purposes of § 226.10(b)(3), payments made in person at a branch or office of a financial institution include payments made with the direct assistance of, or to, a branch or office employee, for example a teller at a bank branch. A payment made at the bank branch without the direct assistance of a branch or office employee, for example a payment placed in a branch or office mail slot, is not a payment made in person for purposes of § 226.10(b)(3).

10(d) Crediting of payments when creditor does not receive or accept payments on due date.

1. *Example.* A day on which the creditor does not receive or accept payments by mail may occur, for example, if the U.S. Postal Service does not deliver mail on that date.

10(e) Limitations on fees related to method of payment.

1. *Separate fee to allow consumers to make a payment.* For purposes of § 226.10(e), ''separate fee'' means a fee imposed on a consumer for making a single payment to the consumer's account. A fee or other charge imposed if payment is made after the due date, such as a late fee or finance charge, is not a separate fee to allow consumers to make a payment for purposes of § 226.10(e).

2. *Expedited.* For purposes of § 226.10(e), the term ''expedited'' means crediting a payment the same day or, if the payment is received after any cut-off time established by the creditor, the next business day.

3. *Service by a customer service representative.* Service by a customer service representative of a creditor means any payment made to the consumer's account with the assistance of a live representative or agent of the creditor, including those made in person, on the telephone, or by electronic means. A customer service representative does not include automated means of making payment that do not involve a live representative or agent of the creditor, such as a voice response unit or interactive voice response system.

10(f) Changes by card issuer.

1. *Address for receiving payment.* For purposes of § 226.10(f), ''address for receiving payment'' means a mailing address for receiving payment, such as a post office box, or the address of a branch or office at which payments on credit card accounts are accepted.

2. *Materiality.* For purposes of § 226.10(f), a ''material change'' means any change in the address for receiving payment or procedures for handling cardholder payments which causes a material delay in the crediting of a payment. ''Material delay'' means any delay in crediting payment to a consumer's account which would result in a late payment and the imposition of a late fee or finance charge. A delay in crediting a payment which does not result in a late fee or finance charge would be immaterial.

3. *Safe harbor.* A card issuer may elect not to impose a late fee or finance charge on a consumer's account for the 60-day period following a change in address for receiving payment or procedures for handling cardholder payments which could reasonably be expected to cause a material delay in crediting of a payment to the consumer's account.

4. *Examples.*

i. A card issuer changes the mailing address for receiving payments by mail from a five-digit postal zip code to a nine-digit postal zip code. A consumer mails a payment using the five-digit postal zip code. The change in mailing address is immaterial and it does not cause a delay. Therefore, a card issuer may impose a late fee or finance charge for a late payment on the account.

ii. A card issuer changes the mailing address for receiving payments by mail from one post office box number to another post office box number. For a 60-day period following the change, the card issuer continues to use both post office box numbers for the collection of payments received by mail. The change in mailing address would not cause a material delay in crediting a payment because payments would be received and credited at both addresses. Therefore, a card issuer may impose a late fee or finance charge for a late payment on the account during the 60-day period following the date on which the change took effect.

iii. Same facts as paragraph ii. above, except the prior post office box number is no longer valid and mail sent to that address during the 60-day period following the change would be returned to sender. The change in mailing address is material and the change could cause a material delay in the crediting of a payment because a payment sent to the old address could be delayed past the due date. If, as a result, a consumer makes a late payment on the account during the 60-day period following the date on which the change took effect, a card issuer may not impose any late fee or finance charge for the late payment.

iv. A consumer regularly makes payments in person at a local branch of a card issuer which maintains offices at which payments are accepted on credit card accounts. The card issuer permanently closes that local branch office. The permanent closing of the local branch office is a material change in address for receiving payment. If, as a result, a consumer makes a late payment on the account during the 60-day period following the date on which the change took effect, the card issuer may not impose any late fee or finance charge for the late payment.

v. A consumer has elected to make payments automatically to a credit card account, such as through a payroll deduction plan or a third party payor's preauthorized payment arrangement. A card issuer changes the procedures for handling such payments and as a result, a payment is delayed and not credited to the consumer's account before the due date. In these circumstances, a card issuer may not impose any late fee or finance charge during the 60-day period following the date on which the change took effect for a late payment on the account.

5. *Finance charge due to periodic interest rate.* When an account is not eligible for a grace period, imposing a finance charge due to a periodic interest rate does not constitute imposition of a finance charge for a late payment for the purposes of § 226.10(f).

§ 226.11 Treatment of Credit Balances; Account Termination.

11(a) Credit balances.

1. *Timing of refund.* The creditor may also fulfill its obligations under § 226.11 by:

i. Refunding any credit balance to the consumer immediately.

ii. Refunding any credit balance prior to receiving a written request (under § 226.11(a)(2)) from the consumer.

iii. Refunding any credit balance upon the consumer's oral or electronic request.

iv. Making a good faith effort to refund any credit balance before 6 months have passed. If that attempt is unsuccessful, the creditor need not try again to refund the credit balance at the end of the 6-month period.

2. *Amount of refund.* The phrases *any part of the remaining credit balance* in § 226.11(a)(2) and *any part of the credit balance remaining in the account* in § 226.11(a)(3) mean the amount of the credit balance at the time the creditor is required to make the refund. The creditor may take into consideration intervening purchases or other debits to the consumer's account (including those that have not yet been reflected on a

periodic statement) that decrease or eliminate the credit balance.

Paragraph 11(a)(2).

1. *Written requests—standing orders.* The creditor is not required to honor standing orders requesting refunds of any credit balance that may be created on the consumer's account.

Paragraph 11(a)(3).

1. *Good faith effort to refund.* The creditor must take positive steps to return any credit balance that has remained in the account for over 6 months. This includes, if necessary, attempts to trace the consumer through the consumer's last known address or telephone number, or both.

2. *Good faith effort unsuccessful.* Section 226.11 imposes no further duties on the creditor if a good faith effort to return the balance is unsuccessful. The ultimate disposition of the credit balance (or any credit balance of $1 or less) is to be determined under other applicable law.

11(b) Account termination.

Paragraph 11(b)(1).

1. *Expiration date.* The credit agreement determines whether or not an open-end plan has a stated expiration (maturity) date. Creditors that offer accounts with no stated expiration date are prohibited from terminating those accounts solely because a consumer does not incur a finance charge, even if credit cards or other access devices associated with the account expire after a stated period. Creditors may still terminate such accounts for inactivity consistent with § 226.11(b)(2).

11(c) Timely settlement of estate debts.

1. *Examples.* The following are examples of reasonable procedures that may satisfy this rule:

i. A creditor may decline future transactions and terminate the account upon receiving reasonable notice of the consumer's death.

ii. A creditor may credit the account for fees and charges imposed after the date of receiving reasonable notice of the consumer's death.

iii. A creditor may waive the estate's liability for all charges made to the account after receiving reasonable notice of the consumer's death.

iv. A creditor may authorize an agent to handle matters in accordance with the requirements of this rule.

2. *Fees and charges.* Section 226.11(c)(2) does not prohibit a creditor from imposing finance charges based on balances for days that precede the date on which the creditor receives a request pursuant to § 226.11(c)(3). For example, if the last day of the billing cycle is June 30 and the creditor receives a request pursuant to § 226.11(c)(3) on June 25, the creditor may charge interest that accrued prior to June 25.

3. *Application to joint accounts.* A creditor may impose fees and charges on an account of a deceased consumer if a joint accountholder remains on the account. If only an authorized user remains on the account of a deceased consumer, however, then a creditor may not impose fees and charges.

4. *Request by an administrator or executor of an estate.* A creditor may receive a request for the amount of the balance on a deceased consumer's account in writing or by telephone call from the administrator or executor of an estate. If a request is made in writing, such as by mail, the request is received on the date the creditor receives the correspondence.

5. *Timely statement of balance.* A creditor must disclose the balance on a deceased consumer's account, upon request by the administrator or executor of the decedent's estate. A creditor may provide the amount, if any, by a written statement or by telephone. This does not preclude a creditor from providing the balance amount to appropriate persons, other than the administrator or executor, such as the spouse or a relative of the decedent, who indicate that they may pay any balance. This provision does not relieve creditors of the requirements to provide a periodic statement, under § 226.5(b)(2). A periodic statement, under § 226.5(b)(2), may satisfy the requirements of § 226.11(c)(3), if provided within 30 days of the notice of the consumer's death.

§ 226.12 Special Credit Card Provisions.

1. *Scope.* Sections 226.12(a) and (b) deal with the issuance and liability rules for credit cards, whether the card is intended for consumer, business, or any other purposes. Sections 226.12(a) and (b) are exceptions to the general rule that the regulation applies only to consumer credit. (*See* §§ 226.1 and 226.3.)

2. *Definition of ''accepted credit card''.* For purposes of this section, ''accepted credit card'' means any credit card that a cardholder has requested or applied for and received, or has signed, used, or authorized another person to use to obtain credit. Any credit card issued as a renewal or substitute in accordance with § 226.12(a) becomes an accepted credit card when received by the cardholder.

12(a) Issuance of credit cards.

Paragraph 12(a)(1).

1. *Explicit request.* A request or application for a card must be explicit. For example, a request for an overdraft plan tied to a checking account does not constitute an application for a credit card with overdraft checking features.

2. *Addition of credit features.* If the consumer has a non-credit card, the addition of credit features to the card (for example, the granting of overdraft privileges on a checking account when the consumer already has a check guarantee card) constitutes issuance of a credit card.

3. *Variance of card from request.* The request or application need not correspond exactly to the card that is issued. For example:

i. The name of the card requested may be different when issued.

ii. The card may have features in addition to those reflected in the request or application.

4. *Permissible form of request.* The request or application may be oral (in response to a telephone solicitation by a card issuer, for example) or written.

5. *Time of issuance.* A credit card may be issued in response to a request made before any cards are ready for issuance (for example, if a new program is established), even if there is some delay in issuance.

6. *Persons to whom cards may be issued.* A card issuer may issue a credit card to the person who requests it, and to anyone else for whom that person requests a card and who will be an authorized user on the requester's account. In other words, cards may be sent to consumer A on A's request, and also (on A's request) to consumers B and C, who will be authorized users on A's account. In these circumstances, the following rules apply:

i. The additional cards may be imprinted in either A's name or in the names of B and C.

ii. No liability for unauthorized use (by persons other than B and C), not even the $50, may be imposed on B or C since they are merely users and not cardholders as that term is defined in § 226.2 and used in § 226.12(b); of course, liability of up to $50 for unauthorized use of B's and C's cards may be imposed on A.

iii. Whether B and C may be held liable for their own use, or on the account generally, is a matter of State or other applicable law.

7. *Issuance of non-credit cards.*

i. *General.* Under § 226.12(a)(1), a credit card cannot be issued except in response to a request or an application. (*See* comment 2(a)(15)–2 for examples of cards or devices that are and are not credit cards.) A non-credit card may be sent on an unsolicited basis by an issuer that does not propose to connect the card to any credit plan; a credit feature may be added to a previously issued

non-credit card only upon the consumer's specific request.

ii. *Examples.* A purchase-price discount card may be sent on an unsolicited basis by an issuer that does not propose to connect the card to any credit plan. An issuer demonstrates that it proposes to connect the card to a credit plan by, for example, including promotional materials about credit features or account agreements and disclosures required by § 226.6. The issuer will violate the rule against unsolicited issuance if, for example, at the time the card is sent a credit plan can be accessed by the card or the recipient of the unsolicited card has been preapproved for credit that the recipient can access by contacting the issuer and activating the card.

8. *Unsolicited issuance of PINs.* A card issuer may issue personal identification numbers (PINs) to existing credit cardholders without a specific request from the cardholders, provided the PINs cannot be used alone to obtain credit. For example, the PINs may be necessary if consumers wish to use their existing credit cards at automated teller machines or at merchant locations with point of sale terminals that require PINs.

Paragraph 12(a)(2).

1. *Renewal.* Renewal generally contemplates the regular replacement of existing cards because of, for example, security reasons or new technology or systems. It also includes the re-issuance of cards that have been suspended temporarily, but does not include the opening of a new account after a previous account was closed.

2. *Substitution—examples.* Substitution encompasses the replacement of one card with another because the underlying account relationship has changed in some way—such as when the card issuer has:

i. Changed its name.

ii. Changed the name of the card.

iii. Changed the credit or other features available on the account. For example, the original card could be used to make purchases and obtain cash advances at teller windows. The substitute card might be usable, in addition, for obtaining cash advances through automated teller machines. (If the substitute card constitutes an access device, as defined in Regulation E, then the Regulation E issuance rules would have to be followed.) The substitution of one card with another on an unsolicited basis is not permissible, however, where in conjunction with the substitution an additional credit card account is opened and the consumer is able to make new purchases or advances under both the original and the new account with the new card. For example, if a retail card issuer replaces its credit card with a combined retailer/bank card, each of the creditors maintains a separate account, and both accounts can be accessed for new transactions by use of the new credit card, the card cannot be provided to a consumer without solicitation.

iv. Substituted a card user's name on the substitute card for the cardholder's name appearing on the original card.

v. Changed the merchant base, provided that the new card is honored by at least one of the persons that honored the original card. However, unless the change in the merchant base is the addition of an affiliate of the existing merchant base, the substitution of a new card for another on an unsolicited basis is not permissible where the account is inactive. A credit card cannot be issued in these circumstances without a request or application. For purposes of § 226.12(a), an account is inactive if no credit has been extended and if the account has no outstanding balance for the prior 24 months. (*See* § 226.11(b)(2).)

3. *Substitution—successor card issuer.* Substitution also occurs when a successor card issuer replaces the original card issuer (for example, when a new card issuer purchases the accounts of the original issuer and issues its own card to replace the original one). A permissible substitution exists even if the original issuer retains the existing receivables and the new card issuer acquires the right only to future receivables, provided use of the original card is cut off when use of the new card becomes possible.

4. *Substitution—non-credit-card plan.* A credit card that replaces a retailer's open-end credit plan not involving a credit card is not considered a substitute for the retailer's plan—even if the consumer used the retailer's plan. A credit card cannot be issued in these circumstances without a request or application.

5. *One-for-one rule.* An accepted card may be replaced by no more than one renewal or substitute card. For example, the card issuer may not replace a credit card permitting purchases and cash advances with two cards, one for the purchases and another for the cash advances.

6. *One-for-one rule—exceptions.* The regulation does not prohibit the card issuer from:

i. Replacing a debit/credit card with a credit card and another card with only debit functions (or debit functions plus an associated overdraft capability), since the latter card could be issued on an unsolicited basis under Regulation E.

ii. Replacing an accepted card with more than one renewal or substitute card, provided that:

A. No replacement card accesses any account not accessed by the accepted card;

B. For terms and conditions required to be disclosed under § 226.6, all replacement cards are issued subject to the same terms and conditions, except that a creditor may vary terms for which no change in terms notice is required under § 226.9(c); and

C. Under the account's terms the consumer's total liability for unauthorized use with respect to the account does not increase.

7. *Methods of terminating replaced card.* The card issuer need not physically retrieve the original card, provided the old card is voided in some way, for example:

i. The issuer includes with the new card a notification that the existing card is no longer valid and should be destroyed immediately.

ii. The original card contained an expiration date.

iii. The card issuer, in order to preclude use of the card, reprograms computers or issues instructions to authorization centers.

8. *Incomplete replacement.* If a consumer has duplicate credit cards on the same account (Card A—one type of bank credit card, for example), the card issuer may not replace the duplicate cards with one Card A and one Card B (Card B—another type of bank credit card) unless the consumer requests Card B.

9. *Multiple entities.* Where multiple entities share responsibilities with respect to a credit card issued by one of them, the entity that issued the card may replace it on an unsolicited basis, if that entity terminates the original card by voiding it in some way, as described in comment 12(a)(2)–7. The other entity or entities may not issue a card on an unsolicited basis in these circumstances.

12(b) Liability of cardholder for unauthorized use.

1. *Meaning of cardholder.* For purposes of this provision, cardholder includes any person (including organizations) to whom a credit card is issued for any purpose, including business. When a corporation is the cardholder, required disclosures should be provided to the corporation (as opposed to an employee user).

2. *Imposing liability.* A card issuer is not required to impose liability on a cardholder for the unauthorized use of a credit card; if the card issuer does not seek to impose liability, the issuer need

not conduct any investigation of the cardholder's claim.

3. *Reasonable investigation.* If a card issuer seeks to impose liability when a claim of unauthorized use is made by a cardholder, the card issuer must conduct a reasonable investigation of the claim. In conducting its investigation, the card issuer may reasonably request the cardholder's cooperation. The card issuer may not automatically deny a claim based solely on the cardholder's failure or refusal to comply with a particular request, including providing an affidavit or filing a police report; however, if the card issuer otherwise has no knowledge of facts confirming the unauthorized use, the lack of information resulting from the cardholder's failure or refusal to comply with a particular request may lead the card issuer reasonably to terminate the investigation. The procedures involved in investigating claims may differ, but actions such as the following represent steps that a card issuer may take, as appropriate, in conducting a reasonable investigation:

i. Reviewing the types or amounts of purchases made in relation to the cardholder's previous purchasing pattern.

ii. Reviewing where the purchases were delivered in relation to the cardholder's residence or place of business.

iii. Reviewing where the purchases were made in relation to where the cardholder resides or has normally shopped.

iv. Comparing any signature on credit slips for the purchases to the signature of the cardholder or an authorized user in the card issuer's records, including other credit slips.

v. Requesting documentation to assist in the verification of the claim.

vi. Requiring a written, signed statement from the cardholder or authorized user. For example, the creditor may include a signature line on a billing rights form that the cardholder may send in to provide notice of the claim. However, a creditor may not require the cardholder to provide an affidavit or signed statement under penalty of perjury as part of a reasonable investigation.

vii. Requesting a copy of a police report, if one was filed.

viii. Requesting information regarding the cardholder's knowledge of the person who allegedly used the card or of that person's authority to do so.

4. *Checks that access a credit card account.* The liability provisions for unauthorized use under § 226.12(b)(1) only apply to transactions involving the use of a credit card, and not if an unauthorized transaction is made using a check accessing the credit card account. However, the billing error provisions in § 226.13 apply to both of these types of transactions.

12(b)(1)(ii) Limitation on amount.

1. *Meaning of authority.* Section 226.12(b)(1)(i) defines unauthorized use in terms of whether the user has actual, implied, or apparent authority. Whether such authority exists must be determined under State or other applicable law.

2. *Liability limits—dollar amounts.* As a general rule, the cardholder's liability for a series of unauthorized uses cannot exceed either $50 or the value obtained through the unauthorized use before the card issuer is notified, whichever is less.

3. *Implied or apparent authority.* If a cardholder furnishes a credit card and grants authority to make credit transactions to a person (such as a family member or coworker) who exceeds the authority given, the cardholder is liable for the transaction(s) unless the cardholder has notified the creditor that use of the credit card by that person is no longer authorized.

4. *Credit card obtained through robbery or fraud.* An unauthorized use includes, but is not limited to, a transaction initiated by a person who has obtained the credit card from the consumer, or otherwise initiated the transaction, through fraud or robbery.

12(b)(2) Conditions of liability.

1. *Issuer's option not to comply.* A card issuer that chooses not to impose any liability on cardholders for unauthorized use need not comply with the disclosure and identification requirements discussed in § 226.12(b)(2).

Paragraph 12(b)(2)(ii).

1. *Disclosure of liability and means of notifying issuer.* The disclosures referred to in § 226.12(b)(2)(ii) may be given, for example, with the initial disclosures under § 226.6, on the credit card itself, or on periodic statements. They may be given at any time preceding the unauthorized use of the card.

2. *Meaning of ''adequate notice.''* For purposes of this provision, ''adequate notice'' means a printed notice to a cardholder that sets forth clearly the pertinent facts so that the cardholder may reasonably be expected to have noticed it and understood its meaning. The notice may be given by any means reasonably assuring receipt by the cardholder.

Paragraph 12(b)(2)(iii).

1. *Means of identifying cardholder or user.* To fulfill the condition set forth in § 226.12(b)(2)(iii), the issuer must provide some method whereby the cardholder or the authorized user can be identified. This could include, for example, a signature, photograph, or fingerprint on the card or other biometric means, or electronic or mechanical confirmation.

2. *Identification by magnetic strip.* Unless a magnetic strip (or similar device not readable without physical aids) must be used in conjunction with a secret code or the like, it would not constitute sufficient means of identification. Sufficient identification also does not exist if a ''pool'' or group card, issued to a corporation and signed by a corporate agent who will not be a user of the card, is intended to be used by another employee for whom no means of identification is provided.

3. *Transactions not involving card.* The cardholder may not be held liable under § 226.12(b) when the card itself (or some other sufficient means of identification of the cardholder) is not presented. Since the issuer has not provided a means to identify the user under these circumstances, the issuer has not fulfilled one of the conditions for imposing liability. For example, when merchandise is ordered by telephone or the Internet by a person without authority to do so, using a credit card account number by itself or with other information that appears on the card (for example, the card expiration date and a 3- or 4-digit cardholder identification number), no liability may be imposed on the cardholder.

12(b)(3) Notification to card issuer.

1. *How notice must be provided.* Notice given in a normal business manner—for example, by mail, telephone, or personal visit—is effective even though it is not given to, or does not reach, some particular person within the issuer's organization. Notice also may be effective even though it is not given at the address or phone number disclosed by the card issuer under § 226.12(b)(2)(ii).

2. *Who must provide notice.* Notice of loss, theft, or possible unauthorized use need not be initiated by the cardholder. Notice is sufficient so long as it gives the ''pertinent information'' which would include the name or card number of the cardholder and an indication that unauthorized use has or may have occurred.

3. *Relationship to § 226.13.* The liability protections afforded to cardholders in § 226.12 do not depend upon the cardholder's following the error resolution procedures in § 226.13. For example, the written notification and time limit requirements of § 226.13 do not affect the § 226.12 protections. (*See* also comment 12(b)–4.)

12(b)(5) Business use of credit cards.

1. *Agreement for higher liability for business use cards.* The card issuer may not rely on § 226.12(b)(5) if the business is clearly not in a position to provide 10 or more cards to employees (for example, if the business has only 3 employees). On the other hand, the issuer need not monitor the personnel practices of the business to make sure that it has at least 10 employees at all times.

2. *Unauthorized use by employee.* The protection afforded to an employee against liability for unauthorized use in excess of the limits set in § 226.12(b) applies only to unauthorized use by someone other than the employee. If the employee uses the card in an unauthorized manner, the regulation sets no restriction on the employee's potential liability for such use.

12(c) Right of cardholder to assert claims or defenses against card issuer.

1. *Relationship to § 226.13.* The § 226.12(c) credit card ''holder in due course'' provision deals with the consumer's right to assert against the card issuer a claim or defense concerning property or services purchased with a credit card, if the merchant has been unwilling to resolve the dispute. Even though certain merchandise disputes, such as non-delivery of goods, may also constitute ''billing errors'' under § 226.13, that section operates independently of § 226.12(c). The cardholder whose asserted billing error involves undelivered goods may institute the error resolution procedures of § 226.13; but whether or not the cardholder has done so, the cardholder may assert claims or defenses under § 226.12(c). Conversely, the consumer may pay a disputed balance and thus have no further right to assert claims and defenses, but still may assert a billing error if notice of that billing error is given in the proper time and manner. An assertion that a particular transaction resulted from unauthorized use of the card could also be both a ''defense'' and a billing error.

2. *Claims and defenses assertible.* Section 226.12(c) merely preserves the consumer's right to assert against the card issuer any claims or defenses that can be asserted against the merchant. It does not determine what claims or defenses are valid as to the merchant; this determination must be made under State or other applicable law.

3. *Transactions excluded.* Section 226.12(c) does not apply to the use of a check guarantee card or a debit card in connection with an overdraft credit plan, or to a check guarantee card used in connection with cash-advance checks.

4. *Method of calculating the amount of credit outstanding.* The amount of the claim or defense that the cardholder may assert shall not exceed the amount of credit outstanding for the disputed transaction at the time the cardholder first notifies the card issuer or the person honoring the credit card of the existence of the claim or defense. To determine the amount of credit outstanding for purposes of this section, payments and other credits shall be applied to: (i) Late charges in the order of entry to the account; then to (ii) finance charges in the order of entry to the account; and then to (iii) any other debits in the order of entry to the account. If more than one item is included in a single extension of credit, credits are to be distributed pro rata according to prices and applicable taxes.

12(c)(1) General rule.

1. *Situations excluded and included.* The consumer may assert claims or defenses only when the goods or services are ''purchased with the credit card.'' This could include mail, the Internet or telephone orders, if the purchase is charged to the credit card account. But it would exclude:

i. Use of a credit card to obtain a cash advance, even if the consumer then uses the money to purchase goods or services. Such a transaction would not involve ''property or services purchased with the credit card.''

ii. The purchase of goods or services by use of a check accessing an overdraft account and a credit card used solely for identification of the consumer. (On the other hand, if the credit card is used to make partial payment for the purchase and not merely for identification, the right to assert claims or defenses would apply to credit extended via the credit card, although not to the credit extended on the overdraft line.)

iii. Purchases made by use of a check guarantee card in conjunction with a cash advance check (or by cash advance checks alone). (*See* comment 12(c)–3.) A cash advance check is a check that, when written, does not draw on an asset account; instead, it is charged entirely to an open-end credit account.

iv. Purchases effected by use of either a check guarantee card or a debit card when used to draw on overdraft credit plans. (*See* comment 12(c)–3.) The debit card exemption applies whether the card accesses an asset account via point of sale terminals, automated teller machines, or in any other way, and whether the card qualifies as an ''access device'' under Regulation E or is only a paper based debit card. If a card serves both as an ordinary credit card and also as check guarantee or debit card, a transaction will be subject to this rule on asserting claims and defenses when used as an ordinary credit card, but not when used as a check guarantee or debit card.

12(c)(2) Adverse credit reports prohibited.

1. *Scope of prohibition.* Although an amount in dispute may not be reported as delinquent until the matter is resolved:

i. That amount may be reported as disputed.

ii. Nothing in this provision prohibits the card issuer from undertaking its normal collection activities for the delinquent and undisputed portion of the account.

2. *Settlement of dispute.* A card issuer may not consider a dispute settled and report an amount disputed as delinquent or begin collection of the disputed amount until it has completed a reasonable investigation of the cardholder's claim. A reasonable investigation requires an independent assessment of the cardholder's claim based on information obtained from both the cardholder and the merchant, if possible. In conducting an investigation, the card issuer may request the cardholder's reasonable cooperation. The card issuer may not automatically consider a dispute settled if the cardholder fails or refuses to comply with a particular request. However, if the card issuer otherwise has no means of obtaining information necessary to resolve the dispute, the lack of information resulting from the cardholder's failure or refusal to comply with a particular request may lead the card issuer reasonably to terminate the investigation.

12(c)(3) Limitations.

Paragraph 12(c)(3)(i)(A).

1. *Resolution with merchant.* The consumer must have tried to resolve the dispute with the merchant. This does not require any special procedures or correspondence between them, and is a matter for factual determination in each case. The consumer is not required to seek satisfaction from the manufacturer of the goods involved. When the merchant is in bankruptcy proceedings, the consumer is not required to file a claim in those proceedings, and may instead file a claim for the property or service purchased with the credit card with the card issuer directly.

Paragraph 12(c)(3)(i)(B).

1. *Geographic limitation.* The question of where a transaction occurs (as in the case of mail, Internet, or telephone orders, for example) is to be determined under State or other applicable law.

Paragraph 12(c)(3)(ii).

1. *Merchant honoring card.* The exceptions (stated in § 226.12(c)(3)(ii)) to the amount and geographic limitations in § 226.12(c)(3)(i)(B) do not apply if the merchant merely honors, or indicates through signs or advertising that it honors, a particular credit card.

12(d) Offsets by card issuer prohibited.

Paragraph 12(d)(1).

1. *Holds on accounts.* ''Freezing'' or placing a hold on funds in the cardholder's deposit account is the functional equivalent of an offset and would contravene the prohibition in § 226.12(d)(1), unless done in the context of one of the exceptions specified in § 226.12(d)(2). For example, if the terms of a security agreement permitted the card issuer to place a hold on the funds, the hold would not violate the offset prohibition. Similarly, if an order of a bankruptcy court required the card issuer to turn over deposit account funds to the trustee in bankruptcy, the issuer would not violate the regulation by placing a hold on the funds in order to comply with the court order.

2. *Funds intended as deposits.* If the consumer tenders funds as a deposit (to a checking account, for example), the card issuer may not apply the funds to repay indebtedness on the consumer's credit card account.

3. *Types of indebtedness; overdraft accounts.* The offset prohibition applies to any indebtedness arising from transactions under a credit card plan, including accrued finance charges and other charges on the account. The prohibition also applies to balances arising from transactions not using the credit card itself but taking place under plans that involve credit cards. For example, if the consumer writes a check that accesses an overdraft line of credit, the resulting indebtedness is subject to the offset prohibition since it is incurred through a credit card plan, even though the consumer did not use an associated check guarantee or debit card.

4. *When prohibition applies in case of termination of account.* The offset prohibition applies even after the card issuer terminates the cardholder's credit card privileges, if the indebtedness was incurred prior to termination. If the indebtedness was incurred after termination, the prohibition does not apply.

Paragraph 12(d)(2).

1. *Security interest—limitations.* In order to qualify for the exception stated in § 226.12(d)(2), a security interest must be affirmatively agreed to by the consumer and must be disclosed in the issuer's account-opening disclosures under § 226.6. The security interest must not be the functional equivalent of a right of offset; as a result, routinely including in agreements contract language indicating that consumers are giving a security interest in any deposit accounts maintained with the issuer does not result in a security interest that falls within the exception in § 226.12(d)(2). For a security interest to qualify for the exception under § 226.12(d)(2) the following conditions must be met:

i. The consumer must be aware that granting a security interest is a condition for the credit card account (or for more favorable account terms) and must specifically intend to grant a security interest in a deposit account. Indicia of the consumer's awareness and intent include at least one of the following (or a substantially similar procedure that evidences the consumer's awareness and intent):

A. Separate signature or initials on the agreement indicating that a security interest is being given.

B. Placement of the security agreement on a separate page, or otherwise separating the security interest provisions from other contract and disclosure provisions.

C. Reference to a specific amount of deposited funds or to a specific deposit account number.

ii. The security interest must be obtainable and enforceable by creditors generally. If other creditors could not obtain a security interest in the consumer's deposit accounts to the same extent as the card issuer, the security interest is prohibited by § 226.12(d)(2).

2. *Security interest—after-acquired property.* As used in § 226.12(d), the term ''security interest'' does not exclude (as it does for other Regulation Z purposes) interests in after-acquired property. Thus, a consensual security interest in deposit-account funds, including funds deposited after the granting of the security interest would constitute a permissible exception to the prohibition on offsets.

3. *Court order.* If the card issuer obtains a judgment against the cardholder, and if State and other applicable law and the terms of the judgment do not so prohibit, the card issuer may offset the indebtedness against the cardholder's deposit account.

Paragraph 12(d)(3).

1. *Automatic payment plans—scope of exception.* With regard to automatic debit plans under § 226.12(d)(3), the following rules apply:

i. The cardholder's authorization must be in writing and signed or initialed by the cardholder.

ii. The authorizing language need not appear directly above or next to the cardholder's signature or initials, provided it appears on the same document and that it clearly spells out the terms of the automatic debit plan.

iii. If the cardholder has the option to accept or reject the automatic debit feature (such option may be required under section 913 of the Electronic Fund Transfer Act), the fact that the option exists should be clearly indicated.

2. *Automatic payment plans—additional exceptions.* The following practices are not prohibited by § 226.12(d)(1):

i. Automatically deducting charges for participation in a program of banking services (one aspect of which may be a credit card plan).

ii. Debiting the cardholder's deposit account on the cardholder's specific request rather than on an automatic periodic basis (for example, a cardholder might check a box on the credit card bill stub, requesting the issuer to debit the cardholder's account to pay that bill).

12(e) Prompt notification of returns and crediting of refunds.

Paragraph 12(e)(1).

1. *Normal channels.* The term normal channels refers to any network or interchange system used for the processing of the original charge slips (or equivalent information concerning the transaction).

Paragraph 12(e)(2).

1. *Crediting account.* The card issuer need not actually post the refund to the consumer's account within three business days after receiving the credit statement, provided that it credits the account as of a date within that time period.

§ 226.13 Billing Error Resolution.

1. *Creditor's failure to comply with billing error provisions.* Failure to comply with the error resolution procedures may result in the forfeiture of disputed amounts as prescribed in section 161(e) of the act. (Any failure to comply may also be a violation subject to the liability provisions of section 130 of the act.)

2. *Charges for error resolution.* If a billing error occurred, whether as alleged or in a different amount or manner, the creditor may not impose a charge related to any aspect of the error resolution process (including charges for documentation or investigation) and must credit the consumer's account if such a charge was assessed pending resolution. Since the act grants the consumer error resolution rights, the creditor should avoid any chilling effect

on the good faith assertion of errors that might result if charges are assessed when no billing error has occurred.

13(a) Definition of billing error.

Paragraph 13(a)(1).

1. *Actual, implied, or apparent authority.* Whether use of a credit card or open-end credit plan is authorized is determined by State or other applicable law. (*See* comment 12(b)(1)(ii)–1.)

Paragraph 13(a)(3).

1. *Coverage.* i. Section 226.13(a)(3) covers disputes about goods or services that are ''not accepted'' or ''not delivered * * * as agreed''; for example:

A. The appearance on a periodic statement of a purchase, when the consumer refused to take delivery of goods because they did not comply with the contract.

B. Delivery of property or services different from that agreed upon.

C. Delivery of the wrong quantity.

D. Late delivery.

E. Delivery to the wrong location.

ii. Section 226.13(a)(3) does not apply to a dispute relating to the quality of property or services that the consumer accepts. Whether acceptance occurred is determined by State or other applicable law.

2. *Application to purchases made using a third-party payment intermediary.* Section 226.13(a)(3) generally applies to disputes about goods and services that are purchased using a third-party payment intermediary, such as a person-to-person Internet payment service, funded through use of a consumer's open-end credit plan when the goods or services are not accepted by the consumer or not delivered to the consumer as agreed. However, the extension of credit must be made at the time the consumer purchases the good or service and match the amount of the transaction to purchase the good or service (including ancillary taxes and fees). Under these circumstances, the property or service for which the extension of credit is made is not the payment service, but rather the good or service that the consumer has purchased using the payment service. Thus, for example, § 226.13(a)(3) would not apply to purchases using a third party payment intermediary that is funded through use of an open-end credit plan if:

i. The extension of credit is made to fund the third-party payment intermediary ''account,'' but the consumer does not contemporaneously use those funds to purchase a good or service at that time.

ii. The extension of credit is made to fund only a portion of the purchase amount, and the consumer uses other sources to fund the remaining amount.

3. *Notice to merchant not required.* A consumer is not required to first notify the merchant or other payee from whom he or she has purchased goods or services and attempt to resolve a dispute regarding the good or service before providing a billing-error notice to the creditor under § 226.13(a)(3) asserting that the goods or services were not accepted or delivered as agreed.

Paragraph 13(a)(5).

1. *Computational errors.* In periodic statements that are combined with other information, the error resolution procedures are triggered only if the consumer asserts a computational billing error in the credit-related portion of the periodic statement. For example, if a bank combines a periodic statement reflecting the consumer's credit card transactions with the consumer's monthly checking statement, a computational error in the checking account portion of the combined statement is not a billing error.

Paragraph 13(a)(6).

1. *Documentation requests.* A request for documentation such as receipts or sales slips, unaccompanied by an allegation of an error under § 226.13(a) or a request for additional clarification under § 226.13(a)(6), does not trigger the error resolution procedures. For example, a request for documentation merely for purposes such as tax preparation or recordkeeping does not trigger the error resolution procedures.

13(b) Billing error notice.

1. *Withdrawal of billing error notice by consumer.* The creditor need not comply with the requirements of § 226.13(c) through (g) of this section if the consumer concludes that no billing error occurred and voluntarily withdraws the billing error notice. The consumer's withdrawal of a billing error notice may be oral, electronic or written.

2. *Form of written notice.* The creditor may require that the written notice not be made on the payment medium or other material accompanying the periodic statement if the creditor so stipulates in the billing rights statement required by §§ 226.6(a)(5) or (b)(5)(iii), and 226.9(a). In addition, if the creditor stipulates in the billing rights statement that it accepts billing error notices submitted electronically, and states the means by which a consumer may electronically submit a billing error notice, a notice sent in such manner will be deemed to satisfy the written notice requirement for purposes of § 226.13(b).

Paragraph 13(b)(1).

1. *Failure to send periodic statement—timing.* If the creditor has failed to send a periodic statement, the 60-day period runs from the time the statement should have been sent. Once the statement is provided, the consumer has another 60 days to assert any billing errors reflected on it.

2. *Failure to reflect credit—timing.* If the periodic statement fails to reflect a credit to the account, the 60-day period runs from transmittal of the statement on which the credit should have appeared.

3. *Transmittal.* If a consumer has arranged for periodic statements to be held at the financial institution until called for, the statement is ''transmitted'' when it is first made available to the consumer.

Paragraph 13(b)(2).

1. *Identity of the consumer.* The billing error notice need not specify both the name and the account number if the information supplied enables the creditor to identify the consumer's name and account.

13(c) Time for resolution; general procedures.

1. *Temporary or provisional corrections.* A creditor may temporarily correct the consumer's account in response to a billing error notice, but is not excused from complying with the remaining error resolution procedures within the time limits for resolution.

2. *Correction without investigation.* A creditor may correct a billing error in the manner and amount asserted by the consumer without the investigation or the determination normally required. The creditor must comply, however, with all other applicable provisions. If a creditor follows this procedure, no presumption is created that a billing error occurred.

3. *Relationship with § 226.12.* The consumer's rights under the billing error provisions in § 226.13 are independent of the provisions set forth in § 226.12(b) and (c). (*See* comments 12(b)–4, 12(b)(3)–3, and 12(c)–1.)

Paragraph 13(c)(2).

1. *Time for resolution.* The phrase two complete billing cycles means two actual billing cycles occurring after receipt of the billing error notice, not a measure of time equal to two billing cycles. For example, if a creditor on a monthly billing cycle receives a billing error notice mid-cycle, it has the remainder of that cycle plus the next two full billing cycles to resolve the error.

2. *Finality of error resolution procedure.* A creditor must comply with the error resolution procedures and complete its investigation to determine whether an error occurred within two complete billing cycles as set forth in paragraph (c)(2) of this section. Thus,

for example, the creditor would be prohibited from reversing amounts previously credited for an alleged billing error even if the creditor obtains evidence after the error resolution time period has passed indicating that the billing error did not occur as asserted by the consumer. Similarly, if a creditor fails to mail or deliver a written explanation setting forth the reason why the billing error did not occur as asserted, or otherwise fails to comply with the error resolution procedures set forth in § 226.13(f), the creditor generally must credit the disputed amount and related finance or other charges, as applicable, to the consumer's account.

13(d) Rules pending resolution.

1. *Disputed amount.* Disputed amount is the dollar amount alleged by the consumer to be in error. When the allegation concerns the description or identification of the transaction (such as the date or the seller's name) rather than a dollar amount, the disputed amount is the amount of the transaction or charge that corresponds to the disputed transaction identification. If the consumer alleges a failure to send a periodic statement under § 226.13(a)(7), the disputed amount is the entire balance owing.

13(d)(1) Consumer's right to withhold disputed amount; collection action prohibited.

1. *Prohibited collection actions.* During the error resolution period, the creditor is prohibited from trying to collect the disputed amount from the consumer. Prohibited collection actions include, for example, instituting court action, taking a lien, or instituting attachment proceedings.

2. *Right to withhold payment.* If the creditor reflects any disputed amount or related finance or other charges on the periodic statement, and is therefore required to make the disclosure under § 226.13(d)(4), the creditor may comply with that disclosure requirement by indicating that payment of any disputed amount is not required pending resolution. Making a disclosure that only refers to the disputed amount would, of course, in no way affect the consumer's right under § 226.13(d)(1) to withhold related finance and other charges. The disclosure under § 226.13(d)(4) need not appear in any specific place on the periodic statement, need not state the specific amount that the consumer may withhold, and may be preprinted on the periodic statement.

3. *Imposition of additional charges on undisputed amounts.* The consumer's withholding of a disputed amount from the total bill cannot subject undisputed balances (including new purchases or cash advances made during the present or subsequent cycles) to the imposition of finance or other charges. For example, if on an account with a grace period (that is, an account in which paying the new balance in full allows the consumer to avoid the imposition of additional finance charges), a consumer disputes a $2 item out of a total bill of $300 and pays $298 within the grace period, the consumer would not lose the grace period as to any undisputed amounts, even if the creditor determines later that no billing error occurred. Furthermore, finance or other charges may not be imposed on any new purchases or advances that, absent the unpaid disputed balance, would not have finance or other charges imposed on them. Finance or other charges that would have been incurred even if the consumer had paid the disputed amount would not be affected.

4. *Automatic payment plans—coverage.* The coverage of this provision is limited to the card issuer's automatic payment plans, whether or not the consumer's asset account is held by the card issuer or by another financial institution. It does not apply to automatic or bill-payment plans offered by financial institutions other than the credit card issuer.

5. *Automatic payment plans—time of notice.* While the card issuer does not have to restore or prevent the debiting of a disputed amount if the billing error notice arrives after the three business-day cut-off, the card issuer must, however, prevent the automatic debit of any part of the disputed amount that is still outstanding and unresolved at the time of the next scheduled debit date.

13(d)(2) Adverse credit reports prohibited.

1. *Report of dispute.* Although the creditor must not issue an adverse credit report because the consumer fails to pay the disputed amount or any related charges, the creditor may report that the amount or the account is in dispute. Also, the creditor may report the account as delinquent if undisputed amounts remain unpaid.

2. *Person.* During the error resolution period, the creditor is prohibited from making an adverse credit report about the disputed amount to any person—including employers, insurance companies, other creditors, and credit bureaus.

3. *Creditor's agent.* Whether an agency relationship exists between a creditor and an issuer of an adverse credit report is determined by State or other applicable law.

13(e) Procedures if billing error occurred as asserted.

1. *Correction of error.* The phrase as applicable means that the necessary corrections vary with the type of billing error that occurred. For example, a misidentified transaction (or a transaction that is identified by one of the alternative methods in § 226.8) is cured by properly identifying the transaction and crediting related finance and any other charges imposed. The creditor is not required to cancel the amount of the underlying obligation incurred by the consumer.

2. *Form of correction notice.* The written correction notice may take a variety of forms. It may be sent separately, or it may be included on or with a periodic statement that is mailed within the time for resolution. If the periodic statement is used, the amount of the billing error must be specifically identified. If a separate billing error correction notice is provided, the accompanying or subsequent periodic statement reflecting the corrected amount may simply identify it as credit.

3. *Discovery of information after investigation period. See* comment 13(c)(2)–2.

13(f) Procedures if different billing error or no billing error occurred.

1. *Different billing error.* Examples of a different billing error include:

i. Differences in the amount of an error (for example, the customer asserts a $55.00 error but the error was only $53.00).

ii. Differences in other particulars asserted by the consumer (such as when a consumer asserts that a particular transaction never occurred, but the creditor determines that only the seller's name was disclosed incorrectly).

2. *Form of creditor's explanation.* The written explanation (which also may notify the consumer of corrections to the account) may take a variety of forms. It may be sent separately, or it may be included on or with a periodic statement that is mailed within the time for resolution. If the creditor uses the periodic statement for the explanation and correction(s), the corrections must be specifically identified. If a separate explanation, including the correction notice, is provided, the enclosed or subsequent periodic statement reflecting the corrected amount may simply identify it as a credit. The explanation may be combined with the creditor's notice to the consumer of amounts still owing, which is required under § 226.13(g)(1), provided it is sent within the time limit for resolution. (*See* commentary to § 226.13(e).)

3. *Reasonable investigation.* A creditor must conduct a reasonable investigation before it determines that no billing error occurred or that a

different billing error occurred from that asserted. In conducting its investigation of an allegation of a billing error, the creditor may reasonably request the consumer's cooperation. The creditor may not automatically deny a claim based solely on the consumer's failure or refusal to comply with a particular request, including providing an affidavit or filing a police report. However, if the creditor otherwise has no knowledge of facts confirming the billing error, the lack of information resulting from the consumer's failure or refusal to comply with a particular request may lead the creditor reasonably to terminate the investigation. The procedures involved in investigating alleged billing errors may differ depending on the billing error type.

i. *Unauthorized transaction.* In conducting an investigation of a notice of billing error alleging an unauthorized transaction under § 226.13(a)(1), actions such as the following represent steps that a creditor may take, as appropriate, in conducting a reasonable investigation:

A. Reviewing the types or amounts of purchases made in relation to the consumer's previous purchasing pattern.

B. Reviewing where the purchases were delivered in relation to the consumer's residence or place of business.

C. Reviewing where the purchases were made in relation to where the consumer resides or has normally shopped.

D. Comparing any signature on credit slips for the purchases to the signature of the consumer (or an authorized user in the case of a credit card account) in the creditor's records, including other credit slips.

E. Requesting documentation to assist in the verification of the claim.

F. Requesting a written, signed statement from the consumer (or authorized user, in the case of a credit card account). For example, the creditor may include a signature line on a billing rights form that the consumer may send in to provide notice of the claim. However, a creditor may not require the consumer to provide an affidavit or signed statement under penalty of perjury as a part of a reasonable investigation.

G. Requesting a copy of a police report, if one was filed.

H. Requesting information regarding the consumer's knowledge of the person who allegedly obtained an extension of credit on the account or of that person's authority to do so.

ii. *Nondelivery of property or services.* In conducting an investigation of a billing error notice alleging the nondelivery of property or services under § 226.13(a)(3), the creditor shall not deny the assertion unless it conducts a reasonable investigation and determines that the property or services were actually delivered, mailed, or sent as agreed.

iii. *Incorrect information.* In conducting an investigation of a billing error notice alleging that information appearing on a periodic statement is incorrect because a person honoring the consumer's credit card or otherwise accepting an access device for an open-end plan has made an incorrect report to the creditor, the creditor shall not deny the assertion unless it conducts a reasonable investigation and determines that the information was correct.

13(g) Creditor's rights and duties after resolution.

Paragraph 13(g)(1).

1. *Amounts owed by consumer.* Amounts the consumer still owes may include both minimum periodic payments and related finance and other charges that accrued during the resolution period. As explained in the commentary to § 226.13(d)(1), even if the creditor later determines that no billing error occurred, the creditor may not include finance or other charges that are imposed on undisputed balances solely as a result of a consumer's withholding payment of a disputed amount.

2. *Time of notice.* The creditor need not send the notice of amount owed within the time period for resolution, although it is under a duty to send the notice promptly after resolution of the alleged error. If the creditor combines the notice of the amount owed with the explanation required under § 226.13(f)(1), the combined notice must be provided within the time limit for resolution.

Paragraph 13(g)(2).

1. *Grace period if no error occurred.* If the creditor determines, after a reasonable investigation, that a billing error did not occur as asserted, and the consumer was entitled to a grace period at the time the consumer provided the billing error notice, the consumer must be given a period of time equal to the grace period disclosed under § 226.6(a)(1) or (b)(2) and § 226.7(a)(8) or (b)(8) to pay any disputed amounts due without incurring additional finance or other charges. However, the creditor need not allow a grace period disclosed under the above-mentioned sections to pay the amount due under § 226.13(g)(1) if no error occurred and the consumer was not entitled to a grace period at the time the consumer asserted the error. For example, assume that a creditor provides a consumer a grace period of 20 days to pay a new balance to avoid finance charges, and that the consumer did not carry an outstanding balance from the prior month. If the consumer subsequently asserts a billing error for the current statement period within the 20-day grace period, and the creditor determines that no billing error in fact occurred, the consumer must be given at least 20 days (*i.e.*, the full disclosed grace period) to pay the amount due without incurring additional finance charges. Conversely, if the consumer was not entitled to a grace period at the time the consumer asserted the billing error, for example, if the consumer did not pay the previous monthly balance of undisputed charges in full, the creditor may assess finance charges on the disputed balance for the entire period the item was in dispute.

Paragraph 13(g)(3).

1. *Time for payment.* The consumer has a minimum of 10 days to pay (measured from the time the consumer could reasonably be expected to have received notice of the amount owed) before the creditor may issue an adverse credit report; if an initially disclosed grace period allows the consumer a longer time in which to pay, the consumer has the benefit of that longer period.

Paragraph 13(g)(4).

1. *Credit reporting.* Under § 226.13(g)(4)(i) and (iii) the creditor's additional credit reporting responsibilities must be accomplished promptly. The creditor need not establish costly procedures to fulfill this requirement. For example, a creditor that reports to a credit bureau on scheduled updates need not transmit corrective information by an unscheduled computer or magnetic tape; it may provide the credit bureau with the correct information by letter or other commercially reasonable means when using the scheduled update would not be ''prompt.'' The creditor is not responsible for ensuring that the credit bureau corrects its information immediately.

2. *Adverse report to credit bureau.* If a creditor made an adverse report to a credit bureau that disseminated the information to other creditors, the creditor fulfills its § 226.13(g)(4)(ii) obligations by providing the consumer with the name and address of the credit bureau.

13(i) Relation to Electronic Fund Transfer Act and Regulation E.

1. *Coverage.* Credit extended directly from a non-overdraft credit line is governed solely by Regulation Z, even though a combined credit card/access device is used to obtain the extension.

2. *Incidental credit under agreement.* Credit extended incident to an electronic fund transfer under an agreement between the consumer and the financial institution is governed by § 226.13(i), which provides that certain error resolution procedures in both this regulation and Regulation E apply. Incidental credit that is not extended under an agreement between the consumer and the financial institution is governed solely by the error resolution procedures in Regulation E. For example, credit inadvertently extended incident to an electronic fund transfer, such as under an overdraft service not subject to Regulation Z, is governed solely by the Regulation E error resolution procedures, if the bank and the consumer do not have an agreement to extend credit when the consumer's account is overdrawn.

3. *Application to debit/credit transactions-examples.* If a consumer withdraws money at an automated teller machine and activates an overdraft credit feature on the checking account:

i. An error asserted with respect to the transaction is subject, for error resolution purposes, to the applicable Regulation E provisions (such as timing and notice) for the entire transaction.

ii. The creditor need not provisionally credit the consumer's account, under § 205.11(c)(2)(i) of Regulation E, for any portion of the unpaid extension of credit.

iii. The creditor must credit the consumer's account under § 205.11(c) with any finance or other charges incurred as a result of the alleged error.

iv. The provisions of §§ 226.13(d) and (g) apply only to the credit portion of the transaction.

§ 226.14 Determination of Annual Percentage Rate.

14(a) General rule.

1. *Tolerance.* The tolerance of ⅛ of 1 percentage point above or below the annual percentage rate applies to any required disclosure of the annual percentage rate. The disclosure of the annual percentage rate is required in §§ 226.5a, 226.5b, 226.6, 226.7, 226.9, 226.15, 226.16, 226.26, 226.55, and 226.56.

2. *Rounding.* The regulation does not require that the annual percentage rate be calculated to any particular number of decimal places; rounding is permissible within the ⅛ of 1 percent tolerance. For example, an exact annual percentage rate of 14.33333% may be stated as 14.33% or as 14.3%, or even as 14¼%; but it could not be stated as 14.2% or 14%, since each varies by more than the permitted tolerance.

3. *Periodic rates.* No explicit tolerance exists for any periodic rate as such; a disclosed periodic rate may vary from precise accuracy (for example, due to rounding) only to the extent that its annualized equivalent is within the tolerance permitted by § 226.14(a). Further, a periodic rate need not be calculated to any particular number of decimal places.

4. *Finance charges.* The regulation does not prohibit creditors from assessing finance charges on balances that include prior, unpaid finance charges; State or other applicable law may do so, however.

5. *Good faith reliance on faulty calculation tools.* The regulation relieves a creditor of liability for an error in the annual percentage rate or finance charge that resulted from a corresponding error in a calculation tool used in good faith by the creditor. Whether or not the creditor's use of the tool was in good faith must be determined on a case-by-case basis, but the creditor must in any case have taken reasonable steps to verify the accuracy of the tool, including any instructions, before using it. Generally, the safe harbor from liability is available only for errors directly attributable to the calculation tool itself, including software programs; it is not intended to absolve a creditor of liability for its own errors, or for errors arising from improper use of the tool, from incorrect data entry, or from misapplication of the law.

14(b) Annual percentage rate—in general.

1. *Corresponding annual percentage rate computation.* For purposes of §§ 226.5a, 226.5b, 226.6, 226.7(a)(4) or (b)(4), 226.9, 226.15, 226.16, 226.26, 226.55, and 226.56, the annual percentage rate is determined by multiplying the periodic rate by the number of periods in the year. This computation reflects the fact that, in such disclosures, the rate (known as the corresponding annual percentage rate) is prospective and does not involve any particular finance charge or periodic balance.

14(c) Optional effective annual percentage rate for periodic statements for creditors offering open-end plans subject to the requirements of § 226.5b.

1. *General rule.* The periodic statement may reflect (under § 226.7(a)(7)) the annualized equivalent of the rate actually applied during a particular cycle; this rate may differ from the corresponding annual percentage rate because of the inclusion of, for example, fixed, minimum, or transaction charges. Sections 226.14(c)(1) through (c)(4) state the computation rules for the effective rate.

2. *Charges related to opening, renewing, or continuing an account.* Sections 226.14(c)(2) and (c)(3) exclude from the calculation of the effective annual percentage rate finance charges that are imposed during the billing cycle such as a loan fee, points, or similar charge that relates to opening, renewing, or continuing an account. The charges involved here do not relate to a specific transaction or to specific activity on the account, but relate solely to the opening, renewing, or continuing of the account. For example, an annual fee to renew an open-end credit account that is a percentage of the credit limit on the account, or that is charged only to consumers that have not used their credit card for a certain dollar amount in transactions during the preceding year, would not be included in the calculation of the annual percentage rate, even though the fee may not be excluded from the finance charge under § 226.4(c)(4). (*See* comment 4(c)(4)–2.) This rule applies even if the loan fee, points, or similar charges are billed on a subsequent periodic statement or withheld from the proceeds of the first advance on the account.

3. *Classification of charges.* If the finance charge includes a charge not due to the application of a periodic rate, the creditor must use the annual percentage rate computation method that corresponds to the type of charge imposed. If the charge is tied to a specific transaction (for example, 3 percent of the amount of each transaction), then the method in § 226.14(c)(3) must be used. If a fixed or minimum charge is applied, that is, one not tied to any specific transaction, then the formula in § 226.14(c)(2) is appropriate.

4. *Small finance charges.* Section 226.14(c)(4) gives the creditor an alternative to § 226.14(c)(2) and (c)(3) if small finance charges (50 cents or less) are involved; that is, if the finance charge includes minimum or fixed fees not due to the application of a periodic rate and the total finance charge for the cycle does not exceed 50 cents. For example, while a monthly activity fee of 50 cents on a balance of $20 would produce an annual percentage rate of 30 percent under the rule in § 226.14(c)(2), the creditor may disclose an annual percentage rate of 18 percent if the periodic rate generally applicable to all balances is 1½ percent per month.

5. *Prior-cycle adjustments.* i. The annual percentage rate reflects the finance charges imposed during the billing cycle. However, finance charges imposed during the billing cycle may

relate to activity in a prior cycle. Examples of circumstances when this may occur are:

A. A cash advance occurs on the last day of a billing cycle on an account that uses the transaction date to figure finance charges, and it is impracticable to post the transaction until the following cycle.

B. An adjustment to the finance charge is made following the resolution of a billing error dispute.

C. A consumer fails to pay the purchase balance under a deferred payment feature by the payment due date, and finance charges are imposed from the date of purchase.

ii. Finance charges relating to activity in prior cycles should be reflected on the periodic statement as follows:

A. If a finance charge imposed in the current billing cycle is attributable to periodic rates applicable to prior billing cycles (such as when a deferred payment balance was not paid in full by the payment due date and finance charges from the date of purchase are now being debited to the account, or when a cash advance occurs on the last day of a billing cycle on an account that uses the transaction date to figure finance charges and it is impracticable to post the transaction until the following cycle), and the creditor uses the quotient method to calculate the annual percentage rate, the numerator would include the amount of any transaction charges plus any other finance charges posted during the billing cycle. At the creditor's option, balances relating to the finance charge adjustment may be included in the denominator if permitted by the legal obligation, if it was impracticable to post the transaction in the previous cycle because of timing, or if the adjustment is covered by comment 14(c)–5.ii.B.

B. If a finance charge that is posted to the account relates to activity for which a finance charge was debited or credited to the account in a previous billing cycle (for example, if the finance charge relates to an adjustment such as the resolution of a billing error dispute, or an unintentional posting error, or a payment by check that was later returned unpaid for insufficient funds or other reasons), the creditor shall at its option:

1. Calculate the annual percentage rate in accordance with ii.A. of this paragraph, or

2. Disclose the finance charge adjustment on the periodic statement and calculate the annual percentage rate for the current billing cycle without including the finance charge adjustment in the numerator and balances associated with the finance charge adjustment in the denominator.

14(c)(1) Solely periodic rates imposed.

1. *Periodic rates.* Section 226.14(c)(1) applies if the only finance charge imposed is due to the application of a periodic rate to a balance. The creditor may compute the annual percentage rate either:

i. By multiplying each periodic rate by the number of periods in the year; or

ii. By the ''quotient'' method. This method refers to a composite annual percentage rate when different periodic rates apply to different balances. For example, a particular plan may involve a periodic rate of 1½ percent on balances up to $500, and 1 percent on balances over $500. If, in a given cycle, the consumer has a balance of $800, the finance charge would consist of $7.50 (500×.015) plus $3.00 (300×.01), for a total finance charge of $10.50. The annual percentage rate for this period may be disclosed either as 18% on $500 and 12 percent on $300, or as 15.75 percent on a balance of $800 (the quotient of $10.50 divided by $800, multiplied by 12).

14(c)(2) Minimum or fixed charge, but not transaction charge, imposed.

1. *Certain charges not based on periodic rates.* Section 226.14(c)(2) specifies use of the quotient method to determine the annual percentage rate if the finance charge imposed includes a certain charge not due to the application of a periodic rate (other than a charge relating to a specific transaction). For example, if the creditor imposes a minimum $1 finance charge on all balances below $50, and the consumer's balance was $40 in a particular cycle, the creditor would disclose an annual percentage rate of 30 percent (1/40×12).

2. *No balance.* If there is no balance to which the finance charge is applicable, an annual percentage rate cannot be determined under § 226.14(c)(2). This could occur not only when minimum charges are imposed on an account with no balance, but also when a periodic rate is applied to advances from the date of the transaction. For example, if on May 19 the consumer pays the new balance in full from a statement dated May 1, and has no further transactions reflected on the June 1 statement, that statement would reflect a finance charge with no account balance.

14(c)(3) Transaction charge imposed.

1. *Transaction charges.* i. Section 226.14(c)(3) transaction charges include, for example:

A. A loan fee of $10 imposed on a particular advance.

B. A charge of 3 percent of the amount of each transaction.

ii. The reference to avoiding duplication in the computation requires that the amounts of transactions on which transaction charges were imposed not be included both in the amount of total balances and in the ''other amounts on which a finance charge was imposed'' figure. In a multifeatured plan, creditors may consider each bona fide feature separately in the calculation of the denominator. A creditor has considerable flexibility in defining features for open-end plans, as long as the creditor has a reasonable basis for the distinctions. For further explanation and examples of how to determine the components of this formula, *see* appendix F to part 226.

2. *Daily rate with specific transaction charge.* Section 226.14(c)(3) sets forth an acceptable method for calculating the annual percentage rate if the finance charge results from a charge relating to a specific transaction and the application of a daily periodic rate. This section includes the requirement that the creditor follow the rules in appendix F to part 226 in calculating the annual percentage rate, especially the provision in the introductory section of appendix F which addresses the daily rate/transaction charge situation by providing that the ''average of daily balances'' shall be used instead of the ''sum of the balances.''

14(d) Calculations where daily periodic rate applied.

1. *Quotient method.* Section 226.14(d) addresses use of a daily periodic rate(s) to determine some or all of the finance charge and use of the quotient method to determine the annual percentage rate. Since the quotient formula in § 226.14(c)(1)(ii) and (c)(2) cannot be used when a daily rate is being applied to a series of daily balances, § 226.14(d) provides two alternative ways to calculate the annual percentage rate—either of which satisfies the provisions of § 226.7(a)(7).

2. *Daily rate with specific transaction charge.* If the finance charge results from a charge relating to a specific transaction and the application of a daily periodic rate, *see* comment 14(c)(3)–2 for guidance on an appropriate calculation method.

* * * * *

§ 226.16 Advertising.

1. *Clear and conspicuous standard—general.* Section 226.16 is subject to the general ''clear and conspicuous'' standard for subpart B (*see* § 226.5(a)(1)) but prescribes no specific rules for the format of the necessary disclosures, other than the format requirements related to the disclosure of a

promotional rate or payment under § 226.16(d)(6), a promotional rate under § 226.16(g), or a deferred interest or similar offer under § 226.16(h). Other than the disclosure of certain terms described in §§ 226.16(d)(6), (g), or (h), the credit terms need not be printed in a certain type size nor need they appear in any particular place in the advertisement.

2. *Clear and conspicuous standard—promotional rates or payments; deferred interest or similar offers.*

i. For purposes of § 226.16(d)(6), a clear and conspicuous disclosure means that the required information in § 226.16(d)(6)(ii)(A)–(C) is disclosed with equal prominence and in close proximity to the promotional rate or payment to which it applies. If the information in § 226.16(d)(6)(ii)(A)–(C) is the same type size and is located immediately next to or directly above or below the promotional rate or payment to which it applies, without any intervening text or graphical displays, the disclosures would be deemed to be equally prominent and in close proximity. Notwithstanding the above, for electronic advertisements that disclose promotional rates or payments, compliance with the requirements of § 226.16(c) is deemed to satisfy the clear and conspicuous standard.

ii. For purposes of § 226.16(g)(4) as it applies to written or electronic advertisements only, a clear and conspicuous disclosure means the required information in § 226.16(g)(4)(i) and (g)(4)(ii) must be equally prominent to the promotional rate to which it applies. If the information in § 226.16(g)(4)(i) and (g)(4)(ii) is the same type size as the promotional rate to which it applies, the disclosures would be deemed to be equally prominent. For purposes of § 226.16(h)(3) as it applies to written or electronic advertisements only, a clear and conspicuous disclosure means the required information in § 226.16(h)(3) must be equally prominent to each statement of ''no interest,'' ''no payments,'' ''deferred interest,'' ''same as cash,'' or similar term regarding interest or payments during the deferred interest period. If the information required to be disclosed under § 226.16(h)(3) is the same type size as the statement of ''no interest,'' ''no payments,'' ''deferred interest,'' ''same as cash,'' or similar term regarding interest or payments during the deferred interest period, the disclosure would be deemed to be equally prominent.

3. *Clear and conspicuous standard—Internet advertisements for home-equity plans.* For purposes of this section, a clear and conspicuous disclosure for visual text advertisements on the Internet for home-equity plans subject to the requirements of § 226.5b means that the required disclosures are not obscured by techniques such as graphical displays, shading, coloration, or other devices and comply with all other requirements for clear and conspicuous disclosures under § 226.16(d). (*See* also comment 16(c)(1)–2.)

4. *Clear and conspicuous standard—televised advertisements for home-equity plans.* For purposes of this section, including alternative disclosures as provided for by § 226.16(e), a clear and conspicuous disclosure in the context of visual text advertisements on television for home-equity plans subject to the requirements of § 226.5b means that the required disclosures are not obscured by techniques such as graphical displays, shading, coloration, or other devices, are displayed in a manner that allows for a consumer to read the information required to be disclosed, and comply with all other requirements for clear and conspicuous disclosures under § 226.16(d). For example, very fine print in a television advertisement would not meet the clear and conspicuous standard if consumers cannot see and read the information required to be disclosed.

5. *Clear and conspicuous standard—oral advertisements for home-equity plans.* For purposes of this section, including alternative disclosures as provided for by § 226.16(e), a clear and conspicuous disclosure in the context of an oral advertisement for home-equity plans subject to the requirements of § 226.5b, whether by radio, television, the Internet, or other medium, means that the required disclosures are given at a speed and volume sufficient for a consumer to hear and comprehend them. For example, information stated very rapidly at a low volume in a radio or television advertisement would not meet the clear and conspicuous standard if consumers cannot hear and comprehend the information required to be disclosed.

6. *Expressing the annual percentage rate in abbreviated form.* Whenever the annual percentage rate is used in an advertisement for open-end credit, it may be expressed using a readily understandable abbreviation such as APR.

7. *Effective date.* For guidance on the applicability of the Board's revisions to § 226.16 published on July 30, 2008, *see* comment 1(d)(5)–1.

16(a) Actually available terms.

1. *General rule.* To the extent that an advertisement mentions specific credit terms, it may state only those terms that the creditor is actually prepared to offer. For example, a creditor may not advertise a very low annual percentage rate that will not in fact be available at any time. Section 226.16(a) is not intended to inhibit the promotion of new credit programs, but to bar the advertising of terms that are not and will not be available. For example, a creditor may advertise terms that will be offered for only a limited period, or terms that will become available at a future date.

2. *Specific credit terms. Specific credit terms* is not limited to the disclosures required by the regulation but would include any specific components of a credit plan, such as the minimum periodic payment amount or seller's points in a plan secured by real estate.

16(b) Advertisement of terms that require additional disclosures.

Paragraph (b)(1).

1. *Triggering terms.* Negative as well as affirmative references trigger the requirement for additional information. For example, if a creditor states *no interest* or *no annual membership fee* in an advertisement, additional information must be provided. Other examples of terms that trigger additional disclosures are:

i. *Small monthly service charge on the remaining balance,* which describes how the amount of a finance charge will be determined.

ii. *12 percent Annual Percentage Rate* or *A $15 annual membership fee buys you $2,000 in credit,* which describe required disclosures under § 226.6.

2. *Implicit terms.* Section 226.16(b) applies even if the triggering term is not stated explicitly, but may be readily determined from the advertisement.

3. *Membership fees.* A membership fee is not a triggering term nor need it be disclosed under § 226.16(b)(3) if it is required for participation in the plan whether or not an open-end credit feature is attached. (*See* comment 6(a)(2)–1 and § 226.6(b)(3)(iii)(B).)

4. *Deferred billing and deferred payment programs.* Statements such as ''Charge it—you won't be billed until May'' or ''You may skip your January payment'' are not in themselves triggering terms, since the timing for initial billing or for monthly payments are not terms required to be disclosed under § 226.6. However, a statement such as ''No interest charges until May'' or any other statement regarding when interest or finance charges begin to accrue is a triggering term, whether appearing alone or in conjunction with a description of a deferred billing or

deferred payment program such as the examples above.

5. *Variable-rate plans.* In disclosing the annual percentage rate in an advertisement for a variable-rate plan, as required by § 226.16(b)(1)(ii), the creditor may use an insert showing the current rate; or may give the rate as of a specified recent date. The additional requirement in § 226.16(b)(1)(ii) to disclose the variable-rate feature may be satisfied by disclosing that the annual percentage rate may vary or a similar statement, but the advertisement need not include the information required by § 226.6(a)(1)(ii) or (b)(4)(ii).

6. *Membership fees for open-end (not home-secured) plans.* For purposes of § 226.16(b)(1)(iii), membership fees that may be imposed on open-end (not home-secured) plans shall have the same meaning as in § 226.5a(b)(2).

Paragraph (b)(2).

1. *Assumptions.* In stating the total of payments and the time period to repay the obligation, assuming that the consumer pays only the periodic payment amounts advertised, as required under § 226.16(b)(2), the following additional assumptions may be made:

i. Payments are made timely so as not to be considered late by the creditor;

ii. Payments are made each period, and no debt cancellation or suspension agreement, or skip payment feature applies to the account;

iii. No interest rate changes will affect the account;

iv. No other balances are currently carried or will be carried on the account;

v. No taxes or ancillary charges are or will be added to the obligation;

vi. Goods or services are delivered on a single date; and

vii. The consumer is not currently and will not become delinquent on the account.

2. *Positive periodic payment amounts.* Only positive periodic payment amounts trigger the additional disclosures under § 226.16(b)(2). Therefore, if the periodic payment amount advertised is not a positive amount (*e.g.*, ''No payments''), the advertisement need not state the total of payments and the time period to repay the obligation.

16(c) Catalogs or other multiple-page advertisements; electronic advertisements.

1. *Definition.* The multiple-page advertisements to which § 226.16(c) refers are advertisements consisting of a series of sequentially numbered pages—for example, a supplement to a newspaper. A mailing consisting of several separate flyers or pieces of promotional material in a single envelope does not constitute a single multiple-page advertisement for purposes of § 226.16(c).

Paragraph 16(c)(1).

1. *General.* Section 226.16(c)(1) permits creditors to put credit information together in one place in a catalog or other multiple-page advertisement or an electronic advertisement (such as an advertisement appearing on an Internet Web site). The rule applies only if the advertisement contains one or more of the triggering terms from § 226.16(b).

2. *Electronic advertisement.* If an electronic advertisement (such as an advertisement appearing on an Internet Web site) contains the table or schedule permitted under § 226.16(c)(1), any statement of terms set forth in § 226.6 appearing anywhere else in the advertisement must clearly direct the consumer to the location where the table or schedule begins. For example, a term triggering additional disclosures may be accompanied by a link that directly takes the consumer to the additional information.

Paragraph 16(c)(2).

1. *Table or schedule if credit terms depend on outstanding balance.* If the credit terms of a plan vary depending on the amount of the balance outstanding, rather than the amount of any property purchased, a table or schedule complies with § 226.16(c)(2) if it includes the required disclosures for representative balances. For example, a creditor would disclose that a periodic rate of 1.5% is applied to balances of $500 or less, and a 1% rate is applied to balances greater than $500.

16(d) Additional requirements for home-equity plans.

1. *Trigger terms.* Negative as well as affirmative references trigger the requirement for additional information. For example, if a creditor states *no annual fee, no points,* or *we waive closing costs* in an advertisement, additional information must be provided. (*See* comment 16(d)–4 regarding the use of a phrase such as *no closing costs.*) Inclusion of a statement such as *low fees,* however, would not trigger the need to state additional information. References to payment terms include references to the draw period or any repayment period, to the length of the plan, to how the minimum payments are determined and to the timing of such payments.

2. *Fees to open the plan.* Section 226.16(d)(1)(i) requires a disclosure of any fees imposed by the creditor or a third party to open the plan. In providing the fee information required under this paragraph, the corresponding rules for disclosure of this information apply. For example, fees to open the plan may be stated as a range. Similarly, if property insurance is required to open the plan, a creditor either may estimate the cost of the insurance or provide a statement that such insurance is required. (*See* the commentary to § 226.5b(d)(7) and (d)(8).)

3. *Statements of tax deductibility.* An advertisement that refers to deductibility for tax purposes is not misleading if it includes a statement such as ''consult a tax advisor regarding the deductibility of interest.'' An advertisement distributed in paper form or through the Internet (rather than by radio or television) that states that the advertised extension of credit may exceed the fair market value of the consumer's dwelling is not misleading if it clearly and conspicuously states the required information in §§ 226.16(d)(4)(i) and (d)(4)(ii).

4. *Misleading terms prohibited.* Under § 226.16(d)(5), advertisements may not refer to home-equity plans as *free money* or use other misleading terms. For example, an advertisement could not state ''no closing costs'' or ''we waive closing costs'' if consumers may be required to pay any closing costs, such as recordation fees. In the case of property insurance, however, a creditor may state, for example, ''no closing costs'' even if property insurance may be required, as long as the creditor also provides a statement that such insurance may be required. (*See* the commentary to this section regarding fees to open a plan.)

5. *Promotional rates and payments in advertisements for home-equity plans.* Section 226.16(d)(6) requires additional disclosures for promotional rates or payments.

i. *Variable-rate plans.* In advertisements for variable-rate plans, if the advertised annual percentage rate is based on (or the advertised payment is derived from) the index and margin that will be used to make rate (or payment) adjustments over the term of the loan, then there is no promotional rate or promotional payment. If, however, the advertised annual percentage rate is not based on (or the advertised payment is not derived from) the index and margin that will be used to make rate (or payment) adjustments, and a reasonably current application of the index and margin would result in a higher annual percentage rate (or, given an assumed balance, a higher payment) then there is a promotional rate or promotional payment.

ii. *Equal prominence, close proximity.* Information required to be disclosed in § 226.16(d)(6)(ii) that is immediately

next to or directly above or below the promotional rate or payment (but not in a footnote) is deemed to be closely proximate to the listing. Information required to be disclosed in § 226.16(d)(6)(ii) that is in the same type size as the promotional rate or payment is deemed to be equally prominent.

iii. *Amounts and time periods of payments.* Section 226.16(d)(6)(ii)(C) requires disclosure of the amount and time periods of any payments that will apply under the plan. This section may require disclosure of several payment amounts, including any balloon payment. For example, if an advertisement for a home-equity plan offers a $100,000 five-year line of credit and assumes that the entire line is drawn resulting in a minimum payment of $800 per month for the first six months, increasing to $1,000 per month after month six, followed by a $50,000 balloon payment after five years, the advertisement must disclose the amount and time period of each of the two monthly payment streams, as well as the amount and timing of the balloon payment, with equal prominence and in close proximity to the promotional payment. However, if the final payment could not be more than twice the amount of other minimum payments, the final payment need not be disclosed.

iv. *Plans other than variable-rate plans.* For a plan other than a variable-rate plan, if an advertised payment is calculated in the same way as other payments based on an assumed balance, the fact that the minimum payment could increase solely if the consumer made an additional draw does not make the payment a promotional payment. For example, if a payment of $500 results from an assumed $10,000 draw, and the payment would increase to $1,000 if the consumer made an additional $10,000 draw, the payment is not a promotional payment.

v. *Conversion option.* Some home-equity plans permit the consumer to repay all or part of the balance during the draw period at a fixed rate (rather than a variable rate) and over a specified time period. The fixed-rate conversion option does not, by itself, make the rate or payment that would apply if the consumer exercised the fixed-rate conversion option a promotional rate or payment.

vi. *Preferred-rate provisions.* Some home-equity plans contain a preferred-rate provision, where the rate will increase upon the occurrence of some event, such as the consumer-employee leaving the creditor's employ, the consumer closing an existing deposit account with the creditor, or the consumer revoking an election to make automated payments. A preferred-rate provision does not, by itself, make the rate or payment under the preferred-rate provision a promotional rate or payment.

6. *Reasonably current index and margin.* For the purposes of this section, an index and margin is considered reasonably current if:

i. For direct mail advertisements, it was in effect within 60 days before mailing;

ii. For advertisements in electronic form it was in effect within 30 days before the advertisement is sent to a consumer's e-mail address, or in the case of an advertisement made on an Internet Web site, when viewed by the public; or

iii. For printed advertisements made available to the general public, including ones contained in a catalog, magazine, or other generally available publication, it was in effect within 30 days before printing.

7. *Relation to other sections.* Advertisements for home-equity plans must comply with all provisions in § 226.16, not solely the rules in § 226.16(d). If an advertisement contains information (such as the payment terms) that triggers the duty under § 226.16(d) to state the annual percentage rate, the additional disclosures in § 226.16(b) must be provided in the advertisement. While § 226.16(d) does not require a statement of fees to use or maintain the plan (such as membership fees and transaction charges), such fees must be disclosed under § 226.16(b)(1)(i) and (b)(1)(iii).

8. *Inapplicability of closed-end rules.* Advertisements for home-equity plans are governed solely by the requirements in § 226.16, except § 226.16(g), and not by the closed-end advertising rules in § 226.24. Thus, if a creditor states payment information about the repayment phase, this will trigger the duty to provide additional information under § 226.16, but not under § 226.24.

9. *Balloon payment. See* comment 5b(d)(5)(ii)–3 for information not required to be stated in advertisements, and on situations in which the balloon payment requirement does not apply.

16(e) Alternative disclosures—television or radio advertisements.

1. *Multi-purpose telephone number.* When an advertised telephone number provides a recording, disclosures must be provided early in the sequence to ensure that the consumer receives the required disclosures. For example, in providing several options—such as providing directions to the advertiser's place of business—the option allowing the consumer to request disclosures should be provided early in the telephone message to ensure that the option to request disclosures is not obscured by other information.

2. *Statement accompanying toll free number.* Language must accompany a telephone number indicating that disclosures are available by calling the telephone number, such as ''call 1–800–000–0000 for details about credit costs and terms.''

16(g) Promotional rates.

1. *Rate in effect at the end of the promotional period.* If the annual percentage rate that will be in effect at the end of the promotional period (*i.e.*, the post-promotional rate) is a variable rate, the post-promotional rate for purposes of § 226.16(g)(2)(i) is the rate that would have applied at the time the promotional rate was advertised if the promotional rate was not offered, consistent with the accuracy requirements in § 226.5a(c)(2) and (e)(4), as applicable.

2. *Immediate proximity.* For written or electronic advertisements, including the term ''introductory'' or ''intro'' in the same phrase as the listing of the introductory rate is deemed to be in immediate proximity of the listing.

3. *Prominent location closely proximate.* For written or electronic advertisements, information required to be disclosed in § 226.16(g)(4)(i) and (g)(4)(ii) that is in the same paragraph as the first listing of the promotional rate is deemed to be in a prominent location closely proximate to the listing. Information disclosed in a footnote will not be considered in a prominent location closely proximate to the listing.

4. *First listing.* For purposes of § 226.16(g)(4) as it applies to written or electronic advertisements, the first listing of the promotional rate is the most prominent listing of the rate on the front side of the first page of the principal promotional document. The principal promotional document is the document designed to be seen first by the consumer in a mailing, such as a cover letter or solicitation letter. If the promotional rate does not appear on the front side of the first page of the principal promotional document, then the first listing of the promotional rate is the most prominent listing of the rate on the subsequent pages of the principal promotional document. If the promotional rate is not listed on the principal promotional document or there is no principal promotional document, the first listing is the most prominent listing of the rate on the front side of the first page of each document listing the promotional rate. If the promotional rate does not appear on the front side of the first page of a document, then the first listing of the

promotional rate is the most prominent listing of the rate on the subsequent pages of the document. If the listing of the promotional rate with the largest type size on the front side of the first page (or subsequent pages if the promotional rate is not listed on the front side of the first page) of the principal promotional document (or each document listing the promotional rate if the promotional rate is not listed on the principal promotional document or there is no principal promotional document,) is used as the most prominent listing, it will be deemed to be the first listing. Consistent with comment 16(c)–1, a catalog or multiple-page advertisement is considered one document for purposes of § 226.16(g)(4).

5. *Post-promotional rate depends on consumer's creditworthiness.* For purposes of disclosing the rate that may apply after the end of the promotional rate period, at the advertiser's option, the advertisement may disclose the rates that may apply as either specific rates, or a range of rates. For example, if there are three rates that may apply (9.99%, 12.99% or 17.99%), an issuer may disclose these three rates as specific rates (9.99%, 12.99% or 17.99%) or as a range of rates (9.99%–17.99%).

16(h) Deferred interest or similar offers.

1. *Deferred interest or similar offers clarified.* Deferred interest or similar offers do not include offers that allow a consumer to skip payments during a specified period of time, and under which the consumer is not obligated under any circumstances for any interest or other finance charges that could be attributable to that period. Deferred interest or similar offers also do not include 0% annual percentage rate offers where a consumer is not obligated under any circumstances for interest attributable to the time period the 0% annual percentage rate was in effect, though such offers may be considered promotional rates under § 226.16(g)(2)(i). Deferred interest or similar offers also do not include skip payment programs that have no required minimum payment for one or more billing cycles but where interest continues to accrue and is imposed during that period.

2. *Deferred interest period clarified.* Although the terms of an advertised deferred interest or similar offer may provide that a creditor may charge the accrued interest if the balance is not paid in full by a certain date, creditors sometimes have an informal policy or practice that delays charging the accrued interest for payment received a brief period of time after the date upon which a creditor has the contractual right to charge the accrued interest. The advertisement need not include the end of an informal ''courtesy period'' in disclosing the deferred interest period under § 226.16(h)(3).

3. *Immediate proximity.* For written or electronic advertisements, including the deferred interest period in the same phrase as the statement of ''no interest,'' ''no payments,'' ''deferred interest,'' or ''same as cash'' or similar term regarding interest or payments during the deferred interest period is deemed to be in immediate proximity of the statement.

4. *Prominent location closely proximate.* For written or electronic advertisements, information required to be disclosed in § 226.16(h)(4)(i) and (ii) that is in the same paragraph as the first statement of ''no interest,'' ''no payments,'' ''deferred interest,'' or ''same as cash'' or similar term regarding interest or payments during the deferred interest period is deemed to be in a prominent location closely proximate to the statement. Information disclosed in a footnote is not considered in a prominent location closely proximate to the statement.

5. *First listing.* For purposes of § 226.16(h)(4) as it applies to written or electronic advertisements, the first statement of ''no interest,'' ''no payments,'' ''deferred interest,'' ''same as cash,'' or similar term regarding interest or payments during the deferred interest period is the most prominent listing of one of these statements on the front side of the first page of the principal promotional document. The principal promotional document is the document designed to be seen first by the consumer in a mailing, such as a cover letter or solicitation letter. If one of the statements does not appear on the front side of the first page of the principal promotional document, then the first listing of one of these statements is the most prominent listing of a statement on the subsequent pages of the principal promotional document. If one of the statements is not listed on the principal promotional document or there is no principal promotional document, the first listing of one of these statements is the most prominent listing of the statement on the front side of the first page of each document containing one of these statements. If one of the statements does not appear on the front side of the first page of a document, then the first listing of one of these statements is the most prominent listing of a statement on the subsequent pages of the document. If the listing of one of these statements with the largest type size on the front side of the first page (or subsequent pages if one of these statements is not listed on the front side of the first page) of the principal promotional document (or each document listing one of these statements if a statement is not listed on the principal promotional document or there is no principal promotional document) is used as the most prominent listing, it will be deemed to be the first listing. Consistent with comment 16(c)–1, a catalog or multiple-page advertisement is considered one document for purposes of § 226.16(h)(4).

6. *Additional information.* Consistent with comment 5(a)–2, the information required under § 226.16(h)(4) need not be segregated from other information regarding the deferred interest or similar offer. Advertisements may also be required to provide additional information pursuant to § 226.16(b) though such information need not be integrated with the information required under § 226.16(h)(4).

7. *Examples.* Examples of disclosures that could be used to comply with the requirements of § 226.16(h)(3) include: ''no interest if paid in full within 6 months'' and ''no interest if paid in full by December 31, 2010.''

* * * * *

§ 226.26 Use of Annual Percentage Rate in Oral Disclosures.

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26(a) Open-end credit.

1. *Information that may be given.* The creditor may state periodic rates in addition to the required annual percentage rate, but it need not do so. If the annual percentage rate is unknown because transaction charges, loan fees, or similar finance charges may be imposed, the creditor must give the corresponding annual percentage rate (that is, the periodic rate multiplied by the number of periods in a year, as described in §§ 226.6(a)(1)(ii) and (b)(4)(i)(A) and 226.7(a)(4) and (b)(4)). In such cases, the creditor may, but need not, also give the consumer information about other finance charges and other charges.

* * * * *

§ 226.27 Language of Disclosures.

1. *Subsequent disclosures.* If a creditor provides account-opening disclosures in a language other than English, subsequent disclosures need not be in that other language. For example, if the creditor gave Spanish-language account-opening disclosures, periodic statements and change-in-terms notices may be made in English.

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§ 226.28 Effect on State Laws.

28(a) Inconsistent disclosure requirements.

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6. *Rules for other fair credit billing provisions.* The second part of the criteria for fair credit billing relates to the other rules implementing chapter 4 of the act (addressed in §§ 226.4(c)(8), 226.5(b)(2)(ii), 226.6(a)(5) and (b)(5)(iii), 226.7(a)(9) and (b)(9), 226.9(a), 226.10, 226.11, 226.12(c) through (f), 226.13, and 226.21). Section 226.28(a)(2)(ii) provides that the test of inconsistency is whether the creditor can comply with State law without violating Federal law. For example:

i. A State law that allows the card issuer to offset the consumer's credit-card indebtedness against funds held by the card issuer would be preempted, since § 226.12(d) prohibits such action.

ii. A State law that requires periodic statements to be sent more than 14 days before the end of a free-ride period would not be preempted.

iii. A State law that permits consumers to assert claims and defenses against the card issuer without regard to the $50 and 100-mile limitations of § 226.12(c)(3)(ii) would not be preempted.

iv. In paragraphs ii. and iii. of this comment, compliance with State law would involve no violation of the Federal law.

* * * * *

§ 226.30 Limitation on Rates.

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8. *Manner of stating the maximum interest rate.* The maximum interest rate must be stated in the credit contract either as a specific amount or in any other manner that would allow the consumer to easily ascertain, at the time of entering into the obligation, what the rate ceiling will be over the term of the obligation.

i. For example, the following statements would be sufficiently specific:

A. The maximum interest rate will not exceed X%.

B. The interest rate will never be higher than X percentage points above the initial rate of Y%.

C. The interest rate will not exceed X%, or X percentage points about [a rate to be determined at some future point in time], whichever is less.

D. The maximum interest rate will not exceed X%, or the State usury ceiling, whichever is less.

ii. The following statements would not comply with this section:

A. The interest rate will never be higher than X percentage points over the prevailing market rate.

B. The interest rate will never be higher than X percentage points above [a rate to be determined at some future point in time].

C. The interest rate will not exceed the State usury ceiling which is currently X%.

iii. A creditor may state the maximum rate in terms of a maximum annual percentage rate that may be imposed. Under an open-end credit plan, this normally would be the corresponding annual percentage rate. (*See* generally § 226.6(a)(1)(ii) and (b)(4)(i)(A).)

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Subpart G—Special Rules Applicable to Credit Card Accounts and Open-End Credit Offered to College Students

§ 226.51 Ability to pay.

51(a) General rule.

1. *Consideration of additional factors.* Section 226.51(a) requires a card issuer to consider a consumer's ability to make the required minimum periodic payments under the terms of an account based on the consumer's income or assets and the consumer's current obligations. The card issuer may also consider credit reports, credit scores, and other factors, consistent with Regulation B (12 CFR part 202).

2. *Ability to pay as of application or consideration of increase.* A card issuer complies with § 226.51(a) if it bases its determination regarding a consumer's ability to make the required minimum periodic payments on the facts and circumstances known to the card issuer at the time the consumer applies to open the credit card account or when the card issuer considers increasing the credit line on an existing account.

3. *Credit line increase.* When a card issuer considers increasing the credit line on an existing account, § 226.51(a) applies when the consideration is based upon a request of the consumer or is initiated by the card issuer.

4. *Income, assets, and employment.* Any current or reasonably expected assets or income may be considered by the card issuer. For example, a card issuer may use information about current or expected salary, wages, bonus pay, tips and commissions. Employment may be full-time, part-time, seasonal, irregular, military, or self-employment. Other sources of income could include interest or dividends, retirement benefits, public assistance, alimony, child support, or separate maintenance payments. A card issuer may also take into account assets such as savings accounts or investments that the consumer can or will be able to use.

5. *Current obligations.* A card issuer may consider the consumer's current obligations based on information provided by the consumer or in a consumer report.

51(b) Rules affecting young consumers.

1. *Age as of date of application or consideration of credit line increase.* Sections 226.51(b)(1) and (b)(2) apply only to a consumer who has not attained the age of 21 as of the date of submission of the application under § 226.51(b)(1) or the date the credit line increase is requested by the consumer (or if no request has been made, the date the credit line increase is considered by the card issuer) under § 226.51(b)(2).

2. *Liability of cosigner, guarantor, or joint accountholder.* Sections 226.51(b)(1)(i) and (b)(2) require the signature or written consent of a cosigner, guarantor, or joint accountholder agreeing either to be secondarily liable for any debt on the account incurred by the consumer before the consumer has attained the age of 21 in the event the consumer defaults on the account or to be jointly liable with the consumer for any debt on the account incurred by either party. Sections 226.51(b)(1)(i) and (b)(2) do not prohibit a card issuer from also requiring the cosigner, guarantor, or joint accountholder to assume liability for debts incurred after the consumer has attained the age of 21, consistent with any agreement made between the parties.

3. *Authorized users exempt.* If a consumer who has not attained the age of 21 is being added to another person's account as an authorized user and has no liability for debts incurred on the account, § 226.51(b)(1) and (b)(2) do not apply.

4. *Electronic application.* Consistent with § 226.5(a)(1)(iii), an application may be provided to the consumer in electronic form without regard to the consumer consent or other provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*) in the circumstances set forth in § 226.5a. The electronic submission of an application from a consumer or a credit line increase approval from a consumer, cosigner, guarantor, or joint accountholder to a card issuer would constitute a written application or approval for purposes of § 226.51(b) and would not be considered a consumer disclosure for purposes of the E-Sign Act.

51(b)(1) Applications from young consumers.

1. *Relation to Regulation B.* In considering an application or credit line increase on the credit card account of a consumer who is less than 21 years old, creditors must comply with the

applicable rules in Regulation B (12 CFR part 202).

51(b)(2) Credit line increases for young consumers.

1. *Credit line request by joint accountholder aged 21 or older.* The requirement under § 226.51(b)(2) that a cosigner, guarantor, or joint accountholder for a credit card account opened pursuant to § 226.51(b)(1)(i) must agree in writing to assume liability for the increase before a credit line is increased, does not apply if the cosigner, guarantor or joint accountholder who is at least 21 years old requests the increase.

§ 226.52 Limitations on Fees.

52(a) Limitations during first year after account opening.

52(a)(1)(i) 25 percent limit.

1. *Example.* Assume that, under the terms of a credit card account, a consumer is required to pay $120 in fees for the issuance or availability of credit at account opening. The consumer is also required to pay a cash advance fee that is equal to five percent of the cash advance and a late payment fee of $15 if the required minimum periodic payment is not received by the payment due date (which is the twenty-fifth of the month). At account opening on January 1 of year one, the credit limit for the account is $500. Section 226.52(a)(1)(i) permits the card issuer to charge to the account the $120 in fees for the issuance or availability of credit at account opening. On February 1 of year one, the consumer uses the account for a $100 cash advance. Section 226.52(a)(1)(i) permits the card issuer to charge a $5 cash-advance fee to the account. On March 26 of year one, the card issuer has not received the consumer's required minimum periodic payment. Section 226.52(a)(2)(i) permits the card issuer to charge a $15 late payment fee to the account. On July 15 of year one, the consumer uses the account for a $50 cash advance. Section 226.52(a)(1)(i) does not permit the card issuer to charge a $2.50 cash advance fee to the account. Furthermore, § 225.52(a)(1)(ii) prohibits the card issuer from collecting the $2.50 cash advance fee from the consumer by other means.

2. *Fees that exceed 25 percent limit.* A card issuer that charges a fee to a credit card account that exceeds the 25 percent limit complies with § 226.52(a)(1)(i) if the card issuer waives or removes the fee and any associated interest charges or credits the account for an amount equal to the fee and any associated interest charges at the end of the billing cycle during which the fee was charged. For example, assuming the facts in comment 52(a)(1)(i)–1 above, the card issuer complies with § 226.52(a)(1)(i) if the card issuer charged the $2.50 cash advance fee to the account on July 15 of year one but waived or removed the fee or credited the account for $2.50 (plus any interest charges on that $2.50) at the end of the billing cycle.

3. *Increases in credit limit.* Because the limitation in § 226.52(a)(1)(i) is based on the credit limit in effect when the account is opened, a subsequent increase in the credit limit during the first year does not permit the card issuer to charge to the account additional fees that would otherwise be prohibited (such as a fee for increasing the credit limit). For example, assume that, at account opening on January 1, the credit limit for a credit card account is $400 and the consumer is required to pay $100 in fees for the issuance or availability of credit. On July 1, the card issuer increases the credit limit for the account to $600. Section 226.52(a)(1)(i) does not permit the card issuer to require the consumer to pay additional fees based on the increased credit limit.

52(a)(1)(ii) Additional fees.

1. *Example.* Section 226.52(a)(1)(ii) prohibits a card issuer that charges to a credit card account fees during the first year that total 25 percent of the initial credit limit from requiring the consumer to pay any additional fees through other means during the first year (such as through a payment from the consumer to the card issuer or from another credit account provided by the card issuer). For example, assume that, under the terms of a credit card account, a consumer is required to pay $125 in fees for the issuance or availability of credit during the first year after account opening. At account opening on January 1 of year one, the credit limit for the account is $500. Section 226.52(a)(1)(i) permits the card issuer to charge the $125 in fees to the account. However, § 226.52(a)(1)(ii) prohibits the card issuer from requiring the consumer to make payments to the card issuer for additional fees with respect to the account during the first year after account opening or requiring the consumer to open a separate credit account with the card issuer to fund the payment of additional fees during the first year.

52(a)(2) Fees not subject to limitations.

1. *Covered fees.* Except as provided in § 226.52(a)(2), the limitations in § 226.52(a)(1) apply to any fees that a card issuer will or may require the consumer to pay with respect to a credit card account under an open-end (not home-secured) consumer credit plan during the first year after account opening. For example, § 226.52(a) applies to:

i. Fees that the consumer is required to pay for the issuance or availability of credit described in § 226.5a(b)(2), including any fee based on account activity or inactivity and any fee that a consumer is required to pay in order to receive a particular credit limit;

ii. Fees for insurance described in § 226.4(b)(7) or debt cancellation or debt suspension coverage described in § 226.4(b)(10) written in connection with a credit transaction, if the insurance or debt cancellation or debt suspension coverage is required by the terms of the account;

iii. Fees that the consumer is required to pay in order to engage in transactions using the account (such as cash advance fees, balance transfer fees, foreign transaction fees, and fees for using the account for purchases); and

iv. Fees that the consumer is required to pay for violating the terms of the account (except to the extent specifically excluded by § 226.52(a)(2)(i)).

2. *Fees the consumer is not required to pay.* Section 226.52(a)(2)(ii) provides that § 226.52(a) does not apply to fees that the consumer is not required to pay with respect to the account. For example, the limitations in § 226.52(a) generally do not apply to fees for making an expedited payment (to the extent permitted by § 226.10(e)), fees for optional services (such as travel insurance), fees for reissuing a lost or stolen card, or statement reproduction fees.

3. *Security deposits.* A security deposit that is charged to a credit card account is a fee for purposes of the limitations in § 226.52(a)(1). In contrast, however, a security deposit is not subject to the 25 percent limit in § 226.52(a)(1)(i) if it is not charged to the account. Similarly, § 226.52(a)(1)(ii) does not prohibit a card issuer from requiring a consumer to provide a security deposit that exceeds 25 percent of the credit limit at account opening so long as the card issuer does not charge any portion of that security deposit to the account.

52(a)(3) Rule of construction.

1. *Fees or charges otherwise prohibited by law.* Section 226.52(a) does not authorize the imposition or payment of fees or charges otherwise prohibited by law. For example, *see* 16 CFR 310.4(a)(4).

§ 226.53 Allocation of Payments.

1. *Required minimum periodic payment.* Section 226.53 addresses the allocation of amounts paid by the

consumer in excess of the minimum periodic payment required by the card issuer. Section 226.53 does not limit or otherwise address the card issuer's ability to determine, consistent with applicable law and regulatory guidance, the amount of the required minimum periodic payment or how that payment is allocated. A card issuer may, but is not required to, allocate the required minimum periodic payment consistent with the requirements in § 226.53 to the extent consistent with other applicable law or regulatory guidance.

2. *Applicable rates and balances.* Section 226.53 permits a card issuer to allocate an amount paid by the consumer in excess of the required minimum periodic payment based on the annual percentage rates and balances on the date the preceding billing cycle ends, on the date the payment is credited to the account, or on any day in between those two dates. For example:

i. Assume that the billing cycles for a credit card account start on the first day of the month and end on the last day of the month. On the date the March billing cycle ends (March 31), the account has a purchase balance of $500 at a promotional annual percentage rate of 5% and another purchase balance of $200 at a non-promotional annual percentage rate of 15%. On April 5, a $100 purchase to which the 15% rate applies is charged to the account. On April 15, the promotional rate expires and § 226.55(b)(1) permits the card issuer to increase the rate that applies to the $500 balance from 5% to 18%. On April 25, the card issuer credits to the account $400 paid by the consumer in excess of the required minimum periodic payment. Under § 226.53, the card issuer could, based on the rates and balances on March 31, allocate the $400 payment to pay in full the $200 balance to which the 15% rate applied on March 31 and then allocate the remaining $200 to the $500 balance to which the 5% rate applied on March 31. In the alternative, the card issuer could, based on the rates and balances on April 25, allocate the $400 payment to the $500 balance to which the 18% rate applied on April 25.

ii. Same facts as above except that, on April 25, the card issuer credits to the account $750 paid by the consumer in excess of the required minimum periodic payment. Under § 226.53, the card issuer could, based on the rates and balances on March 31, allocate the $750 payment to pay in full the $200 balance to which the 15% rate applied on March 31 and the $500 balance to which the 5% rate applied on March 31 and then allocate the remaining $50 to the $100 purchase made on April 5. In the alternative, the card issuer could, based on the rates and balances on April 25, allocate the $750 payment to pay in full the $500 balance to which the 18% rate applied on April 25 and then allocate the remaining $250 to the $300 balance to which the 15% rate applied on April 25.

3. *Claims or defenses under § 226.12(c).* When a consumer has asserted a claim or defense against the card issuer pursuant to § 226.12(c), the card issuer must apply the consumer's payment in a manner that avoids or minimizes any reduction in the amount of that claim or defense.

4. *Balances with the same rate.* When the same annual percentage rate applies to more than one balance on an account and a different annual percentage rate applies to at least one other balance on that account, § 226.53 generally does not require that any particular method be used when allocating among the balances with the same annual percentage rate. Under these circumstances, a card issuer may treat the balances with the same rate as a single balance or separate balances. *See* example in comment 53(a)–1.iv. However, when a balance on a credit card account is subject to a deferred interest or similar program that provides that a consumer will not be obligated to pay interest that accrues on the balance if the balance is paid in full prior to the expiration of a specified period of time, that balance must be treated as a balance with an annual percentage rate of zero for purposes of § 226.53 during that period of time. For example, if an account has a $1,000 purchase balance and a $2,000 balance that is subject to a deferred interest program that expires on July 1 and a 15% annual percentage rate applies to both, the balances must be treated as balances with different rates for purposes of § 226.53 until July 1. In addition, for purposes of allocating pursuant to § 226.53, any amount paid by the consumer in excess of the required minimum periodic payment must be applied first to the $1,000 purchase balance except during the last two billing cycles of the deferred interest period (when it must be applied first to any remaining portion of the $2,000 balance). *See* example in comment 53(a)–1.v.

53(a) General rule.

1. *Examples.* For purposes of the following examples, assume that none of the required minimum periodic payment is allocated to the balances discussed (unless otherwise stated).

i. Assume that a credit card account has a cash advance balance of $500 at an annual percentage rate of 20% and a purchase balance of $1,500 at an annual percentage rate of 15% and that the consumer pays $800 in excess of the required minimum periodic payment. Under § 226.53(a), the card issuer must allocate $500 to pay off the cash advance balance and then allocate the remaining $300 to the purchase balance.

ii. Assume that a credit card account has a cash advance balance of $500 at an annual percentage rate of 20% and a purchase balance of $1,500 at an annual percentage rate of 15% and that the consumer pays $400 in excess of the required minimum periodic payment. Under § 226.53(a), the card issuer must allocate the entire $400 to the cash advance balance.

iii. Assume that a credit card account has a cash advance balance of $100 at an annual percentage rate of 20%, a purchase balance of $300 at an annual percentage rate of 18%, and a $600 protected balance on which the 12% annual percentage rate cannot be increased pursuant to § 226.55. If the consumer pays $500 in excess of the required minimum periodic payment, § 226.53(a) requires the card issuer to allocate $100 to pay off the cash advance balance, $300 to pay off the purchase balance, and $100 to the protected balance.

iv. Assume that a credit card account has a cash advance balance of $500 at an annual percentage rate of 20%, a purchase balance of $1,000 at an annual percentage rate of 15%, and a transferred balance of $2,000 that was previously at a discounted annual percentage rate of 5% but is now at an annual percentage rate of 15%. Assume also that the consumer pays $800 in excess of the required minimum periodic payment. Under § 226.53(a), the card issuer must allocate $500 to pay off the cash advance balance and allocate the remaining $300 among the purchase balance and the transferred balance in the manner the card issuer deems appropriate.

v. Assume that on January 1 a consumer uses a credit card account to make a $1,200 purchase subject to a deferred interest program under which interest accrues at an annual percentage rate of 15% but the consumer will not be obligated to pay that interest if the balance is paid in full on or before June 30. The billing cycles for this account begin on the first day of the month and end on the last day of the month. Each month from January through June, the consumer uses the account to make $200 in purchases that are not subject to the deferred interest program but are subject to the 15% rate. Each month from February through June, the consumer pays $400 in excess of the

required minimum periodic payment on the payment due date, which is the twenty-fifth of the month. Any interest that accrues on the purchases not subject to the deferred interest program is paid by the required minimum periodic payment. Under § 226.53(a), the card issuer must allocate the $400 excess payments received on February 25, March 25, and April 25 as follows: $200 to pay off the balance not subject to the deferred interest program (which is subject to the 15% rate) and the remaining $200 to the deferred interest balance (which is treated as a balance with a rate of zero). Section 226.53(b), however, requires the card issuer to allocate the entire $400 excess payment received on May 25 to the deferred interest balance. Similarly, § 227.53(b) requires the card issuer to allocate the $400 excess payment received on June 25 as follows: $200 to the deferred interest balance (which pays that balance in full) and the remaining $200 to the balance not subject to the deferred interest program.

53(b) Special rule for balances subject to deferred interest or similar programs.

1. *Expiration during billing cycle.* For purposes of § 226.53(b), a billing cycle does not constitute one of the two billing cycles immediately preceding expiration of a deferred interest or similar program if the expiration date for the program precedes the payment due date in that billing cycle. For example, assume that a credit card account has a balance subject to a deferred interest program that expires on June 15. Assume also that the billing cycles for the account begin on the first day of the month and end on the last day of the month and that the required minimum periodic payment is due on the twenty-fifth day of the month. Because the expiration date for the deferred interest program (June 15) precedes the due date in the June billing cycle (June 25), § 226.53(b) requires the card issuer to allocate first to the deferred interest balance any amount paid by the consumer in excess of the required minimum periodic payment during the April and May billing cycles (as well as any amount paid by the consumer before June 15). However, if the deferred interest program expired on June 25 or on June 30 (or on any day in between), § 226.53(b) would apply only to the May and June billing cycles.

2. *Grace periods.* Section 226.53(b) applies to deferred interest or similar programs under which the consumer is not obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time. A grace period during which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate is not a deferred interest or similar program for purposes of § 226.53(b).

§ 226.54 Limitations on the Imposition of Finance Charges.

54(a) Limitations on imposing finance charges as a result of the loss of a grace period.

54(a)(1) General rule.

1. *Grace period not mandated.* Section 226.54 prohibits the imposition of finance charges as a result of the loss of a grace period in certain specified circumstances. Section 226.54 does not require the card issuer to provide a grace period or prohibit the card issuer from placing limitations and conditions on a grace period to the extent consistent with § 226.54.

2. *Charging accrued interest at expiration of deferred interest or similar promotional programs.* When a card issuer offers a deferred interest or similar promotional program under which a consumer will not be obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time, § 226.54 does not prohibit the card issuer from charging that accrued interest to the account if the balance is not paid in full prior to expiration of the period (to the extent consistent with § 226.55 and other applicable law and regulatory guidance).

3. *Relationship to payment allocation requirements in § 226.53.* Card issuers must comply with the payment allocation requirements in § 226.53 even if doing so will result in the loss of a grace period.

4. *Prohibition on two-cycle balance computation method.* When a consumer ceases to be eligible for a grace period, § 226.54(a)(1)(i) prohibits the card issuer from computing the finance charge using the two-cycle average daily balance computation method. This method calculates the finance charge using a balance that is the sum of the average daily balances for two billing cycles. The first balance is for the current billing cycle, and is calculated by adding the total balance (including or excluding new purchases and deducting payments and credits) for each day in the billing cycle, and then dividing by the number of days in the billing cycle. The second balance is for the preceding billing cycle.

5. *Prohibition on imposing finance charges on amounts paid within grace period.* When a balance on a credit card account is subject to a grace period and the card issuer receives payment for some but not all of that balance prior to the expiration of the grace period, § 226.54(a)(1)(ii) prohibits the card issuer from imposing finance charges on the portion of the balance paid. Card issuers are not required to use a particular method to comply with § 226.54(a)(1)(ii). However, a card issuer complies with § 226.54(a)(1)(ii) if it applies the consumer's payment to the balance subject to the grace period at the end of the prior billing cycle (in a manner consistent with the payment allocation requirements in § 226.53) and then calculates interest charges based on the amount of the balance that remains unpaid.

6. *Examples.* Assume that the annual percentage rate for purchases on a credit card account is 15%. The billing cycle starts on the first day of the month and ends on the last day of the month. The payment due date for the account is the twenty-fifth day of the month. Under the terms of the account, the consumer will receive a grace period and not be charged interest on purchases if the purchase balance at the end of a billing cycle is paid in full by the following payment due date. For purposes of this example, assume that none of the required minimum periodic payment is allocated to the balances discussed. During the March billing cycle, the following transactions are charged to the account: a $100 purchase on March 10, a $200 purchase on March 15, and a $300 purchase on March 20. The balance for the February billing cycle is paid in full on March 25. At the end of the March billing cycle (March 31), the consumer's total purchase balance is $600 and the consumer will not be charged interest on that balance if it is paid in full by the following due date (April 25).

i. On April 10, a $150 purchase is charged to the account. On April 25, the card issuer receives $500 in excess of the required minimum periodic payment. Section 226.54(a)(1)(i) prohibits the card issuer from reaching back and charging interest on any of the March transactions from the date of the transaction through the end of the March billing cycle (March 31). In these circumstances, the card issuer may comply with § 226.54(a)(1)(ii) by applying the $500 excess payment to the $600 purchase balance and then charging interest only on the portion of the $600 purchase balance that remains unpaid ($100) from the start of the April billing cycle (April 1) through the end of the April billing cycle (April 30). In addition, the card issuer may charge interest on the $150 purchase from the date of the transaction (April 10) through the end of the April billing cycle (April 31).

ii. Same facts as in paragraph 6 above except that, on March 18, a $250 cash advance is charged to the account at an annual percentage rate of 25%. The grace period does not apply to cash advances, but the consumer retains the grace period on purchases. On April 25, the card issuer receives $600 in excess of the required minimum periodic payment. As required by § 226.53, the card issuer allocates the $600 excess payment first to the balance with the highest annual percentage rate (the $250 cash advance balance). Although § 226.54(a)(1)(i) prohibits the card issuer from charging interest on the March transactions based on days in the March billing cycle, the card issuer may charge interest on the $250 cash advance from the date of the transaction (March 18) through April 24. In these circumstances, the card issuer may comply with § 226.54(a)(1)(ii) by applying the remainder of the excess payment ($350) to the $600 purchase balance and then charging interest only on the portion of the $600 purchase balance that remains unpaid ($250) from the start of the April billing cycle (April 1) through the end of the April billing cycle (April 30).

iii. Same facts as in paragraph 6 above except that the consumer does not pay the balance for the February billing cycle in full on March 25 and therefore, under the terms of the account, is not eligible for a grace period on the March purchases. Under these circumstances, § 226.54 does not apply and the card issuer may charge interest from the date of each transaction through April 24 and interest on the remaining $100 from April 25 through the end of the April billing cycle (April 25).

§ 226.55 Limitations on Increasing Annual Percentage Rates, Fees, and Charges.

55(a) General rule.

1. *Examples.* Section 226.55(a) prohibits card issuers from increasing an annual percentage rate or any fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) on a credit card account unless specifically permitted by one of the exceptions in § 226.55(b). The following examples illustrate the general application of § 226.55(a) and (b). Additional examples illustrating specific aspects of the exceptions in § 226.55(b) are provided in the commentary to those exceptions.

i. *Account-opening disclosure of non-variable rate for six months, then variable rate.* Assume that, at account opening on January 1 of year one, a card issuer discloses that the annual percentage rate for purchases is a non-variable rate of 15% and will apply for six months. The card issuer also discloses that, after six months, the annual percentage rate for purchases will be a variable rate that is currently 18% and will be adjusted quarterly by adding a margin of 8 percentage points to a publicly-available index not under the card issuer's control. Furthermore, the card issuer discloses that the annual percentage rate for cash advances is the same variable rate that will apply to purchases after six months. Finally, the card issuer discloses that, to the extent consistent with § 226.55 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer makes a late payment. The payment due date for the account is the twenty-fifth day of the month and the required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase and cash advance balances.

A. *Change-in-terms rate increase for new transactions after first year.* On January 15 of year one, the consumer uses the account to make a $2,000 purchase and a $500 cash advance. No other transactions are made on the account. At the start of each quarter, the card issuer may adjust the variable rate that applies to the $500 cash advance consistent with changes in the index (pursuant to § 226.55(b)(2)). All required minimum periodic payments are received on or before the payment due date until May of year one, when the payment due on May 25 is received by the creditor on May 28. At this time, the card issuer is prohibited by § 226.55 from increasing the rates that apply to the $2,000 purchase, the $500 cash advance, or future purchases and cash advances. Six months after account opening (July 1), the card issuer may begin to accrue interest on the $2,000 purchase at the previously-disclosed variable rate determined using an 8-point margin (pursuant to § 226.55(b)(1)). Because no other increases in rate were disclosed at account opening, the card issuer may not subsequently increase the variable rate that applies to the $2,000 purchase and the $500 cash advance (except due to increases in the index pursuant to § 226.55(b)(2)). On November 16, the card issuer provides a notice pursuant to § 226.9(c) informing the consumer of a new variable rate that will apply on January 1 of year two (calculated using the same index and an increased margin of 12 percentage points). On December 15, the consumer makes a $100 purchase. On January 1 of year two, the card issuer may increase the margin used to determine the variable rate that applies to new purchases to 12 percentage points (pursuant to § 227.55(b)(3)). On January 15 of year two, the consumer makes a $300 purchase. The card issuer may apply the variable rate determined using the 12-point margin to the $300 purchase but not the $2,000 purchase or the $100 purchase.

B. *Account becomes more than 60 days delinquent during first year.* Same facts as above except that the required minimum periodic payment due on May 25 of year one is not received by the card issuer until July 30 of year one. Because the card issuer received the required minimum periodic payment more than 60 days after the payment due date, § 226.55(b)(4) permits the card issuer to increase the annual percentage rate applicable to the $2,000 purchase, the $500 cash advance, and future purchases and cash advances. However, the card issuer must first comply with the notice requirements in § 226.9(g). Thus, if the card issuer provided a § 226.9(g) notice on July 25 stating that all rates on the account would be increased to the 30% penalty rate, the card issuer could apply that rate beginning on September 8 to all balances and to future transactions.

ii. *Account-opening disclosure of non-variable rate for six months, then increased non-variable rate for six months, then variable rate; change-in-terms rate increase for new transactions after first year.* Assume that, at account opening on January 1 of year one, a card issuer discloses that the annual percentage rate for purchases will increase as follows: a non-variable rate of 5% for six months; a non-variable rate of 10% for an additional six months; and thereafter a variable rate that is currently 15% and will be adjusted monthly by adding a margin of 5 percentage points to a publicly-available index not under the card issuer's control. The payment due date for the account is the fifteenth day of the month and the required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase balance. On January 15 of year one, the consumer uses the account to make a $1,500 purchase. Six months after account opening (July 1), the card issuer may begin to accrue interest on the $1,500 purchase at the previously-disclosed 10% non-variable rate (pursuant to § 226.55(b)(1)). On September 15, the consumer uses the account for a $700 purchase. On November 16, the card issuer provides a notice pursuant to § 226.9(c) informing the consumer of a new variable rate that will apply on January 1 of year two (calculated using the same index and an increased margin

of 8 percentage points). One year after account opening (January 1 of year two), the card issuer may begin accruing interest on the $2,200 purchase balance at the previously-disclosed variable rate determined using a 5-point margin (pursuant to § 226.55(b)(1)). Because the variable rate determined using the 8-point margin was not disclosed at account opening, the card issuer may not apply that rate to the $2,200 purchase balance. Furthermore, because no other increases in rate were disclosed at account opening, the card issuer may not subsequently increase the variable rate that applies to the $2,200 purchase balance (except due to increases in the index pursuant to § 226.55(b)(2)). The card issuer may, however, apply the variable rate determined using the 8-point margin to purchases made on or after January 1 of year two (pursuant to § 226.55(b)(3)).

iii. *Change-in-terms rate increase for new transactions after first year; penalty rate increase after first year.* Assume that, at account opening on January 1 of year one, a card issuer discloses that the annual percentage rate for purchases is a variable rate determined by adding a margin of 6 percentage points to a publicly-available index outside of the card issuer's control. The card issuer also discloses that, to the extent consistent with § 226.55 and other applicable law, a non-variable penalty rate of 28% may apply if the consumer makes a late payment. The due date for the account is the fifteenth of the month. On May 30 of year two, the account has a purchase balance of $1,000. On May 31, the card issuer provides a notice pursuant to § 226.9(c) informing the consumer of a new variable rate that will apply on July 16 for all purchases made on or after June 15 (calculated by using the same index and an increased margin of 8 percentage points). On June 14, the consumer makes a $500 purchase. On June 15, the consumer makes a $200 purchase. On July 1, the card issuer has not received the payment due on June 15 and provides the consumer with a notice pursuant to § 226.9(g) stating that the 28% penalty rate will apply as of August 15 to all transactions made on or after July 16 and that, if the consumer becomes more than 60 days late, the penalty rate will apply to all balances on the account. On July 17, the consumer makes a $300 purchase.

A. *Account does not become more than 60 days delinquent.* The payment due on June 15 of year two is received on July 2. On July 16, § 226.55(b)(3) permits the card issuer to apply the variable rate determined using the 8-point margin disclosed in the § 226.9(c) notice to the $200 purchase made on June 15 but does not permit the card issuer to apply this rate to the $1,500 purchase balance. On August 15, § 226.55(b)(3) permits the card issuer to apply the 28% penalty rate disclosed at account opening and in the § 226.9(g) notice to the $300 purchase made on July 17 but does not permit the card issuer to apply this rate to the $1,500 purchase balance (which remains at the variable rate determined using the 6-point margin) or the $200 purchase (which remains at the variable rate determined using the 8-point margin).

B. *Account becomes more than 60 days delinquent after provision of § 226.9(g) notice.* Same facts as above except the payment due on June 15 of year two has not been received by August 15. Section 226.55(b)(4) permits the card issuer to apply the 28% penalty rate to the $1,500 purchase balance and the $200 purchase because it has not received the June 15 payment within 60 days after the due date. However, in order to do so, the card issuer must provide an additional notice pursuant to § 226.9(g). This notice must be sent no earlier than August 15, which is the first day the account became more than 60 days' delinquent. If the notice is sent on August 15, the card issuer may begin accruing interest on the $1,500 purchase balance and the $200 purchase at the 28% penalty rate beginning on September 29.

2. *Relationship to grace period.* Nothing in § 226.55 prohibits a card issuer from assessing interest due to the loss of a grace period to the extent consistent with § 226.54. In addition, a card issuer has not reduced an annual percentage rate on a credit card account for purposes of § 226.55 if the card issuer does not charge interest on a balance or a portion thereof based on a payment received prior to the expiration of a grace period. For example, if the annual percentage rate for purchases on an account is 15% but the card issuer does not charge any interest on a $500 purchase balance because that balance was paid in full prior to the expiration of the grace period, the card issuer has not reduced the 15% purchase rate to 0% for purposes of § 226.55.

55(b) Exceptions.

1. *Exceptions not mutually exclusive.* A card issuer may increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) pursuant to an exception set forth in § 226.55(b) even if that increase would not be permitted under a different exception. For example, although a card issuer cannot increase an annual percentage rate pursuant to § 226.55(b)(1) unless that rate is provided for a specified period of at least six months, the card issuer may increase an annual percentage rate during a specified period due to an increase in an index consistent with § 226.55(b)(2). Similarly, although § 226.55(b)(3) does not permit a card issuer to increase an annual percentage rate during the first year after account opening, the card issuer may increase the rate during the first year after account opening pursuant to § 226.55(b)(4) if the required minimum periodic payment is not received within 60 days after the due date.

2. *Delayed implementation of increase.* If § 226.55(b) permits a card issuer to apply an increased annual percentage rate, fee, or charge on a date that is not the first day of a billing cycle, the card issuer may delay application of the increased rate, fee, or charge until the first day of the following billing cycle without relinquishing the ability to apply that rate, fee, or charge. For example, assume that, at account opening on January 1, a card issuer discloses that a non-variable annual percentage rate of 10% will apply to purchases for six months and a non-variable rate of 15% will apply thereafter. The first day of each billing cycle for the account is the fifteenth of the month. If the six-month period expires on July 1, the card issuer may delay application of the 15% rate until the start of the next billing cycle (July 15) without relinquishing its ability to apply that rate under § 226.55(b)(1).

3. *Application of a lower rate, fee, or charge.* Nothing in § 226.55 prohibits a card issuer from lowering an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii). However, a card issuer that does so cannot subsequently increase the rate, fee, or charge unless permitted by one of the exceptions in § 226.55(b). The following examples illustrate the application of the rule:

i. *Application of lower rate during first year.* Assume that a card issuer discloses at account opening on January 1 of year one that a non-variable annual percentage rate of 15% will apply to purchases. The card issuer also discloses that, to the extent consistent with § 226.55 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer's required minimum periodic payment is received after the payment due date, which is the tenth of the month. The required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase balance.

A. *Temporary rate returns to standard rate at expiration.* On September 30 of year one, the account has a purchase balance of $1,400 at the 15% rate. On October 1, the card issuer provides a notice pursuant to § 226.9(c) informing the consumer that the rate for new purchases will decrease to a non-variable rate of 5% for six months (from October 1 through March 31 of year two) and that, beginning on April 1 of year two, the rate for purchases will increase to the 15% non-variable rate disclosed at account opening. The card issuer does not apply the 5% rate to the $1,400 purchase balance. On October 14 of year one, the consumer makes a $300 purchase at the 5% rate. On January 15 of year two, the consumer makes a $150 purchase at the 5% rate. On April 1 of year two, the card issuer may begin accruing interest on the $300 purchase and the $150 purchase at 15% as disclosed in the § 226.9(c) notice (pursuant to § 226.55(b)(1)).

B. *Penalty rate increase.* Same facts as above except that the required minimum periodic payment due on November 10 of year one is not received until November 15. Section 226.55 does not permit the card issuer to increase any annual percentage rate on the account at this time. The card issuer may apply the 30% penalty rate to new transactions beginning on April 1 of year two pursuant to § 226.55(b)(3) by providing a § 226.9(g) notice informing the consumer of this increase no later than February 14 of year two. The card issuer may not, however, apply the 30% penalty rate to the $1,400 purchase balance as of September 30 of year one, the $300 purchase on October 15 of year one, or the $150 purchase on January 15 of year two.

ii. *Application of lower rate at end of first year.* Assume that, at account opening on January 1 of year one, a card issuer discloses that a non-variable annual percentage rate of 15% will apply to purchases for one year and discloses that, after the first year, the card issuer will apply a variable rate that is currently 20% and is determined by adding a margin of 10 percentage points to a publicly-available index not under the card issuer's control. On December 31 of year one, the account has a purchase balance of $3,000.

A. *Notice of temporary rate provided consistent with § 226.55(b)(1)(i).* On November 16 of year one, the card issuer provides a notice pursuant to § 226.9(c) informing the consumer of a new variable rate that will apply on January 1 of year two (which is calculated using the same index and a reduced margin of 8 percentage points). The notice further states that, on July 1 of year two, the margin will increase to the margin disclosed at account opening (10 percentage points). On July 1 of year two, the card issuer may increase the margin used to determine the variable rate that applies to new purchases to 10 percentage points and apply that rate to any remaining portion of the $3,000 purchase balance (pursuant to § 226.55(b)(1)).

B. *No notice provided.* Same facts as above except that the card issuer does not send a notice on November 16 of year one. Instead, on January 1 of year two, the card issuer lowers the margin used to determine the variable rate to 8 percentage points and applies that rate to the $3,000 purchase balance and to new purchases. Section 226.9 does not require advance notice in these circumstances. However, unless the account becomes more than 60 days' delinquent, the card issuer may not subsequently increase the rate that applies to the $3,000 purchase balance except due to increases in the index (pursuant to § 226.55(b)(2)).

iii. *Application of lower rate after first year; effect of 14-day period.* Assume that a card issuer discloses at account opening on January 1 of year one that a non-variable annual percentage rate of 10% will apply to purchases for one year, after which that rate will increase to a non-variable rate of 15%. The card issuer also discloses that, to the extent consistent with § 226.55 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer's required minimum periodic payment is received after the payment due date, which is the tenth of the month. The required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase balance. On June 30 of year two, the account has a purchase balance of $1,000 at the 15% rate. On July 1, the card issuer provides a notice pursuant to § 226.9(c) informing the consumer that the rate for new purchases will decrease to a non-variable rate of 5% for six months (from July 1 through December 31 of year two) and that, beginning on January 1 of year three, the rate for purchases will increase to a non-variable rate of 17%. On July 15 of year two, the consumer makes a $200 purchase. On July 16, the consumer makes a $100 purchase. On January 1 of year three, the card issuer may begin accruing interest on the $100 purchase at 17% (pursuant to § 226.55(b)(1)). However, § 226.55(b)(1)(ii)(B) does not permit the card issuer to apply the 17% rate to the $200 purchase because that transaction occurred within 14 days after provision of the § 226.9(c) notice. Instead, the card issuer may apply the 15% rate that applied to purchases prior to provision of the § 226.9(c) notice. In addition, if the card issuer applied the 5% rate to the $1,000 purchase balance, § 226.55(b)(ii)(A) would not permit the card issuer to increase the rate that applies to that balance on January 1 of year three to a rate that is higher than 15% that previously applied to the balance.

4. *Date on which transaction occurred.* When a transaction occurred for purposes of § 226.55 is generally determined by the date of the transaction. However, if a transaction that occurred within 14 days after provision of a § 226.9(c) or (g) notice is not charged to the account prior to the effective date of the change or increase, the card issuer may treat the transaction as occurring more than 14 days after provision of the notice for purposes of § 226.55. *See* example in comment 55(b)(3)–4.iii.B. In addition, when a merchant places a ''hold'' on the available credit on an account for an estimated transaction amount because the actual transaction amount will not be known until a later date, the date of the transaction for purposes of § 226.55 is the date on which the card issuer receives the actual transaction amount from the merchant. *See* example in comment 55(b)(3)–4.iii.A.

5. *Category of transactions.* For purposes of § 226.55, a ''category of transactions'' is a type or group of transactions to which an annual percentage rate applies that is different than the annual percentage rate that applies to other transactions. Similarly, a type or group of transactions is a ''category of transactions'' for purposes of § 226.55 if a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) applies to those transactions that is different than the fee or charge that applies to other transactions. For example, purchase transactions, cash advance transactions, and balance transfer transactions are separate categories of transactions for purposes of § 226.55 if a card issuer applies different annual percentage rates to each. Furthermore, if, for example, the card issuer applies different annual percentage rates to different types of purchase transactions (such as one rate for purchases of gasoline or purchases over $100 and a different rate for all other purchases), each type constitutes a separate category of transactions for purposes of § 226.55.

6. *Relationship between exceptions in § 226.55(b) and 45-day advance notice requirements in § 226.9(c) and (g).* Nothing in § 226.55 alters the requirements in § 226.9(c) and (g) that creditors provide written notice at least

45 days prior to the effective date of certain increases in annual percentage rates, fees, and charges. For example, although § 226.55(b)(3)(ii) permits a card issuer that discloses an increased rate pursuant to § 226.9(c) or (g) to apply that rate to transactions that occurred more than 14 days after provision of the notice, the card issuer cannot begin to accrue interest at the increased rate until that increase goes into effect, consistent with § 226.9(c) or (g). *See* examples in comment 55(b)(3)–4. Similarly, on or after the effective date, the card issuer cannot calculate interest charges for days before the effective date based on the increased rate.

55(b)(1) Temporary rate exception.

1. *Relationship to § 226.9(c)(2)(v)(B).* A card issuer that has complied with the disclosure requirements in § 226.9(c)(2)(v)(B) has also complied with the disclosure requirements in § 226.55(b)(1)(i).

2. *Period of six months or longer.* A temporary annual percentage rate must apply to transactions for a specified period of six months or longer before a card issuer can increase that rate pursuant to § 226.55(b)(1). The specified period must expire no less than six months after the date on which the creditor provides the consumer with the disclosures required by § 226.55(b)(1)(i) or, if later, the date on which the account can be used for transactions to which the temporary rate applies. Section 226.55(b)(1) does not prohibit a card issuer from limiting the application of a temporary annual percentage rate to a particular category of transactions (such as balance transfers or purchases over $100). However, in circumstances where the card issuer limits application of the temporary rate to a particular transaction, the specified period must expire no less than six months after the date on which that transaction occurred. The following examples illustrate the application of § 226.55(b)(1):

i. Assume that on January 1 a card issuer offers a consumer a 5% annual percentage rate on purchases made during the months of January through June. A 15% rate will apply thereafter. On February 15, a $500 purchase is charged to the account. On June 15, a $200 purchase is charged to the account. On July 1, the card issuer may begin accruing interest at the 15% rate on the $500 purchase and the $200 purchase (pursuant to § 226.55(b)(1)).

ii. Same facts as above except that on January 1 the card issuer offered the 5% rate on purchases beginning in the month of February. Section 226.55(b)(1) would not permit the card issuer to begin accruing interest at the 15% rate on the $500 purchase and the $200 purchase until August 1.

iii. Assume that on October 31 of year one the annual percentage rate for purchases on a credit card account is 17%. On November 1, the card issuer offers the consumer a 0% rate for six months on purchases made during the months of November and December. The 17% rate will apply thereafter. On November 15, a $500 purchase is charged to the account. On December 15, a $300 purchase is charged to the account. On January 15 of year two, a $150 purchase is charged to the account. Section 226.55(b)(1) would not permit the card issuer to begin accruing interest at the 17% rate on the $500 purchase and the $300 purchase until May 1 of year two. However, the card issuer may accrue interest at the 17% rate on the $150 purchase beginning on January 15 of year two.

iv. Assume that on June 1 of year one a card issuer offers a consumer a 0% annual percentage rate for six months on the purchase of an appliance. An 18% rate will apply thereafter. On September 1, a $5,000 transaction is charged to the account for the purchase of an appliance. Section 226.55(b)(1) would not permit the card issuer to begin accruing interest at the 18% rate on the $5,000 transaction until March 1 of year two.

v. Assume that on May 31 of year one the annual percentage rate for purchases on a credit card account is 15%. On June 1, the card issuer offers the consumer a 5% rate for six months on a balance transfer. The 15% rate will apply thereafter. On June 15, a $3,000 balance is transferred to the account. On July 15, a $200 purchase is charged to the account. Section 226.55(b)(1) would not permit the card issuer to begin accruing interest the 15% rate on the $3,000 transferred balance until December 15. However, the card issuer may accrue interest at the 15% rate on the $200 purchase beginning on July 15.

3. *Deferred interest and similar promotional programs.*

i. *Application of § 226.55.* The general prohibition in § 226.55(a) applies to the imposition of accrued interest upon the expiration of a deferred interest or similar promotional program under which the consumer is not obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time. However, the exception in § 226.55(b)(1) also applies to these programs, provided that, prior to the commencement of the deferred interest period, the card issuer discloses the length of the period and the rate at which interest will accrue on the balance subject to the deferred interest program if that balance is not paid in full prior to expiration of the deferred interest period. *See* comment 9(c)(2)(v)–7.

ii. *Examples.*

A. *Deferred interest offer at account opening.* Assume that, at account opening on January 1 of year one, the card issuer discloses the following with respect to a deferred interest program: ''No interest on purchases made in January of year one if paid in full by December 31 of year one. If the balance is not paid in full by that date, interest will be imposed from the transaction date at a rate of 20%.'' On January 15 of year one, the consumer makes a purchase of $2,000. No other transactions are made on the account. The payment due on April 1 is not received until April 10. Section 226.55 does not permit the card issuer to charge to the account interest that has accrued on the $2,000 purchase at this time. Furthermore, if the consumer pays the $2,000 purchase in full on or before December 31 of year one, § 226.55 does not permit the card issuer to charge to the account any interest that has accrued on that purchase. If, however, the $2,000 purchase has not been paid in full by January 1 of year two, § 226.55(b)(1) permits the card issuer to charge to the account the interest accrued on that purchase at the 20% rate during year one (to the extent consistent with other applicable law).

B. *Deferred interest offer after account opening.* Assume that a card issuer discloses at account opening on January 1 of year one that the rate that applies to purchases is a variable annual percentage rate that is currently 18% and will be adjusted quarterly by adding a margin of 8 percentage points to a publicly-available index not under the card issuer's control. The card issuer also discloses that, to the extent consistent with § 226.55 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer's required minimum periodic payment is received after the payment due date, which is the first of the month. On June 30 of year two, the consumer uses the account for a $1,000 purchase in response to an offer of a deferred interest program. Under the terms of this program, interest on the purchase will accrue at the variable rate for purchases but the consumer will not be obligated to pay that interest if the purchase is paid in full by December 31 of year two. The payment due on September 1 of year two is not received until September 6. Section 226.55 does not permit the card issuer to charge to the account interest that has accrued on the $1,000 purchase at this time.

Furthermore, if the consumer pays the $1,000 purchase in full on or before December 31 of year two, § 226.55 does not permit the card issuer to charge to the account any interest that has accrued on that purchase. On December 31 of year two, the $1,000 purchase has been paid in full. Under these circumstances, the card issuer may not charge any interest accrued on the $1,000 purchase.

4. *Contingent or discretionary rate increases.* Section § 226.55(b)(1) permits a card issuer to increase a temporary annual percentage rate upon the expiration of a specified period of time. However, § 226.55(b)(1) does not permit a card issuer to apply an increased rate that is contingent on a particular event or occurrence or that may be applied at the card issuer's discretion. The following examples illustrate rate increases that are not permitted by § 226.55:

i. Assume that a card issuer discloses at account opening on January 1 of year one that a non-variable annual percentage rate of 15% applies to purchases but that all rates on an account may be increased to a non-variable penalty rate of 30% if a consumer's required minimum periodic payment is received after the payment due date, which is the fifteenth of the month. On March 1, the account has a $2,000 purchase balance. The payment due on March 15 is not received until March 20. Section 226.55 does not permit the card issuer to apply the 30% penalty rate to the $2,000 purchase balance. However, pursuant to § 226.55(b)(3), the card issuer could provide a § 226.9(c) or (g) notice on or before November 16 informing the consumer that, on January 1 of year two, the 30% rate (or a different rate) will apply to new transactions.

ii. Assume that a card issuer discloses at account opening on January 1 of year one that a non-variable annual percentage rate of 5% applies to transferred balances but that this rate will increase to a non-variable rate of 18% if the consumer does not use the account for at least $200 in purchases each billing cycle. On July 1, the consumer transfers a balance of $4,000 to the account. During the October billing cycle, the consumer uses the account for $150 in purchases. Section 226.55 does not permit the card issuer to apply the 18% rate to the $4,000 transferred balance or the $150 in purchases. However, pursuant to § 226.55(b)(3), the card issuer could provide a § 226.9(c) or (g) notice on or before November 16 informing the consumer that, on January 1 of year two, the 18% rate (or a different rate) will apply to new transactions.

55(b)(2) Variable rate exception.

1. *Increases due to increase in index.* Section 226.55(b)(2) provides that an annual percentage rate that varies according to an index that is not under the card issuer's control and is available to the general public may be increased due to an increase in the index. This section does not permit a card issuer to increase the rate by changing the method used to determine a rate that varies with an index (such as by increasing the margin), even if that change will not result in an immediate increase. However, a card issuer may change the day of the month on which index values are measured to determine changes to the rate.

2. *External index.* A card issuer may increase the annual percentage rate if the increase is based on an index or indices outside the card issuer's control. A card issuer may not increase the rate based on its own prime rate or cost of funds. A card issuer is permitted, however, to use a published prime rate, such as that in the *Wall Street Journal,* even if the card issuer's own prime rate is one of several rates used to establish the published rate.

3. *Publicly available.* The index or indices must be available to the public. A publicly-available index need not be published in a newspaper, but it must be one the consumer can independently obtain (by telephone, for example) and use to verify the annual percentage rate applied to the credit card account.

4. *Changing a non-variable rate to a variable rate.* Section 226.55 generally prohibits a card issuer from changing a non-variable annual percentage rate to a variable annual percentage rate because such a change can result in an increase. However, a card issuer may change a non-variable rate to a variable to the extent permitted by one of the exceptions in § 226.55(b). For example, § 226.55(b)(1) permits a card issuer to change a non-variable rate to a variable rate upon expiration of a specified period of time. Similarly, following the first year after the account is opened, § 226.55(b)(3) permits a card issuer to change a non-variable rate to a variable rate with respect to new transactions (after complying with the notice requirements in § 226.9(b), (c) or (g)).

5. *Changing a variable rate to a non-variable rate.* Nothing in § 226.55 prohibits a card issuer from changing a variable annual percentage rate to an equal or lower non-variable rate. Whether the non-variable rate is equal to or lower than the variable rate is determined at the time the card issuer provides the notice required by § 226.9(c). For example, assume that on March 1 a variable annual percentage rate that is currently 15% applies to a balance of $2,000 and the card issuer sends a notice pursuant to § 226.9(c) informing the consumer that the variable rate will be converted to a non-variable rate of 14% effective April 15. On April 15, the card issuer may apply the 14% non-variable rate to the $2,000 balance and to new transactions even if the variable rate on March 2 or a later date was less than 14%.

6. *Substitution of index.* A card issuer may change the index and margin used to determine the annual percentage rate under § 226.55(b)(2) if the original index becomes unavailable, as long as historical fluctuations in the original and replacement indices were substantially similar, and as long as the replacement index and margin will produce a rate similar to the rate that was in effect at the time the original index became unavailable. If the replacement index is newly established and therefore does not have any rate history, it may be used if it produces a rate substantially similar to the rate in effect when the original index became unavailable.

55(b)(3) Advance notice exception.

1. *Relationship to § 226.9(h).* A card issuer may not increase a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) pursuant to § 226.55(b)(3) if the consumer has rejected the increased fee or charge pursuant to § 226.9(h).

2. *Notice provided pursuant to § 226.9(b) and (c).* If an increased annual percentage rate, fee, or charge is disclosed pursuant to both § 226.9(b) and (c), that rate, fee, or charge may only be applied to transactions that occur more than 14 days after provision of the § 226.9(c) notice.

3. *Account opening.*

i. *Multiple accounts with same card issuer.* When a consumer has a credit card account with a card issuer and the consumer opens a new credit card account with the same card issuer (or its affiliate or subsidiary), the opening of the new account constitutes the opening of a credit card account for purposes of § 226.55(b)(3)(iii) if, more than 30 days after the new account is opened, the consumer has the option to obtain additional extensions of credit on each account. For example, assume that, on January 1 of year one, a consumer opens a credit card account with a card issuer. On July 1 of year one, the consumer opens a second credit card account with that card issuer. On July 15, a $1,000 balance is transferred from the first account to the second account. The opening of the second account

constitutes the opening of a credit card account for purposes of § 226.55(b)(3)(iii) so long as, on August 1, the consumer has the option to engage in transactions using either account. Under these circumstances, the card issuer could not increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) on the second account pursuant to § 226.55(b)(3) until July 1 of year two (which is one year after the second account was opened).

ii. *Substitution, replacement or consolidation.*

A. *Generally.* A credit card account has not been opened for purposes of § 226.55(b)(3)(iii) when a credit card account issued by a card issuer is substituted, replaced, or consolidated with another credit card account issued by the same card issuer (or its affiliate or subsidiary). Circumstances in which a credit card account has not been opened for purposes of § 226.55(b)(3)(iii) include when:

(1) A retail credit card is replaced with a cobranded general purpose card that can be used at a wider number of merchants;

(2) A credit card account is replaced with another credit card account offering different features;

(3) A credit card account is consolidated or combined with one or more other credit card accounts into a single credit card account; or

(4) A credit card account acquired through merger or acquisition is replaced with a credit card account issued by the acquiring card issuer.

B. *Limitation.* A card issuer that replaces or consolidates a credit card account with another credit card account issued by the card issuer (or its affiliate or subsidiary) may not increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) in a manner otherwise prohibited by § 226.55. For example, assume that, on January 1 of year one, a consumer opens a credit card account with an annual percentage rate of 15% for purchases. On July 1 of year one, the account is replaced with a credit card account that offers different features (such as rewards on purchases). Under these circumstances, the card issuer cannot increase the annual percentage rate for new purchases to a rate that is higher than 15% pursuant to § 226.55(b)(3) until January 1 of year two (which is one year after the first account was opened).

4. *Examples.*

i. *Change-in-terms rate increase; temporary rate increase.* Assume that a credit card account is opened on January 1 of year one. On March 14 of year two, the account has a purchase balance of $2,000 at a non-variable annual percentage rate of 15%. On March 15, the card issuer provides a notice pursuant to § 226.9(c) informing the consumer that the rate for new purchases will increase to a non-variable rate of 18% on May 1. The notice further states that the 18% rate will apply for six months (until November 1) and that thereafter the card issuer will apply a variable rate that is currently 22% and is determined by adding a margin of 12 percentage points to a publicly-available index that is not under the card issuer's control. The fourteenth day after provision of the notice is March 29 and, on that date, the consumer makes a $200 purchase. On March 30, the consumer makes a $1,000 purchase. On May 1, the card issuer may begin accruing interest at 18% on the $1,000 purchase made on March 30 (pursuant to § 226.55(b)(3)). Section 226.55(b)(3)(i) and (ii) do not permit the card issuer to apply the 18% rate to the $2,200 purchase balance as of March 29 because that balance reflects transactions that occurred prior to or within 14 days after the provision of the § 226.9(c) notice. After six months (November 2), the card issuer may begin accruing interest on any remaining portion of the $1,000 purchase at the previously-disclosed variable rate determined using the 12-point margin (pursuant to § 226.55(b)(1)).

ii. *Checks that access a credit card account.* Assume that a card issuer discloses at account opening on January 1 of year one that the annual percentage rate that applies to cash advances is a variable rate that is currently 24% and will be adjusted quarterly by adding a margin of 14 percentage points to a publicly available index not under the card issuer's control. On July 1 of year two, the card issuer provides checks that access the account and, pursuant to § 226.9(b)(3)(i)(A), discloses that a promotional rate of 15% will apply to credit extended by use of the checks until January 1 of year three, after which the cash advance rate determined using the 14-point margin will apply. On July 9 of year two, the consumer uses one of the checks to pay for a $500 transaction. Beginning on January 1 of year three, the card issuer may apply the cash advance rate determined using the 14-point margin to any remaining portion of the $500 transaction (pursuant to § 226.55(b)(1) and (b)(3)).

iii. *Hold on available credit.* Assume that a credit card account is opened on January 1 of year one. On September 14 of year two, the account has a purchase balance of $2,000 at a non-variable annual percentage rate of 17%. On September 15, the card issuer provides a notice pursuant to § 226.9(c) informing the consumer that the rate for new purchases will increase to a non-variable rate of 20% on October 30. The fourteenth day after provision of the notice is September 29. On September 28, the consumer uses the credit card to check into a hotel and the hotel obtains authorization for a $1,000 hold on the account to ensure there is adequate available credit to cover the anticipated cost of the stay.

A. The consumer checks out of the hotel on October 2. The actual cost of the stay is $1,100 because of additional incidental costs. On October 2, the hotel charges the $1,100 transaction to the account. For purposes of § 226.55(b)(3), the transaction occurred on October 2. Therefore, on October 30, § 226.55(b)(3) permits the card issuer to apply the 20% rate to new purchases and to the $1,100 transaction. However, § 226.55(b)(3)(ii) does not permit the card issuer to apply the 20% rate to any remaining portion of the $2,000 purchase balance.

B. Same facts as above except that the consumer checks out of the hotel on September 29. The actual cost of the stay is $250, but the hotel does not charge this amount to the account until November 1. For purposes of § 226.55(b)(3), the card issuer may treat the transaction as occurring more than 14 days after provision of the § 226.9(c) notice (*i.e.,* after September 29). Accordingly, the card issuer may apply the 20% rate to the $250 transaction.

5. *Application of increased fees and charges. See* comment 55(c)(1)–3.

55(b)(4) Delinquency exception.

1. *Receipt of required minimum periodic payment within 60 days of due date.* Section 226.55(b)(4) applies when a card issuer has not received the consumer's required minimum periodic payment within 60 days after the due date for that payment. In order to satisfy this condition, a card issuer that requires monthly minimum payments generally must not have received two consecutive required minimum periodic payments. Whether a required minimum periodic payment has been received for purposes of § 226.55(b)(4) depends on whether the amount received is equal to or more than the first outstanding required minimum periodic payment. For example, assume that the required minimum periodic payments for a credit card account are due on the fifteenth day of the month. On May 13, the card issuer has not received the $50 required minimum periodic payment due on March 15 or the $150 required minimum periodic

payment due on April 15. If the card issuer receives a $50 payment on May 14, § 226.55(b)(4) does not apply because the payment is equal to the required minimum periodic payment due on March 15 and therefore the account is not more than 60 days delinquent. However, if the card issuer instead received a $40 payment on May 14, § 226.55(b)(4) would apply because the payment is less than the required minimum periodic payment due on March 15. Furthermore, if the card issuer received the $50 payment on May 15, § 226.55(b)(4) would apply because the card issuer did not receive the required minimum periodic payment due on March 15 within 60 days after the due date for that payment.

2. *Relationship to § 226.9(g)(3)(i)(B).* A card issuer that has complied with the disclosure requirements in § 226.9(g)(3)(i)(B) has also complied with the disclosure requirements in § 226.55(b)(4)(i).

3. *Reduction in rate pursuant to § 226.55(b)(4)(ii).* Section 226.55(b)(4)(ii) provides that, if the card issuer receives six consecutive required minimum periodic payments on or before the payment due date beginning with the first payment due following the effective date of the increase, the card issuer must reduce any annual percentage rate, fee, or charge increased pursuant to § 226.55(b)(4) to the annual percentage rate, fee, or charge that applied prior to the increase with respect to transactions that occurred prior to or within 14 days after provision of the § 226.9(g) notice.

i. *Six consecutive payments immediately following effective date of increase.* Section 226.55(b)(4)(ii) does not apply if the card issuer does not receive six consecutive required minimum periodic payments on or before the payment due date beginning with the payment due immediately following the effective date of the increase, even if, at some later point in time, the card issuer receives six consecutive required minimum periodic payments on or before the payment due date.

ii. *Rate, fee, or charge that does not exceed rate, fee, or charge that applied before increase.* Although § 226.55(b)(4)(ii) requires the card issuer to reduce an annual percentage rate, fee, or charge increased pursuant to § 226.55(b)(4) to the annual percentage rate, fee, or charge that applied prior to the increase, this provision does not prohibit the card issuer from applying an increased annual percentage rate, fee, or charge consistent with any of the other exceptions in § 226.55(b). For example, if a temporary rate applied prior to the § 226.55(b)(4) increase and the temporary rate expired before a reduction in rate pursuant to § 226.55(b)(4)(ii), the card issuer may apply an increased rate to the extent consistent with § 226.55(b)(1). Similarly, if a variable rate applied prior to the § 226.55(b)(4) increase, the card issuer may apply any increase in that variable rate to the extent consistent with § 226.55(b)(2).

iii. *Delayed implementation of reduction.* If § 226.55(b)(4)(ii) requires a card issuer to reduce an annual percentage rate, fee, or charge on a date that is not the first day of a billing cycle, the card issuer may delay application of the reduced rate, fee, or charge until the first day of the following billing cycle.

iv. *Examples.* The following examples illustrate the application of § 226.55(b)(4)(ii):

A. Assume that the billing cycles for a credit card account begin on the first day of the month and end on the last day of the month and that the required minimum periodic payments are due on the fifteenth day of the month. Assume also that the account has a $5,000 purchase balance to which a non-variable annual percentage rate of 15% applies. On May 16 of year one, the card issuer has not received the required minimum periodic payments due on the fifteenth day of March, April, or May and sends a § 226.9(g) notice stating that the annual percentage rate applicable to the $5,000 balance and to new transactions will increase to 28% effective July 1. On July 1, § 226.55(b)(4) permits the card issuer to apply the 28% rate to the $5,000 balance and to new transactions. The card issuer receives the required minimum periodic payments due on the fifteenth day of July, August, September, October, November, and December. On January 1 of year two, § 226.55(b)(4)(ii) requires the card issuer to reduce the rate that applies to any remaining portion of the $5,000 balance to 15%. The card issuer is not required to reduce the rate that applies to any transactions that occurred on or after May 31 (which is the fifteenth day after provision of the § 226.55(b)(4) notice).

B. Same facts as paragraph iv.A. above except that the 15% rate that applied to the $5,000 balance prior to the § 226.55(b)(4) increase was scheduled to increase to 20% on August 1 of year one (pursuant to § 226.55(b)(1)). On January 1 of year two, § 226.55(b)(4)(ii) requires the card issuer to reduce the rate that applies to any remaining portion of the $5,000 balance to 20%.

C. Same facts as paragraph iv.A. above except that the 15% rate that applied to the $5,000 balance prior to the § 226.55(b)(4) increase was a variable rate that was determined by adding a margin of 10 percentage points to a publicly-available index not under the card issuer's control (consistent with § 226.55(b)(2)). On January 1 of year two, § 226.55(b)(4)(ii) requires the card issuer to reduce the rate that applies to any remaining portion of the $5,000 balance to the variable rate determined using the 10-point margin.

55(b)(5) Workout and temporary hardship arrangement exception.

1. *Scope of exception.* Nothing in § 226.55(b)(5) permits a card issuer to alter the requirements of § 226.55 pursuant to a workout or temporary hardship arrangement. For example, a card issuer cannot increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) pursuant to a workout or temporary hardship arrangement unless otherwise permitted by § 226.55. In addition, a card issuer cannot require the consumer to make payments with respect to a protected balance that exceed the payments permitted under § 226.55(c).

2. *Relationship to § 226.9(c)(2)(v)(D).* A card issuer that has complied with the disclosure requirements in § 226.9(c)(2)(v)(D) has also complied with the disclosure requirements in § 226.55(b)(5)(i). *See* comment 9(c)(2)(v)–8.

3. *Rate, fee, or charge that does not exceed rate, fee, or charge that applied before workout or temporary hardship arrangement.* Upon the completion or failure of a workout or temporary hardship arrangement, § 226.55(b)(5)(ii) prohibits the card issuer from applying to any transactions that occurred prior to commencement of the arrangement an annual percentage rate, fee, or charge that exceeds the annual percentage rate, fee, or charge that applied to those transactions prior to commencement of the arrangement. However, this provision does not prohibit the card issuer from applying an increased annual percentage rate, fee, or charge upon completion or failure of the arrangement, to the extent consistent with any of the other exceptions in § 226.55(b). For example, if a temporary rate applied prior to the arrangement and that rate expired during the arrangement, the card issuer may apply an increased rate upon completion or failure of the arrangement to the extent consistent with § 226.55(b)(1). Similarly, if a variable rate applied prior to the arrangement, the card issuer may apply any increase in that variable rate upon completion or failure of the arrangement to the extent consistent with § 226.55(b)(2).

4. *Examples.*

i. Assume that, consistent with § 226.55(b)(4), the margin used to determine a variable annual percentage rate that applies to a $5,000 balance is increased from 5 percentage points to 15 percentage points. Assume also that the card issuer and the consumer subsequently agree to a workout arrangement that reduces the margin back to 5 points on the condition that the consumer pay a specified amount by the payment due date each month. If the consumer does not pay the agreed-upon amount by the payment due date, the card issuer may increase the margin for the variable rate that applies to the $5,000 balance up to 15 percentage points.

ii. Assume that a consumer fails to make four consecutive monthly minimum payments totaling $480 on a consumer credit card account with a balance of $6,000 and that, consistent with § 226.55(b)(4), the annual percentage rate that applies to that balance is increased from a non-variable rate of 15% to a non-variable penalty rate of 30%. Assume also that the card issuer and the consumer subsequently agree to a temporary hardship arrangement that reduces all rates on the account to 0% on the condition that the consumer pay an amount by the payment due date each month that is sufficient to cure the $480 delinquency within six months. If the consumer pays the agreed-upon amount by the payment due date during the six-month period and cures the delinquency, the card issuer may increase the rate that applies to any remaining portion of the $6,000 balance to 15% or any other rate up to the 30% penalty rate.

55(b)(6) Servicemembers Civil Relief Act exception.

1. *Rate that does not exceed rate that applied before decrease.* Once 50 U.S.C. app. 527 no longer applies, § 226.55(b)(6) prohibits a card issuer from applying an annual percentage rate to any transactions that occurred prior to a decrease in rate pursuant to 50 U.S.C. app. 527 that exceeds the rate that applied to those transactions prior to the decrease. However, this provision does not prohibit the card issuer from applying an increased annual percentage rate once 50 U.S.C. app. 527 no longer applies, to the extent consistent with any of the other exceptions in § 226.55(b). For example, if a temporary rate applied prior to the decrease and that rate expired during the period that 50 U.S.C. app. 527 applied to the account, the card issuer may apply an increased rate once 50 U.S.C. app. 527 no longer applies to the extent consistent with § 226.55(b)(1). Similarly, if a variable rate applied prior to the decrease, the card issuer may apply any increase in that variable rate once 50 U.S.C. app. 527 no longer applies to the extent consistent with § 226.55(b)(2).

2. *Example.* Assume that on December 31 of year one the annual percentage rate that applies to a $5,000 balance on a credit card account is a variable rate that is determined by adding a margin of 10 percentage points to a publicly-available index that is not under the card issuer's control. On January 1 of year two, the card issuer reduces the rate that applies to the $5,000 balance to a non-variable rate of 6% pursuant to 50 U.S.C. app. 527. On January 1 of year three, 50 U.S.C. app. 527 ceases to apply and the card issuer provides a notice pursuant to § 226.9 informing the consumer that on February 15 of year three the variable rate determined using the 10-point margin will apply to any remaining portion of the $5,000 balance. On February 15 of year three, § 226.55(b)(6) permits the card issuer to begin accruing interest on any remaining portion of the $5,000 balance at the variable rate determined using the 10-point margin.

55(c) Treatment of protected balances.

55(c)(1) Definition of protected balance.

1. *Example of protected balance.* Assume that, on March 15 of year two, an account has a purchase balance of $1,000 at a non-variable annual percentage rate of 12% and that, on March 16, the card issuer sends a notice pursuant to § 226.9(c) informing the consumer that the annual percentage rate for new purchases will increase to a non-variable rate of 15% on May 1. The fourteenth day after provision of the notice is March 29. On March 29, the consumer makes a $100 purchase. On March 30, the consumer makes a $150 purchase. On May 1, § 226.55(b)(3) permits the card issuer to begin accruing interest at 15% on the $150 purchase made on March 30 but does not permit the card issuer to apply that 15% rate to the $1,100 purchase balance as of March 29. Accordingly, the protected balance for purposes of § 226.55(c) is the $1,100 purchase balance as of March 29. The $150 purchase made on March 30 is not part of the protected balance.

2. *First year after account opening.* Section 226.55(c) applies to amounts owed for a category of transactions to which an increased annual percentage rate or an increased fee or charge cannot be applied after the rate, fee, or charge for that category of transactions has been increased pursuant to § 226.55(b)(3). Because § 226.55(b)(3)(iii) does not permit a card issuer to increase an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) during the first year after account opening, § 226.55(c) does not apply to balances during the first year after account opening.

3. *Increased fees and charges.* Once an account has been open for more than one year, § 226.55(b)(3) permits a card issuer to increase a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) after complying with the applicable notice requirements in § 226.9(b) or (c), provided that the increased fee or charge is not applied to a protected balance. A card issuer is not prohibited from increasing a fee or charge that applies to the account as a whole or to balances other than the protected balance. For example, after the first year following account opening, a card issuer may add a new annual or a monthly maintenance fee to an account or increase such a fee so long as the fee is not based solely on the protected balance. However, if the consumer rejects an increase in a fee or charge pursuant to § 226.9(h), the card issuer is prohibited from applying the increased fee or charge to the account and from imposing any other fee or charge solely as a result of the rejection. *See* § 226.9(h)(2)(i) and (ii); comment 9(h)(2)(ii)–2.

55(c)(2) Repayment of protected balance.

1. *No less beneficial to the consumer.* A card issuer may provide a method of repaying the protected balance that is different from the methods listed in § 226.55(c)(2) so long as the method used is no less beneficial to the consumer than one of the listed methods. A method is no less beneficial to the consumer if the method results in a required minimum periodic payment that is equal to or less than a minimum payment calculated using the method for the account before the effective date of the increase. Similarly, a method is no less beneficial to the consumer if the method amortizes the balance in five years or longer or if the method results in a required minimum periodic payment that is equal to or less than a minimum payment calculated consistent with § 226.55(c)(2)(iii). For example:

i. If at account opening the cardholder agreement stated that the required minimum periodic payment would be either the total of fees and interest charges plus 1% of the total amount owed or $20 (whichever is greater), the card issuer may require the consumer to make a minimum payment of $20 even if doing so would pay off the balance in

less than five years or constitute more than 2% of the balance plus fees and interest charges.

ii. A card issuer could increase the percentage of the balance included in the required minimum periodic payment from 2% to 5% so long as doing so would not result in amortization of the balance in less than five years.

iii. A card issuer could require the consumer to make a required minimum periodic payment that amortizes the balance in four years so long as doing so would not more than double the percentage of the balance included in the minimum payment prior to the date on which the increased annual percentage rate, fee, or charge became effective.

55(c)(2)(ii) Five-year amortization period.

1. *Amortization period starting from effective date of increase.* Section 226.55(c)(2)(ii) provides for an amortization period for the protected balance of no less than five years, starting from the date on which the increased annual percentage rate or fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) became effective. A card issuer is not required to recalculate the required minimum periodic payment for the protected balance if, during the amortization period, that balance is reduced as a result of the allocation of payments by the consumer in excess of that minimum payment consistent with § 226.53 or any other practice permitted by these rules and other applicable law.

2. *Amortization when applicable rate is variable.* If the annual percentage rate that applies to the protected balance varies with an index, the card issuer may adjust the interest charges included in the required minimum periodic payment for that balance accordingly in order to ensure that the balance is amortized in five years. For example, assume that a variable rate that is currently 15% applies to a protected balance and that, in order to amortize that balance in five years, the required minimum periodic payment must include a specific amount of principal plus all accrued interest charges. If the 15% variable rate increases due to an increase in the index, the creditor may increase the required minimum periodic payment to include the additional interest charges.

55(c)(2)(iii) Doubling repayment rate.

1. *Portion of required minimum periodic payment on other balances.* Section 226.55(c)(2)(iii) addresses the portion of the required minimum periodic payment based on a the protected balance. Section 226.55(c)(2)(iii) does not limit or otherwise address the card issuer's ability to determine the portion of the required minimum periodic payment based on other balances on the account or the card issuer's ability to apply that portion of the minimum payment to the balances on the account.

2. *Example.* Assume that the method used by a card issuer to calculate the required minimum periodic payment for a credit card account requires the consumer to pay either the total of fees and accrued interest charges plus 2% of the total amount owed or $50, whichever is greater. Assume also that the account has a purchase balance of $2,000 at an annual percentage rate of 15% and a cash advance balance of $500 at an annual percentage rate of 20% and that the card issuer increases the rate for purchases to 18% but does not increase the rate for cash advances. Under § 226.55(c)(2)(iii), the card issuer may require the consumer to pay fees and interest plus 4% of the $2,000 purchase balance. Section 226.55(c)(2)(iii) does not limit the card issuer's ability to increase the portion of the required minimum periodic payment that is based on the cash advance balance.

55(d) Continuing application.

1. *Closed accounts.* If a credit card account with a balance is closed, § 226.55 continues to apply to that balance. For example, if a card issuer or a consumer closes a credit card account with a balance, § 226.55(d)(1) prohibits the card issuer from increasing the annual percentage rate that applies to that balance or imposing a periodic fee based solely on that balance that was not charged before the account was closed (such as a closed account fee) unless permitted by one of the exceptions in § 226.55(b).

2. *Acquired accounts.* If, through merger or acquisition (for example), a card issuer acquires a credit card account with a balance, § 226.55 continues to apply to that balance. For example, if a credit card account has a $1,000 purchase balance with an annual percentage rate of 15% and the card issuer that acquires that account applies an 18% rate to purchases, § 226.55(d)(1) prohibits the card issuer from applying the 18% rate to the $1,000 balance unless permitted by one of the exceptions in § 226.55(b).

3. *Balance transfers.*

i. *Between accounts issued by the same creditor.* If a balance is transferred from a credit card account issued by a creditor to another credit account issued by the same creditor or its affiliate or subsidiary, § 226.55 continues to apply to that balance. For example, if a credit card account has a $2,000 purchase balance with an annual percentage rate of 15% and that balance is transferred to another credit card account issued by the same creditor that applies an 18% rate to purchases, § 226.55(d)(2) prohibits the creditor from applying the 18% rate to the $2,000 balance unless permitted by one of the exceptions in § 226.55(b). However, the creditor would not generally be prohibited from charging a new periodic fee (such as an annual fee) on the second account so long as the fee is not based solely on the $2,000 balance and the creditor has notified the consumer of the fee either by providing written notice 45 days before imposing the fee pursuant to § 226.9(c) or by providing account-opening disclosures pursuant to § 226.6(b). *See* also § 226.55(b)(3)(iii); comment 55(b)(3)–3; comment 5(b)(1)(i)–6. Additional circumstances in which a balance is considered transferred for purposes of § 226.55(d)(2) include when:

A. A retail credit card with a balance is replaced or substituted with a cobranded general purpose card that can be used with a broader merchant base;

B. A credit card account with a balance is replaced or substituted with another credit card account offering different features;

C. A credit card account with a balance is consolidated or combined with one or more other credit card accounts into a single credit card account; and

D. A credit card account is replaced or substituted with a line of credit that can be accessed solely by an account number.

ii. *Between accounts issued by different creditors.* If a balance is transferred to a credit card account issued by a creditor from a credit card account issued by a different creditor or an institution that is not an affiliate or subsidiary of the creditor that issued the credit card account, § 226.55(d)(2) does not prohibit the creditor to which the balance is transferred from applying its account terms to that balance, provided that those terms comply with this part. For example, if a credit card account issued by creditor A has a $1,000 purchase balance at an annual percentage rate of 15% and the consumer transfers that balance to a credit card account with a purchase rate of 17% issued by creditor B, creditor B may apply the 17% rate to the $1,000 balance. However, creditor B may not subsequently increase the rate on that balance unless permitted by one of the exceptions in § 226.55(b).

§ 226.56 Requirements for over-the-limit transactions.

56(b) Opt-in requirement.

1. *Policy and practice of declining over-the-limit transactions.* Section 226.56 does not apply to any creditor that has a policy and practice of declining to pay any over-the-limit transactions for the consumer's credit card account when the creditor has a reasonable belief that completing a transaction will cause the consumer to exceed the consumer's credit limit for that account. For example, if a creditor generally declines any transaction that may exceed a consumer's credit limit, it is not subject to the requirement to provide consumers notice and an opportunity to affirmatively consent to the creditor's payment of over-the-limit transactions.

2. *Over-the-limit transactions not required to be paid or authorized.* Section 226.56 does not require a creditor to pay or authorize an over-the-limit transaction even if the consumer has affirmatively consented to the creditor's over-the-limit service.

3. *Periodic fees or charges.* A creditor may not impose a periodic fee for paying over-the-limit transactions that is assessed whether or not the consumer has exceeded the credit limit during the billing cycle (for example, a monthly ''over-the-limit protection'' service fee) unless the consumer has affirmatively consented to or opted in to the service.

4. *Examples of reasonable opportunity to provide affirmative consent.* A creditor provides a reasonable opportunity for the consumer to affirmatively consent to the creditor's payment of over-the-limit transactions if—

i. *On the application.* The creditor provides the notice on the application form that the consumer can fill out to request the service as part of the application;

ii. *By mail.* The creditor provides a form with the account-opening disclosures or the periodic statement for the consumer to fill out and mail to affirmatively request the service;

iii. *By telephone.* The creditor provides a readily available telephone number that consumers may call to provide affirmative consent.

iv. *By electronic means.* The creditor provides an electronic means for the consumer to affirmatively consent. For example, a creditor could provide a form that can be accessed and processed at its Web site, where the consumer can check a box to opt in and confirm that opt-in choice by clicking on a consent box.

5. *Separate consent required.* A consumer's affirmative consent, or opt-in, to a creditor's payment of over-the-limit transactions must be separate from other consents or acknowledgments obtained by the creditor. For example, a consumer's signature on a credit application to request a credit card would not by itself sufficiently evidence the consumer's consent to the creditor's payment of over-the-limit transactions. However, a creditor may comply with the requirement to obtain separate consent if the creditor also includes a check box or signature line on the application that the consumer can initial or sign to request the over-the-limit service, provided that the box or line is used solely to indicate the consumer's opt-in decision and not for any other purpose, such as to also obtain consumer consents for other account services or features.

56(b)(2) Completion of over-the-limit transactions without consumer consent.

1. *Examples of over-the-limit transactions paid without consumer consent.* Section 226.56(b)(2) provides that a creditor may pay an over-the-limit transaction even if the consumer has not provided affirmative consent, so long as the creditor does not impose a fee or charge for paying the transaction. The prohibition on imposing fees for paying an over-the-limit transaction applies even in circumstances where the creditor is unable to avoid paying a transaction that exceeds the consumer's credit limit.

i. *Transactions not submitted for authorization.* A consumer has not affirmatively consented to a creditor's payment of over-the-limit transactions. The consumer purchases a $3 cup of coffee using his debit card. Because of the small dollar amount of the transaction, the merchant does not submit the transaction to the creditor for authorization. The transaction causes the consumer to exceed the credit limit. Under these circumstances, the creditor is prohibited from imposing a fee or charge on the consumer's credit card account for paying the over-the-limit transaction because the consumer has not opted in to the creditor's over-the-limit service.

ii. *Settlement amount exceeds authorization amount.* A consumer has not affirmatively consented to a creditor's payment of over-the-limit transactions. The consumer uses his credit card at a pay-at-the-pump fuel dispenser to purchase $50 of fuel. Before permitting the consumer to use the fuel pump, the merchant verifies the validity of the card by requesting an authorization hold of $1. The subsequent $50 transaction amount causes the consumer to exceed his credit limit. Under these circumstances, the creditor is prohibited from imposing a fee or charge on the consumer's credit card account for paying the over-the-limit transaction because the consumer has not opted in to the creditor's over-the-limit service.

2. *Permissible fees or charges when a consumer has not consented.* Section 226.56(b)(2) does not preclude a creditor from assessing fees or charges other than over-the-limit fees when an over-the-limit transaction is completed. For example, if a consumer has not opted in, the creditor could assess a balance transfer fee in connection with a balance transfer, provided such a fee is assessed whether or not the transfer exceeds the credit limit. The creditor may also assess interest charges in connection with the over-the-limit transaction.

56(c) Method of election.

1. *Creditor-determined methods.* A creditor may determine the means available to consumers to affirmatively consent, or opt in, to the creditor's payment over-the-limit transactions. For example, a creditor may decide to obtain consents in writing, electronically, or orally, or through some combination of these methods. Section 226.56(c) further requires, however, that such methods must be made equally available for consumers to revoke a prior consent.

2. *Electronic requests.* A consumer consent or revocation request submitted electronically is not considered a consumer disclosure for purposes of the E-Sign Act.

56(d) Timing of notices.

1. *Revocation notice on each statement.* A creditor may, but is not required to, include the notice informing the consumer of the right to revoke the consumer's prior consent to the creditor's payment of over-the-limit transactions on each periodic statement sent to the consumer, even if the consumer has not incurred an over-the-limit fee during a particular billing cycle.

56(e) Content.

1. *Range of fees.* If the amount of an over-the-limit fee may vary, such as based on the amount of the over-the-limit transaction, the creditor may indicate that the consumer may be assessed a fee ''up to'' the maximum fee or provide the range of fees.

2. *Additional notice content.* In addition to the content required under § 226.56(e)(1), a creditor may briefly describe in its opt-in notice the benefits of the creditor's payment of over-the-limit transactions. For example, the creditor may state that if the consumer consents, or opts in, to the payment of over-the-limit transactions, the consumer may avoid having

transactions declined when the issuer believes a transaction may cause the consumer to exceed the credit limit. Creditors may also indicate that there may be circumstances under which their creditor will decline an over-the-limit transaction even if the consumer has opted in or that the payment of over-the-limit transactions is at the discretion of the creditor.

56(f) Joint relationships.

1. *Authorized users.* Section 226.56(f) does not permit a creditor to treat a request to opt in to or to revoke a prior request for the creditor's payment of over-the-limit transactions from an authorized user that is not jointly liable on a credit card account as a consent or revocation request for that account.

56(g) Continuing right to opt in or revoke opt-in.

1. *Fees or charges for over-the-limit transactions incurred prior to revocation.* Section 226.56(g) provides that a consumer may revoke his or her prior consent at any time. If a consumer does so, this provision does not require the creditor to waive or reverse any over-the-limit fees or charges assessed to the consumer's account prior to the creditor's implementation of the consumer's revocation request. Nor does this requirement prevent the creditor from assessing over-the-limit fees in subsequent cycles if the consumer's account balance continues to exceed the credit limit as a result of an over-the-limit transaction that was completed prior to the consumer's revocation of consent.

56(h) Duration of opt-in.

1. *Creditor ability to stop paying over-the-limit transactions after consumer consent.* A creditor may cease paying over-the-limit transactions for consumers that have previously opted in at any time and for any reason. For example, a creditor may stop paying over-the-limit transactions for a consumer to respond to changes in the credit risk presented by the consumer.

56(j) Prohibited practices.

1. *Examples of limits on fees or charges imposed per billing cycle.* Section 226.56(j)(1) generally prohibits a creditor from assessing a fee or charge due to the same over-the-limit transaction for more than three billing cycles. The following examples illustrate the prohibition.

i. Assume that a consumer has opted into a creditor's payment of over-the-limit transactions. The consumer exceeds the credit limit during the December billing cycle and does not make sufficient payment to bring the account balance back under the limit for four consecutive cycles. The consumer does not engage in any additional transactions during this period. In this case, § 226.56(j)(1) would permit a creditor to charge a maximum of three over-the-limit fees for the December over-the-limit transaction.

ii. Assume the same facts as above except that the consumer makes sufficient payment to reduce his account balance during the February billing cycle. The creditor may charge over-the-limit fees for the December and January billing cycles. However, because the consumer's account balance was below the credit limit prior to the end of the February billing cycle, the creditor may not charge an over-the-limit fee for the February billing cycle.

iii. Assume the same facts as in paragraph i, except that the consumer engages in another over-the-limit transaction during the February billing cycle. Because the consumer has obtained an additional extension of credit which causes the consumer to exceed his credit limit, the creditor may charge over-the-limit fees for the December transaction on the January, February and March billing statements, and additional over-the-limit fees for the February transaction on the April and May billing statements. The creditor may not charge an over-the-limit fee for each of the December and the February transactions on the March billing statement because it is prohibited from imposing more than one over-the-limit fee during a billing cycle.

2. *Replenishment of credit line.* Section 226.56(j)(2) does not prevent a creditor from delaying replenishment of a consumer's available credit where appropriate, for example, where the creditor may suspect fraud on the credit card account. However, a creditor may not assess an over-the-limit fee or charge if the over-the-limit transaction is caused by the creditor's decision not to promptly replenish the available credit after the consumer's payment is credited to the consumer's account.

3. *Examples of conditioning.* Section 226.56(j)(3) prohibits a creditor from conditioning or otherwise tying the amount of a consumer's credit limit on the consumer affirmatively consenting to the creditor's payment of over-the-limit transactions where the creditor assesses an over-the-limit fee for the transaction. The following examples illustrate the prohibition.

i. *Amount of credit limit.* Assume that a creditor offers a credit card with a credit limit of $1000. The consumer is informed that if the consumer opts in to the payment of the creditor's payment of over-the-limit transactions, the initial credit limit would be increased to $1300. If the creditor would have offered the credit card with the $1300 credit limit but for the fact that the consumer did not consent to the creditor's payment of over-the-limit transactions, the creditor would not be in compliance with § 226.56(j)(3). Section 226.56(j)(3) prohibits the creditor from tying the consumer's opt in to the creditor's payment of over-the-limit transactions as a condition of obtaining the credit card with the $1300 credit limit.

ii. *Access to credit.* Assume the same facts as above, except that the creditor declines the consumer's application altogether because the consumer has not affirmatively consented or opted in to the creditor's payment of over-the-limit transactions. The creditor is not in compliance with § 226.56(j)(3) because the creditor has required the consumer's consent as a condition of obtaining credit.

§ 226.57 Special rules for marketing open-end credit to college students.

57(a) Definitions.

57(a)(1) College student credit card.

1. *Definition.* The definition of college student credit card excludes home-equity lines of credit accessed by credit cards and overdraft lines of credit accessed by debit cards. A college student credit card includes a college affinity card within the meaning of TILA Section 127(r)(1)(A). In addition, a card may fall within the scope of the definition regardless of the fact that it is not intentionally targeted at or marketed to college students. For example, an agreement between a college and a card issuer may provide for marketing of credit cards to alumni, faculty, staff, and other non-student consumers who have a relationship with the college, but also contain provisions that contemplate the issuance of cards to students. A credit card issued to a student at the college in connection with such an agreement qualifies as a *college student credit card.*

57(a)(5) College credit card agreement.

1. *Definition.* Section 226.57(a)(5) defines ''college credit card agreement'' to include any business, marketing or promotional agreement between a card issuer and a college or university (or an affiliated organization, such as an alumni club or a foundation) if the agreement provides for the issuance of credit cards to full-time or part-time students. Business, marketing or promotional agreements may include a broad range of arrangements between a card issuer and an institution of higher education or affiliated organization, including arrangements that do not meet the criteria to be considered college affinity card agreements as discussed in TILA Section 127(r)(1)(A). For example,

TILA Section 127(r)(1)(A) specifies that under a college affinity card agreement, the card issuer has agreed to make a donation to the institution or affiliated organization, the card issuer has agreed to offer discounted terms to the consumer, or the credit card will display pictures, symbols, or words identified with the institution or affiliated organization; even if these conditions are not met, an agreement may qualify as a college credit card agreement, if the agreement is a business, marketing or promotional agreement that contemplates the issuance of college student credit cards to college students currently enrolled (either full-time or part-time) at the institution. An agreement may qualify as a college credit card agreement even if marketing of cards under the agreement is targeted at alumni, faculty, staff, and other non-student consumers, as long as cards may also be issued to students in connection with the agreement.

57(b) Public disclosure of agreements.

1. *Public disclosure.* Section 226.57(b) requires an institution of higher education to publicly disclose any contract or other agreement made with a card issuer or creditor for the purpose of marketing a credit card. Examples of publicly disclosing such contracts or agreements include, but are not limited to, posting such contracts or agreements on the institution's Web site or making such contracts or agreements available upon request, provided the procedures for requesting the documents are reasonable and free of cost to the requestor, and the requested contracts or agreements are provided within a reasonable time frame.

2. *Redaction prohibited.* An institution of higher education must publicly disclose any contract or other agreement made with a card issuer for the purpose of marketing a credit card in its entirety and may not redact any portion of such contract or agreement. Any clause existing in such contracts or agreements, providing for the confidentiality of any portion of the contract or agreement, would be invalid to the extent it restricts the ability of the institution of higher education to publicly disclose the contract or agreement in its entirety.

57(c) Prohibited inducements.

1. *Tangible item clarified.* A tangible item includes any physical item, such as a gift card, a t-shirt, or a magazine subscription, that a card issuer or creditor offers to induce a college student to apply for or open an open-end consumer credit plan offered by such card issuer or creditor. Tangible items do not include non-physical inducements such as discounts, rewards points, or promotional credit terms.

2. *Inducement clarified.* If a tangible item is offered to a person whether or not that person applies for or opens an open-end consumer credit plan, the tangible item has not been offered to induce the person to apply for or open the plan. For example, refreshments offered to a college student on campus that are not conditioned on whether the student has applied for or agreed to open an open-end consumer credit plan would not violate § 226.57(c).

3. *Near campus clarified.* A location that is within 1,000 feet of the border of the campus of an institution of higher education, as defined by the institution of higher education, is considered near the campus of an institution of higher education.

4. *Mailings included.* The prohibition in § 226.57(c) on offering a tangible item to a college student to induce such student to apply for or open an open-end consumer credit plan offered by such card issuer or creditor applies to any solicitation or application mailed to a college student at an address on or near the campus of an institution of higher education.

5. *Related event clarified.* An event is related to an institution of higher education if the marketing of such event uses the name, emblem, mascot, or logo of an institution of higher education, or other words, pictures, symbols identified with an institution of higher education in a way that implies that the institution of higher education endorses or otherwise sponsors the event.

6. *Reasonable procedures for determining if applicant is a student.* Section 226.57(c) applies solely to offering a tangible item to a college student. Therefore, a card issuer or creditor may offer any person who is not a college student a tangible item to induce such person to apply for or open an open-end consumer credit plan offered by such card issuer or creditor, on campus, near campus, or at an event sponsored by or related to an institution of higher education. The card issuer or creditor must have reasonable procedures for determining whether an applicant is a college student before giving the applicant the tangible item. For example, a card issuer or creditor may ask whether the applicant is a college student as part of the application process. The card issuer or creditor may rely on the representations made by the applicant.

57(d) Annual report to the Board.

57(d)(3) Contents of report.

1. *Memorandum of understanding.* Section 226.57(d)(3) requires that the report to the Board include, among other items, a copy of any memorandum of understanding between the card issuer and the institution (or affiliated organization) that ''directly or indirectly relates to the college credit card agreement or that controls or directs any obligations or distribution of benefits between any such entities.'' Such a memorandum of understanding includes any document that amends the college credit card agreement, or that constitutes a further agreement between the parties as to the interpretation or administration of the agreement. For example, a memorandum of understanding required to be included in the report would include a document that provides details on the dollar amounts of payments from the card issuer to the university, to supplement the original agreement which only provided for payments in general terms (*e.g.,* as a percentage). A memorandum of understanding for these purposes would not include e-mail (or other) messages that merely discuss matters such as the addresses to which payments should be sent or the names of contact persons for carrying out the agreement.

§ 226.58 Internet posting of credit card agreements.

58(b) Definitions.

58(b)(1) Agreement.

1. *Material included.* For purposes of this section, the agreement is deemed to include certain information, such as annual percentage rates and fees, even if the issuer does not otherwise include this information in the basic credit contract. This information is listed under the defined term ''pricing information'' in § 226.58(b)(4). For example, the basic credit contract may not specify rates, fees and other information that constitutes pricing information as defined in § 226.58(b)(4); instead, such information may be provided to the cardholder in a separate document sent along with the card. However, this information nevertheless constitutes part of the agreement for purposes of § 226.58.

2. *Material excluded.* Documents that may be sent to the consumer along with the credit card or credit card agreement, but that are not deemed part of the agreement for purposes of this section, include items such as a cover letter, a validation sticker on the card, other information about card security, offers for credit insurance or other optional products, advertisements, and disclosures required under Federal or State law that are not incorporated into the agreement itself.

58(b)(3) Offers.

1. *Cards offered to limited groups.* A card issuer is deemed to offer a credit card agreement to the public even if the issuer solicits, or accepts applications from, only a limited group of persons. For example, an issuer may market affinity cards to students and alumni of a particular educational institution, or may solicit only high-net-worth individuals for a particular card; in these cases, the card agreement would be considered to be offered to the public.

2. *Individualized agreements.* A card issuer is deemed to offer a credit card agreement to the public even if the terms of the agreement are changed immediately upon opening of an account to terms not offered to the public.

58(c) Registration with Board.

1. *Subsequent registration requirement.* An issuer that is required to make a submission to the Board under § 226.58(d) that has not previously registered with the Board must register with the Board at least 21 days before the quarterly submission deadline specified in § 226.58(d)(1) on which the card issuer's first submission is due. This provision would apply, for example, if a new credit card issuer is organized or if an existing issuer that previously qualified for the *de minimis* exception under § 226.58(e) ceased to qualify. For example, a card issuer that previously qualified for the *de minimis* exception ceases to qualify as of September 30. That issuer's first submission to the Board is due on October 31, the next quarterly submission deadline. The issuer must register with the Board no later than October 10, 21 days before October 31.

2. *Updates to registration information.* Issuers that have registered with the Board under § 226.58(c)(1) or (c)(2) must provide updated registration information to the Board no later than the first quarterly submission deadline specified in § 226.58(d)(1) after the information changes. For example, a card issuer that has already registered with the Board changes its address on October 15. The issuer must submit revised registration information advising the Board of the address change no later than October 31, the next quarterly submission deadline specified in § 226.58(d)(1) after the change.

58(d) Submission of agreements to Board.

1. *Quarterly submission requirement.* Section 226.58(d)(1) requires card issuers to make quarterly submissions to the Board no later than the first business day on or after January 31, April 30, July 31, and October 31 of each year. For example, a card issuer has already submitted three credit card agreements to the Board. On October 15, the issuer stops offering agreement A. On November 20, the issuer makes changes to the terms of agreement B. On December 1, the issuer starts offering a new agreement D. The issuer must submit to the Board no later than the first business day on or after January 31: (i) notification that the issuer is withdrawing agreement A, because it is no longer offered to the public; (ii) the revised version of agreement B; and (iii) agreement D.

2. *No quarterly submission required.* Under § 226.58(d)(1), an issuer is not required to make any submission to the Board at a particular quarterly submission deadline if, during the previous calendar quarter, the issuer did not take any of the following actions: (i) offering a new credit card agreement that was not submitted to the Board previously; (ii) revising or amending an agreement previously submitted to the Board; and (iii) ceasing to offer an agreement previously submitted to the Board. For example, a card issuer offers five agreements to the public as of September 30 and submits these to the Board by October 31, as required by § 226.58(d)(1). Between September 30 and December 31, the issuer continues to offer all five of these agreements to the public without amending or revising them and does not begin offering any new agreements. The issuer is not required to make any submission to the Board by the following January 31.

3. *No requirement to resubmit unchanged agreements.* Under § 226.58(d)(3), if a credit card agreement has been submitted to the Board, no changes have been made to the agreement, and the card issuer continues to offer the agreement to the public, no additional submission of that agreement is required. For example, a credit card issuer begins offering an agreement in October and submits the agreement to the Board the following January 31, as required by § 226.58(d)(1). As of March 31, the issuer has not revised or amended the agreement and is still offering the agreement to the public. The issuer is not required to submit anything to the Board regarding that agreement by April 30.

4. *Submission of changed agreements.* If an issuer makes changes to a credit card agreement previously submitted to the Board (including changes to the provisions of the agreement, the pricing information, or both), § 226.58(d)(3) requires the issuer to submit the entire revised agreement to the Board by the first quarterly submission deadline after the last day of the calendar quarter in which the change becomes effective. For example, an issuer submits an agreement to the Board on October 31. On November 15, the issuer changes the method used to calculate required minimum payments under the agreement. Because an element of the pricing information has changed, the issuer must submit the entire revised agreement to the Board no later than January 31 of the following year.

5. *Change-in-terms notices not permissible.* Section 226.58(d)(3) requires that if a change is made to a credit card agreement previously submitted to the Board, the card issuer must submit the entire revised agreement to the Board. An issuer may not fulfill this requirement by submitting a change-in-terms or similar notice covering only the terms that have changed. In addition, amendments and revisions must be integrated into the text of the agreement (or the single addendum described in Appendix N, if applicable), not provided as separate riders. For example, an issuer changes the purchase APR associated with an agreement the issuer has previously submitted to the Board. The purchase APR for that agreement was included in an addendum of pricing information as described in Appendix N. The issuer may not submit a change-in-terms or similar notice reflecting the change in APR, either alone or accompanied by the original text of the agreement and original addendum of pricing information. Instead, the issuer must revise the addendum of pricing information to reflect the change in APR and submit to the Board the entire text of the agreement and the entire revised addendum, even though no changes have been made to the provisions of the agreement and only one item on the addendum has changed.

6. *Notice of withdrawal of agreement.* Section 226.58(d)(4) requires an issuer to notify the Board if any agreement previously submitted to the Board by that issuer is no longer offered to the public by the first quarterly submission deadline after the last day of the calendar quarter in which the issuer ceased to offer the agreement. For example, on January 5 an issuer stops offering to the public an agreement it previously submitted to the Board. The issuer must notify the Board that the agreement is being withdrawn by April 30, the first quarterly submission deadline after March 31, the last day of the calendar quarter in which the issuer stopped offering the agreement.

58(e) De minimis exception.

1. *De minimis exception.* Under § 226.58(e)(1), an issuer is not required

to submit any credit card agreements to the Board under § 226.58(d) if the card issuer has fewer than 10,000 open credit card accounts under open-end (not home-secured) consumer credit plans, as of the last business day of the calendar quarter. For example, an issuer offers five credit card agreements to the public as of September 30. However, the issuer has only 2,000 open credit card accounts under open-end (not home-secured) consumer credit plans as of September 30. The issuer is not required to submit any agreements to the Board by October 31 because the issuer qualifies for the *de minimis* exception.

2. *Open accounts clarified.* For purposes of the *de minimis* exception, a credit card account is considered to be open even if the account is inactive, as long as the account has not been closed by the cardholder or the card issuer and the cardholder can obtain extensions of credit on the account. If an account has been closed for new activity (for example, due to default by the cardholder), but the cardholder is still making payments to pay off the outstanding balance, it need not be considered open. If an account has only been suspended temporarily (for example, due to a report by the cardholder of unauthorized use of the card), the account is considered open.

3. *Date for determining whether issuer qualifies clarified.* Whether an issuer qualifies for the *de minimis* exception is determined as of the last business day of each calendar quarter. For example, as of December 31, an issuer offers three agreements to the public and has 9,500 credit card accounts under open-end (not home secured) consumer credit plans. As of January 30, the issuer still offers three agreements, but has 10,100 open accounts. As of March 31, the issuer still offers three agreements, but has only 9,700 open accounts. Even though the issuer had 10,100 open accounts at one time during the calendar quarter, the issuer qualifies for the *de minimis* exception because the number of open accounts was less than 10,000 as of March 31. The issuer therefore is not required to submit any agreements to the Board under § 226.58(d) by April 30.

4. *Date for determining whether issuer ceases to qualify clarified.* Whether an issuer has ceased to qualify for the *de minimis* exception under § 226.58(e)(2) is determined as of the last business day of the calendar quarter, as indicated in § 226.58(e)(1). For example, as of June 30, an issuer offers three agreements to the public and has 9,500 open credit card accounts under open-end (not home-secured) consumer credit plans. The issuer is not required to submit any agreements to the Board under § 226.58(d) because the issuer qualifies for the *de minimis* exception. As of July 15, the issuer still offers the same three agreements, but now has 10,000 open accounts. The issuer is not required to take any action at this time, because whether an issuer qualifies for the *de minimis* exception under § 226.58(e)(1) is determined as of the last business day of the calendar quarter. As of September 30, the issuer still offers the same three agreements and still has 10,000 open accounts. Because the issuer had 10,000 open accounts as of September 30, the issuer ceased to qualify for the *de minimis* exception and must submit the three agreements it offers to the Board by October 31, the next quarterly submission deadline.

5. *Option to withdraw agreements clarified.* Section 226.58(e)(3) provides that if a card issuer that did not previously qualify comes within the *de minimis* exception, the card issuer may, but is not required to, notify the Board that the card issuer is withdrawing each agreement the card issuer previously submitted to the Board. Until the issuer notifies the Board that each agreement it previously submitted is being withdrawn, the issuer must continue to make quarterly submissions to the Board under § 226.58(d) and to provide updated registration information under § 226.58(c)(3). For example, an issuer has 10,001 open accounts and offers three agreements to the public as of December 31. The issuer has registered with the Board and submitted each of the three agreements to the Board as required under § 226.58(c) and (d). As of March 31, the issuer has only 9,999 open accounts. The issuer has two options. First, the issuer may notify the Board that the issuer is withdrawing each of the three agreements it previously submitted. Once the issuer has notified the Board, the issuer is no longer required to make quarterly submissions to the Board under § 226.58(d) or to provide updated registration information to the Board under § 226.58(c)(3). Alternatively, the issuer may choose not to notify the Board that it is withdrawing its agreements. In this case, the issuer must continue making quarterly submissions to the Board under § 226.58(d) and providing updated registration information to the Board under § 226.58(c)(3). The issuer might choose not to withdraw its agreements if, for example, the issuer believes that it will likely cease to qualify for the *de minimis* exception again in the near future.

58(f)(2) Agreements for all open accounts.

1. *Credit card agreements provided upon request.* Section 226.58(f)(2) states that card issuers may choose to make agreements available to cardholders upon request. Agreements provided upon request may be provided by the issuer in either electronic or paper form, regardless of the form of the cardholder's request.

2. *Requirement applies to all open accounts.* The requirement to provide access to credit card agreements under § 226.58(f)(2) applies to all open credit card accounts under open-end (not home-secured) consumer credit plans, regardless of whether such agreements are required to be submitted to the Board pursuant to § 226.58(d). For example, an issuer that is not required to submit agreements to the Board because it qualifies for the *de minimis* exception under § 226.58(e) would still be required to provide cardholders with access to their specific agreements under § 226.58(f)(2). Similarly, an agreement that is no longer offered to the public would not be required to be submitted to the Board under § 226.58(d), but would still need to be provided to the cardholder to whom it applies under § 226.58(f)(2).

3. *Deadline for providing requested agreements clarified.* Section 226.58(f)(2) requires that credit card agreements provided upon request must be sent to the cardholder or otherwise made available to the cardholder no later than 10 business days after the cardholder's request is received. For example, if an issuer chooses to respond to a cardholder's request by mailing a paper copy of the cardholder's agreement, the issuer must mail the agreement no later than 10 business days after receipt of the cardholder's request. Alternatively, if an issuer chooses to respond to a cardholder's request by posting the cardholder's agreement on the issuer's Web site, the issuer must post the agreement on its Web site no later than 10 business days after receipt of the cardholder's request.

* * * * *

Appendix F—Optional Annual Percentage Rate Computations for Creditors Offering Open-End Plans Subject to the Requirements of § 226.5b

1. *Daily rate with specific transaction charge.* If the finance charge results from a charge relating to a specific transaction and the application of a daily periodic rate, *see* comment 14(c)(3)–2 for guidance on an appropriate calculation method.

Appendices G and H—Open-end and Closed-end Model Forms and Clauses

1. *Permissible changes.* Although use of the model forms and clauses is not required,

creditors using them properly will be deemed to be in compliance with the regulation with regard to those disclosures. Creditors may make certain changes in the format or content of the forms and clauses and may delete any disclosures that are inapplicable to a transaction or a plan without losing the act's protection from liability, except formatting changes may not be made to model forms and samples in G–2(A), G–3(A), G–4(A), G–10(A)–(E), G–17(A)–(D), G–18(A) (except as permitted pursuant to § 226.7(b)(2)), G–18(B)–(C), G–19, G–20, and G–21. The rearrangement of the model forms and clauses may not be so extensive as to affect the substance, clarity, or meaningful sequence of the forms and clauses. Creditors making revisions with that effect will lose their protection from civil liability. Except as otherwise specifically required, acceptable changes include, for example:

i. Using the first person, instead of the second person, in referring to the borrower.

ii. Using ''borrower'' and ''creditor'' instead of pronouns.

iii. Rearranging the sequences of the disclosures.

iv. Not using bold type for headings.

v. Incorporating certain State ''plain English'' requirements.

vi. Deleting inapplicable disclosures by whiting out, blocking out, filling in ''N/A'' (not applicable) or ''0,'' crossing out, leaving blanks, checking a box for applicable items, or circling applicable items. (This should permit use of multipurpose standard forms.)

vii. Using a vertical, rather than a horizontal, format for the boxes in the closed-end disclosures.

2. *Debt-cancellation coverage.* This regulation does not authorize creditors to characterize debt-cancellation fees as insurance premiums for purposes of this regulation. Creditors may provide a disclosure that refers to debt cancellation or debt suspension coverage whether or not the coverage is considered insurance. Creditors may use the model credit insurance disclosures only if the debt cancellation coverage constitutes insurance under State law.

Appendix G—Open-end Model Forms and Clauses

1. *Models G–1 and G–1(A).* The model disclosures in G–1 and G–1(A) (different balance computation methods) may be used in both the account-opening disclosures under § 226.6 and the periodic disclosures under § 226.7. As is clear from the models given, ''shorthand'' descriptions of the balance computation methods are not sufficient, except where § 226.7(b)(5) applies. For creditors using model G–1, the phrase ''a portion of'' the finance charge should be included if the total finance charge includes other amounts, such as transaction charges, that are not due to the application of a periodic rate. If unpaid interest or finance charges are subtracted in calculating the balance, that fact must be stated so that the disclosure of the computation method is accurate. Only model G–1(b) contains a final sentence appearing in brackets, which reflects the total dollar amount of payments and credits received during the billing cycle. The other models do not contain this language because they reflect plans in which payments and credits received during the billing cycle are subtracted. If this is not the case, however, the language relating to payments and credits should be changed, and the creditor should add either the disclosure of the dollar amount as in model G–1(b) or an indication of which credits (disclosed elsewhere on the periodic statement) will not be deducted in determining the balance. (Such an indication may also substitute for the bracketed sentence in model G–1(b).) (*See* the commentary to § 226.7(a)(5) and (b)(5).) For open-end plans subject to the requirements of § 226.5b, creditors may, at their option, use the clauses in G–1 or G–1(A).

2. *Models G–2 and G–2(A).* These models contain the notice of liability for unauthorized use of a credit card. For home-equity plans subject to the requirements of § 226.5b, at the creditor's option, a creditor either may use G–2 or G–2(A). For open-end plans not subject to the requirements of § 226.5b, creditors properly use G–2(A).

3. *Models G–3, G–3(A), G–4 and G–4(A).*

i. These set out models for the long-form billing-error rights statement (for use with the account-opening disclosures and as an annual disclosure or, at the creditor's option, with each periodic statement) and the alternative billing-error rights statement (for use with each periodic statement), respectively. For home-equity plans subject to the requirements of § 226.5b, at the creditor's option, a creditor either may use G–3 or G–3(A), and for creditors that use the short form, G–4 or G–4(A). For open-end (not home-secured) plans that not subject to the requirements of § 226.5b, creditors properly use G–3(A) and G–4(A). Creditors must provide the billing-error rights statements in a form substantially similar to the models in order to comply with the regulation. The model billing-rights statements may be modified in any of the ways set forth in the first paragraph to the commentary on appendices G and H. The models may, furthermore, be modified by deleting inapplicable information, such as:

A. The paragraph concerning stopping a debit in relation to a disputed amount, if the creditor does not have the ability to debit automatically the consumer's savings or checking account for payment.

B. The rights stated in the special rule for credit card purchases and any limitations on those rights.

ii. The model billing rights statements also contain optional language that creditors may use. For example, the creditor may:

A. Include a statement to the effect that notice of a billing error must be submitted on something other than the payment ticket or other material accompanying the periodic disclosures.

B. Insert its address or refer to the address that appears elsewhere on the bill.

C. Include instructions for consumers, at the consumer's option, to communicate with the creditor electronically or in writing.

iii. Additional information may be included on the statements as long as it does not detract from the required disclosures. For instance, information concerning the reporting of errors in connection with a checking account may be included on a combined statement as long as the disclosures required by the regulation remain clear and conspicuous.

* * * * *

5. *Model G–10(A), samples G–10(B) and G–10(C), model G–10(D), sample G–10(E), model G–17(A), and samples G–17(B), 17(C) and 17(D).* i. Model G–10(A) and Samples G–10(B) and G–10(C) illustrate, in the tabular format, the disclosures required under § 226.5a for applications and solicitations for credit cards other than charge cards. Model G–10(D) and Sample G–10(E) illustrate the tabular format disclosure for charge card applications and solicitations and reflect the disclosures in the table. Model G–17(A) and Samples G–17(B), G–17(C) and G–17(D) illustrate, in the tabular format, the disclosures required under § 226.6(b)(2) for account-opening disclosures.

ii. Except as otherwise permitted, disclosures must be substantially similar in sequence and format to Models G–10(A), G–10(D) and G–17(A). While proper use of the model forms will be deemed in compliance with the regulation, card issuers and other creditors offering open-end (not home-secured) plans are permitted to disclose the annual percentage rates for purchases, cash advances, or balance transfers in the same row in the table for any transaction types for which the issuer or creditor charges the same annual percentage rate. Similarly, card issuer and other creditors offering open-end (not home-secured) plans are permitted to disclose fees of the same amount in the same row if the fees are in the same category. Fees in different categories may not be disclosed in the same row. For example, a transaction fee and a penalty fee that are of the same amount may not be disclosed in the same row. Card issuers and other creditors offering open-end (not home-secured) plans are also permitted to use headings other than those in the forms if they are clear and concise and are substantially similar to the headings contained in model forms, with the following exceptions. The heading ''penalty APR'' must be used when describing rates that may increase due to default or delinquency or as a penalty, and in relation to required insurance, or debt cancellation or suspension coverage, the term ''required'' and the name of the product must be used. (*See* also §§ 226.5a(b)(5) and 226.6(b)(2)(v) for guidance on headings that must be used to describe the grace period, or lack of grace period, in the disclosures required under § 226.5a for applications and solicitations for credit cards other than charge cards, and the disclosures required under § 226.6(b)(2) for account-opening disclosures, respectively.)

iii. Models G–10(A) and G–17(A) contain two alternative headings (''Minimum Interest Charge'' and ''Minimum Charge'') for disclosing a minimum interest or fixed finance charge under §§ 226.5a(b)(3) and 226.6(b)(2)(iii). If a creditor imposes a minimum charge in lieu of interest in those months where a consumer would otherwise incur an interest charge but that interest charge is less than the minimum charge, the creditor should disclose this charge under the heading ''Minimum Interest Charge'' or a

substantially similar heading. Other minimum or fixed finance charges should be disclosed under the heading ''Minimum Charge'' or a substantially similar heading.

iv. Models G–10(A), G–10(D) and G–17(A) contain two alternative headings (''Annual Fees'' and ''Set-up and Maintenance Fees'') for disclosing fees for issuance or availability of credit under § 226.5a(b)(2) or § 226.6(b)(2)(ii). If the only fee for issuance or availability of credit disclosed under § 226.5a(b)(2) or § 226.6(b)(2)(ii) is an annual fee, a creditor should use the heading ''Annual Fee'' or a substantially similar heading to disclose this fee. If a creditor imposes fees for issuance or availability of credit disclosed under § 226.5a(b)(2) or § 226.6(b)(2)(ii) other than, or in addition to, an annual fee, the creditor should use the heading ''Set-up and Maintenance Fees'' or a substantially similar heading to disclose fees for issuance or availability of credit, including the annual fee.

v. Although creditors are not required to use a certain paper size in disclosing the §§ 226.5a or 226.6(b)(1) and (2) disclosures, samples G–10(B), G–10(C), G–17(B), G–17(C) and G–17(D) are designed to be printed on an 8 ½ x 14 inch sheet of paper. A creditor may use a smaller sheet of paper, such as 8 ½ x 11 inch sheet of paper. If the table is not provided on a single side of a sheet of paper, the creditor must include a reference or references, such as ''SEE BACK OF PAGE for more important information about your account.'' at the bottom of each page indicating that the table continues onto an additional page or pages. A creditor that splits the table onto two or more pages must disclose the table on consecutive pages and may not include any intervening information between portions of the table. In addition, the following formatting techniques were used in presenting the information in the sample tables to ensure that the information is readable:

A. A readable font style and font size (10-point Arial font style, except for the purchase annual percentage rate which is shown in 16-point type).

B. Sufficient spacing between lines of the text.

C. Adequate spacing between paragraphs when several pieces of information were included in the same row of the table, as appropriate. For example, in the samples in the row of the tables with the heading ''APR for Balance Transfers,'' the forms disclose two components: the applicable balance transfer rate and a cross reference to the balance transfer fee. The samples show these two components on separate lines with adequate space between each component. On the other hand, in the samples, in the disclosure of the late payment fee, the forms disclose two components: the late payment fee, and the cross reference to the penalty rate. Because the disclosure of both these components is short, these components are disclosed on the same line in the tables.

D. Standard spacing between words and characters. In other words, the text was not compressed to appear smaller than 10-point type.

E. Sufficient white space around the text of the information in each row, by providing sufficient margins above, below and to the sides of the text.

F. Sufficient contrast between the text and the background. Generally, black text was used on white paper.

vi. While the Board is not requiring issuers to use the above formatting techniques in presenting information in the table (except for the 10-point and 16-point font requirement), the Board encourages issuers to consider these techniques when deciding how to disclose information in the table, to ensure that the information is presented in a readable format.

vii. Creditors are allowed to use color, shading and similar graphic techniques with respect to the table, so long as the table remains substantially similar to the model and sample forms in appendix G.

6. *Model G–11.* Model G–11 contains clauses that illustrate the general disclosures required under § 226.5a(e) in applications and solicitations made available to the general public.

8. *Samples G–18(A)–(D).* For home-equity plans subject to the requirements of § 226.5b, if a creditor chooses to comply with the requirements in § 226.7(b), the creditor may use Samples G–18(A) through G–18(D) to comply with these requirements, as applicable.

9. *Samples G–18(D).* Sample G–18(D) illustrates how credit card issuers may comply with proximity requirements for payment information on periodic statements. Creditors that offer card accounts with a charge card feature and a revolving feature may change the disclosure to make clear to which feature the disclosures apply.

10. *Forms G–18(F)–(G).* Forms G–18(F) and G–18(G) are intended as a compliance aid to illustrate front sides of a periodic statement, and how a periodic statement for open-end (not home-secured) plans might be designed to comply with the requirements of § 226.7. The samples contain information that is not required by Regulation Z. The samples also present information in additional formats that are not required by Regulation Z.

i. Creditors are not required to use a certain paper size in disclosing the § 226.7 disclosures. However, Forms G–18(F) and G–18(G) are designed to be printed on an 8 x 14 inch sheet of paper.

ii. The due date for a payment, if a late payment fee or penalty rate may be imposed, must appear on the front of the first page of the statement. *See* Sample G–18(D) that illustrates how a creditor may comply with proximity requirements for other disclosures. The payment information disclosures appear in the upper right-hand corner on Samples G–18(F) and G–18(G), but may be located elsewhere, as long as they appear on the front of the first page of the periodic statement. The summary of account activity presented on Samples G–18(F) and G–18(G) is not itself a required disclosure, although the previous balance and the new balance, presented in the summary, must be disclosed in a clear and conspicuous manner on periodic statements.

iii. Additional information not required by Regulation Z may be presented on the statement. The information need not be located in any particular place or be segregated from disclosures required by Regulation Z, although the effect of proximity requirements for required disclosures, such as the due date, may cause the additional information to be segregated from those disclosures required to be disclosed in close proximity to one another. Any additional information must be presented consistent with the creditor's obligation to provide required disclosures in a clear and conspicuous manner.

iv. Model Forms G–18(F) and G–18(G) demonstrate two examples of ways in which transactions could be presented on the periodic statement. Model Form G–18(G) presents transactions grouped by type and Model Form G–18(F) presents transactions in a list in chronological order. Neither of these approaches to presenting transactions is required; a creditor may present transactions differently, such as in a list grouped by authorized user or other means.

11. *Model Form G–19. See* § 226.9(b)(3) regarding the headings required to be disclosed when describing in the tabular disclosure a grace period (or lack of a grace period) offered on check transactions that access a credit card account.

12. *Sample G–24.* Sample G–24 includes two model clauses for use in complying with § 226.16(h)(4). Model clause (a) is for use in connection with credit card accounts under an open-end (not home-secured) consumer credit plan. Model clause (b) is for use in connection with other open-end credit plans.

* * * * *

By order of the Board of Governors of the Federal Reserve System, September 28, 2009.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. E9–23733 Filed 10–20–09; 8:45 am]

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Federal Register

Wednesday,
October 21, 2009

Part III

Department of Labor

Occupational Safety and Health Administration

29 CFR Part 1910
Combustible Dust; Proposed Rule

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. OSHA–2009–0023]

RIN 1218–AC41

Combustible Dust

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: In this advance notice of proposed rulemaking (ANPR), OSHA is requesting comments, including data and other information, on issues related to the hazards of combustible dust in the workplace. For the purposes of this notice, the term ''combustible dust'' includes all combustible particulate solids of any size, shape, or chemical composition that could present a fire or deflagration hazard when suspended in air or other oxidizing medium. OSHA plans to use the information received in response to this notice in developing a proposed standard for combustible dust.

DATES: Submit comments in response to this ANPR by January 19, 2010.

ADDRESSES: Submit comments as follows:

• *Electronic.* Submit comments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

• *Facsimile.* Commenters may fax submissions, including attachments, that are no longer than 10 pages in length to the OSHA Docket Office at (202) 693–1648; OSHA does not require hard copies of these documents. Commenters must submit lengthy attachments that supplement these documents (*e.g.,* studies, journal articles), in triplicate hard copy, to the OSHA Docket Office, Technical Data Center, Room N–2625, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210. These attachments must clearly identify the commenter's name, date, subject, and docket number (*i.e.,* OSHA–2009–0023) so the Agency can attach them to the appropriate comments.

• *Regular mail, express delivery, hand (courier) delivery, and messenger service.* Submit three copies of comments and any additional material (*e.g.,* studies, journal articles) to the OSHA Docket Office, Docket No. OSHA–2009–0023 (or Regulation Identifier Number (RIN) 1218–AC41), Technical Data Center, Room N–2625, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2350 (TDY number: (877) 889–5627). Note that security procedures may result in significant delays in receiving comments and other written materials by regular mail. Contact the OSHA Docket Office for information about security procedures concerning delivery of materials by express delivery, hand delivery, and messenger service. The hours of operation for the OSHA Docket Office are 8:15 a.m.–4:45 p.m., e.t.

• *Instructions.* All submissions must include the Agency name and the OSHA docket number or RIN for this rulemaking (*i.e.,* OSHA Docket No. OSHA–2009–0023 or RIN 1218–AC41). Submissions, including any personal information provided, are placed in the public docket without change and will be available online at *http://www.regulations.gov.* Therefore, the Agency cautions commenters about submitting statements they do not want made available to the public, or submitting comments that contain personal information (either about themselves or others) such as Social Security numbers, birth dates, and medical data.

• *Docket:* To read or download submissions or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. While all documents in the docket 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. Contact the OSHA Docket Office for assistance in locating docket submissions.

FOR FURTHER INFORMATION CONTACT: Information regarding this ANPR is available from the following sources:

• *Press inquiries.* Contact Jennifer Ashley, Director, OSHA Office of Communications, Room N–3647, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–1999.

• *General and technical information.* Contact Don Pittenger, Director, Office of Safety Systems, OSHA Directorate of Standards and Guidance, Room N–3718, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–2255; fax: (202) 693–1663.

• *Copies of this* ***Federal Register*** *notice.* Electronic copies are available at *http://www.regulations.gov.* This **Federal Register** notice, as well as news releases and other relevant information, also are available at OSHA's Web page at *http://www.osha.gov.*

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I. Background

A. Introduction

The hazards of combustible dust encompass a wide array of materials, industries, and processes. Any combustible material can burn rapidly when in a finely divided form. Materials that may form combustible dust include, but are not limited to, wood, coal, plastics, biosolids, candy, sugar, spice, starch, flour, feed, grain, fertilizer, tobacco, paper, soap, rubber, drugs, dried blood, dyes, certain textiles, and metals (such as aluminum and magnesium).

Five elements are needed for a combustible dust explosion to occur. The first three elements are those necessary for a fire: Fuel, heat, and an oxidizer. These three elements form the ''fire triangle,'' in which combustible dust is the fuel, heat is provided by any source of ignition, and oxygen is present in air and in oxidizers.

The fourth element is dispersal of dust into a cloud of the proper concentration. These four conditions are necessary for a deflagration, which is violent combustion accompanied by a pressure wave. The combustion is rapid, but propagates at a speed less than the speed of sound.

A fifth element, confinement, is necessary for an explosion. Confinement can be any enclosure—including, but not limited to, a building, room, duct, or processing and storage equipment. An explosion occurs when the pressure developed by a deflagration bursts or ruptures the enclosure. Together, these five elements (fuel, heat, an oxidizer, dispersion and confinement) are known as the ''dust explosion pentagon.'' The minimum explosible concentration is the lowest concentration of combustible dust suspended in air that will support a deflagration.[1]

Secondary explosions or deflagrations occur when pressure waves from an initial (or primary) deflagration or explosion cause dispersal and ignition of combustible dust that has accumulated on surfaces. Secondary explosions are often more devastating than primary explosions due to the increased amount of fuel and the size of the ignition source (*i.e.,* the initial event). In some cases, explosions continue to cascade throughout an area or facility.

OSHA is developing a standard that will comprehensively address the fire and explosion hazards of combustible dust. The Agency's existing standards address some, but not all, of the elements needed to protect workers from these hazards. For example, OSHA's general industry housekeeping standard (29 CFR 1910.22(a)(1)) addresses accumulations of dust, including dusts that may be combustible, and the general industry electrical standard (29 CFR 1910, subpart S) helps to control electrical ignition hazards. When workers are exposed to hazards not currently addressed in the OSHA standards, employers are cited under the General Duty Clause (GDC) specified by Section 5(a)(1) of the Occupational Safety and Health Act of 1970 (OSH Act; see 29 U.S.C. 654). The information requested in this notice will help the Agency develop a standard that would better protect workers from the hazards of combustible dust.

Industries that may have combustible dust hazards include, among others: Agriculture, animal food manufacturing, grain handling, food manufacturing, wood product manufacturing, chemical manufacturing, textile manufacturing, furniture manufacturing, metal processing, fabricated metal products and machinery manufacturing, pesticide manufacturing, pharmaceutical manufacturing, tire manufacturing, production of rubber and plastics, plastics and rubber products manufacturing, recycling, wastewater treatment, and coal handling and processing. To determine which industries may be affected by an OSHA standard regulating combustible dust hazards, OSHA identified industries that had previous incidents relating to combustible dust. Table 1 summarizes this data. Incidents were identified using data from the U.S. Chemical Safety and Hazard Investigation Board (CSB) involving incidents occurring from 1980 to 2005. For incidents between 2006 and 2008, OSHA used reports gathered by the Web site ''dustexplosions.blogspot.com.'' Using these two data sources, OSHA assigned a North American Industry Classification System (NAICS) code to each incident using the available information. The groups of NAICS codes in this table were determined by combining similar industries together that had explosions in the past. Incidents having insufficient information to assign a NAICS code to the affected establishment were classified as ''unknown.'' OSHA's preliminary analyses show that, in industries for which combustible dust fires or explosions have occurred, there are 426,000 establishments employing 16 million workers (see Table 1). The table does not show that these industries include over 333,000 small businesses with 6.5 million employees. It is possible that some establishments in these industries do not have significant dust hazards.

TABLE 1—INDUSTRIES HAVING AT LEAST ONE RECORDED COMBUSTIBLE DUST INCIDENT REPORTED SINCE 1980, ACCORDING TO OSHA RESEARCH

NAICS group [1]	Name of industry [1]	Incidents (1980–2008) [2]	Firms [3]	Establishments [3]	Employees [3]
115111	Cotton Ginning	1	260	279	2,654
221000	Utilities, Electric Power Gen	28	6,554	17,174	614,427
311000	Food Manufacturing (Except 311100, 311200, 311300, 311800, 311900).	8	5,820	7,786	834,277
311100	Animal Food Mfg. (Except 311119)	2	176	248	16,202
311119	Other Animal Food Mfg	5	1,046	1,549	31,971
311200	Grain and Oilseed Milling (Except 311221 and 311230)	5	392	658	31,439
311221	Wet Corn Milling	21	33	65	8,875
311230	Breakfast Cereal Mfg	6	43	66	13,410
311300	Sugar & Confectionary Product Mfg. (Except 311313)	5	1,581	1,700	66,341
311313	Beet Sugar Manufacturing	6	10	33	6,263
311800	Bakeries	4	9,301	10,072	288,393
311900	Other Food Manufacturing	8	2,768	3,205	161,567
312000	Beverage and Tobacco Product Mfg. (Except 312110)	4	2,193	2,379	83,531
313000	Textile Mills	11	2,770	3,243	187,766
314000	Textile Product Mills	2	6,456	6,726	155,586
321000	Wood Product Mfg. (Except 321113 and 321219)	28	11,192	12,749	449,650
321113	Sawmills	7	3,398	3,731	104,666
321219	Reconstituted Wood Prod. Mfg	14	167	255	22,190
322000	Paper Manufacturing	18	3,269	5,139	441,430
324000	Petroleum & Coal Products Mfg	1	1,166	2,448	102,997
325000	Chemical Mfg. (Except 325188 and 325410)	31	7,737	10,749	514,732
325188	Basic Inorganic Chemical Mfg	11	390	612	40,589
325410	Pharmaceutical & Medicine Mfg	8	1,481	1,886	249,743
326000	Plastics and Rubber Products Mfg. (Except 326211)	17	11,365	11,454	846,857

[1] The terms ''deflagration'', ''explosion'', and ''minimum explosible concentration'' are used in this notice as defined in NFPA 654 (2006 edition) for combustible dust only. This notice does not address the terms ''detonation'' or ''explosion'' as they relate to materials classified as explosives.

TABLE 1—INDUSTRIES HAVING AT LEAST ONE RECORDED COMBUSTIBLE DUST INCIDENT REPORTED SINCE 1980, ACCORDING TO OSHA RESEARCH—Continued

NAICS group [1]	Name of industry [1]	Incidents (1980–2008) [2]	Firms [3]	Establishments [3]	Employees [3]
326211	Tire Manufacturing	5	91	138	53,985
327000	Nonmetallic Mineral Prod. Mfg	4	11,332	17,350	482,459
331000	Primary Metal Manufacturing	32	4,310	5,285	449,914
332000	Fabricated Metal Product Mfg	27	54,969	59,064	1,563,713
333000	Machinery Manufacturing	7	23,842	26,317	1,126,671
334000	Computer, Electronic Equip. Mfg	2	12,733	14,548	1,057,485
336000	Transportation Equipment Mfg	16	10,552	12,707	1,622,527
337000	Furniture & Related Product Mfg. (Except 337100)	2	4,779	5,148	188,908
337100	Household & Institutional Furniture, Cabinet Mfg	16	15,878	16,301	354,341
339000	Miscellaneous Manufacturing	7	29,925	31,239	686,096
423000	Merchant Wholesalers (423110, 423210, 423310, 423930)	4	22,669	27,704	432,265
488000	Support Activities for Transportation	1	29,416	37,083	579,589
493000	Warehousing and Storage	1	7,176	13,849	595,325
511000	Publishing Industries	1	22,874	31,821	1,039,739
561210	Facilities Support Services	1	1,680	4,115	164,637
562000	Waste Management and Remediation Services	3	16,189	19,919	345,334
Other	Unknown Industry Category	42	.....	.....	.....
	Total	422	347,983	426,794	16,018,544

Sources:
[1] North American Industry Classification System, United States, 2008.
[2] Incident data from U.S. Chemical Safety and Hazard Investigation Board and *http://dustexplosions.blogspot.com.*
[3] County Business Patterns 2006—U.S. Census Bureau.

B. Dust Explosions in Grain Handling Facilities

In the 1970s, agriculture and food processing industries experienced several combustible dust explosions. A 1977 grain-dust explosion in Westwago, Louisiana, killed 36 workers. It remains the deadliest grain-dust explosion of the modern era. Five days later, another grain-dust explosion in Galveston, Texas, caused the deaths of 9 workers and injured 34 others.[2] As a result of these and other grain-dust explosions in the 1970s, OSHA issued a document entitled ''Grain Elevator Industry Hazard Alert,'' which provided employers, workers, and other officials with information concerning the hazards and safe handling of grain.

Later in the 1970s, the Agency initiated rulemaking to address the problem of grain-dust explosions. On December 31, 1987, after extensive public comment on its proposed rule and several public hearings, OSHA published its final standard on Grain handling facilities, 29 CFR 1910.272 (52 FR 44592). In its *Combustible Dust Hazard Study* of November 2006 (discussed further in Section 1(D) of this notice), the U.S. Chemical Safety and Hazard Investigation Board stated: ''OSHA's Grain handling facilities standard provides a model for OSHA action that has proven effective in reducing catastrophic dust explosions in the grain industry.'' [3]

During a review of the Grain handling facilities standard in 2003, OSHA received comments from union representatives claiming that, since its promulgation, grain explosions were down 42 percent, and injuries and deaths from grain explosions were reduced by 60 percent and 70 percent respectively.[4] Figure 1 shows the number of grain-dust explosions per year since 1978. For the ten years prior to the standard (1978–1987), the average number of explosions per year was 20.5. This average decreased to 10.3 explosions per year from 1988 to 1997 and further decreased to 6.3 per year from 1998 to 2007. OSHA gathered this data from the *Regulatory Review of OSHA's Grain Handling Standard,*[5] Kansas State University in cooperation with USDA Federal Grain Inspection Service,[6] and USDA Grain Inspection, Packers, and Stockyards Administration.[7]

[2] National Academy of Science, *International Symposium on Grain Elevator Explosions,* July 11–12, 1978, National Materials Advisory Board Committee on Evaluation of Industrial Hazards.

[3] U.S. Chemical Safety and Hazard Investigation Board Investigation Report No. 2006–H–1, *Combustible Dust Hazard Study;* November 2006, page 67.

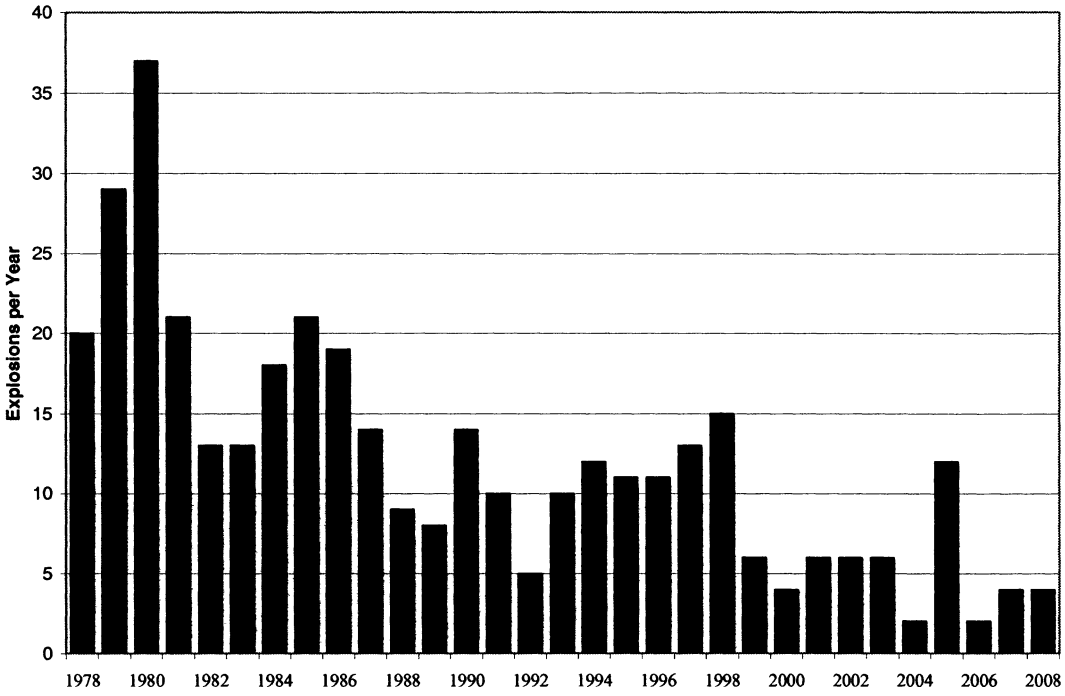
[4] *Regulatory Review of OSHA's Grain Handling Standard [29 CFR 1910.272],* February 2003.

[5] *Regulatory Review of OSHA's Grain Handling Standard [29 CFR 1910.272],* February 2003.

[6] Kansas State University, in cooperation with USDA Federal Grain Inspection Service, available online at: *http://www.oznet.ksu.edu/pr_histpubs/Dust_Exp.htm.*

[7] USDA Grain Inspection, Packers, and Stockyards Administration, personal e-mail communication from USDA to OSHA, Jul 10, 2009, with attachment entitled, ''Explosion Data.''

Figure 1: Number of Grain-Dust Explosions per Year from 1978 – 2008 (Source: USDA FGIS and Kansas State University, and OSHA FRIA, Grain Handling Standard)



C. Dust Explosions in Other Industries

The flammability and explosiveness of various types of organic and inorganic dusts has been recognized for well over a century. The devastating effects of secondary explosions resulting from accumulated dust have also been well documented, particularly since the early years of the 20th century; the hazards of some dusts, particularly coal dust, mineral dusts, and flour, were recognized many years before the 20th century. However, no national organizations focused on the hazards of combustible dusts until the National Fire Protection Association (NFPA) established a committee to do so in 1922. The NFPA's work resulted in a wealth of knowledge about the prevention and control of dust-explosion hazards in material handling and manufacturing processes. In 1923, NFPA published the first national consensus standard to address the prevention of dust explosions in grain terminals and flour mills.[8]

Over the past 15 years, a number of industries have experienced serious dust explosions, causing loss of life and injuries, as well as property damage. The first of these incidents, an explosion and fire in a textile factory in Methuen, Massachusetts in 1995, injured 37 people and destroyed several large buildings.[9] After a detailed investigation of this incident, OSHA issued a Hazard Information Bulletin in 1998 for the textile industry.

In 1999, an automotive plant near Dearborn, Michigan experienced an explosion in one of the boilers in its power plant. Analysis of the explosion indicated that the initial boiler explosion may have caused accumulated coal dust on plant surfaces to become airborne, fueling a secondary explosion that destroyed part of the facility. Six workers were killed and 36 were injured.[10]

In the same year, there was an explosion at a foundry in Springfield, Massachusetts, involving powdered phenolic resin in the iron castings manufacturing process. This explosion killed three workers and injured nine. Investigators found heavy resin deposits in ducts and other surfaces. From this finding, they concluded that a primary explosion in a dust extraction duct had dispersed the settled dust, and that the dispersed dust then fueled secondary explosions in the facility.[11]

A rubber-dust explosion at a rubber recycling plant in Vicksburg, Mississippi in 2002, resulted in five fatalities and seven injuries. Part of the recycling process involved grinding rubber tires; the grinding process produced rubber dust, which accumulated on building surfaces and in a product bagging bin that was not equipped with explosion vents. A fire started on the roof of the plant. When it spread to the bagging bin, it dispersed the layers of dust in the bin and on the surrounding surfaces, fueling an explosion.[12]

A massive explosion in 2003 at a pharmaceuticals device manufacturing facility in Kinston, North Carolina, injured 38 workers and killed 6. In a process in which rubber strips were dipped into a polyethylene slurry, fans were used to help dry the coated rubber, causing fine polyethylene powder to be disbursed. Employees diligently cleaned the visible areas of the process room; however, most of the employees were unaware that combustible polyethylene

[8] Cashdollar, K. L., & Hertzberg, M., eds (1987) *Industrial Dust Explosions,* ASTM International, U.S., p. 345.

[9] U.S. Fire Administration Technical Report #110, *Manufacturing Mill Fire, Methuen, MA,* December 11, 1995.

[10] Michigan Department of Energy, Labor & Economic Growth, *CIS Reaches Historic Settlement Agreement with Ford and UAW,* 1999 available online: *http://www.michigan.gov/dleg/0,1607,7-154-10573_11472–52301-,00.html.*

[11] U.S. Department of Labor (USDOL), 1999. Joint Foundry Explosion Investigation Team Report, Jahn Foundry Corporation, Springfield, MA, February 25, 1999.

[12] OSHA, 2002, *Region 4 Report on Explosion at Rouse Polymerics,* U.S. Department of Labor.

dust was accumulating in the enclosed space above the suspended ceiling, carried there by the building ventilation system. Due to the extensive damage to the facility, and the deaths of potential witnesses, investigators were unable to definitively determine the ignition source or the method of dust dispersal.[13]

That same year, phenolic resin again fueled a fatal dust explosion, this time in an acoustic insulation manufacturing facility in Corbin, Kentucky. As workers were cleaning fugitive dust accumulations with compressed air, a cloud of phenolic resin formed near a malfunctioning appliance, which likely ignited the cloud of dust. The initial deflagration dispersed large quantities of combustible dust that had accumulated on surfaces throughout the facility. The resulting dust clouds fueled several secondary explosions. The building was destroyed, 7 workers were killed, and 37 were injured.[14]

Even finely divided metals can cause dust explosions. Again in 2003, one worker was killed and several injured in an aluminum dust explosion at a wheel manufacturing facility. At the point in the process in which scrap aluminum was reduced to small chips, aluminum particles were drawn into a dust collector. An initial explosion in the dust collector spread through the ventilation system, causing a secondary explosion involving the dust accumulated on overhead beams, ducts, and other structures.[15]

As a result of this series of incidents in 2003, OSHA produced a Safety and Health Information Bulletin (SHIB), *Combustible Dust in Industry: Preventing and Mitigating the Effects of Fire and Explosions.* This widely disseminated guidance document provided employers and workers with information on combustible dust explosions, including mitigation. It contains references to both the applicable OSHA standards and the related industry consensus standards. However, incidents continued to occur despite the availability of these standards and the guidance in the SHIB.

In early 2008, a catastrophic incident at a sugar refinery in Port Wentworth, Georgia, killed 14 workers and seriously injured 36 others. The CSB investigated[16] and determined that an initial dust explosion occurred in an enclosed steel belt conveyor below three 105-foot-tall silos, most likely ignited by an overheated conveyor bearing. Large quantities of sugar dust that had accumulated on surfaces throughout the plant fueled a series of massive secondary explosions and fires, destroying much of the facility. The plant had a history of previous, smaller initial explosion incidents that did not result in significant damage or secondary explosions. The fine OSHA proposed for this employer is the third-largest fine ever proposed for a single incident.

The sugar plant incident highlighted a lack of hazard awareness and a failure to comply with existing Federal standards and State codes. OSHA took prompt action to further heighten awareness of this hazard by producing additional guidance for employers and workers, including a Web page, a fact sheet, and a poster. The Agency mailed the SHIB directly to 30,000 employers suspected of having combustible dust hazards, and also focused enforcement efforts on sugar plants.

D. CSB Combustible Dust Study

The CSB conducted a study of dust explosion incidents between 1980 and 2005. The 2006 report from that study identified 281 incidents that killed 119 workers and injured 718.[17] From 2006 through 2008, OSHA has found records of an additional 16 deaths and 84 injuries; these records are included in Table 1 above. Among CSB's findings and conclusions were the following:

- Many industry and safety professionals lack awareness of combustible dust hazards.
- The widely recognized standards of good engineering practice in the NFPA's voluntary consensus standards were not being followed in many facilities.
- State and local fire codes were ineffective as a viable mechanism to reduce dust explosion risks in general industry nationwide.
- OSHA's focus has been on enforcement activities in response to combustible dust incidents.
- The only comprehensive OSHA standard that specifically addresses combustible dust hazards (the 1987 Grain handling facilities standard) has effectively reduced the risk and consequences of grain-dust explosions, and incorporates many of the same principles that can be found in the NFPA standards.

The report of CSB's combustible dust study also listed five recommendations for OSHA. This notice addresses the first of these recommendations:

''Issue a standard designed to prevent combustible dust fires and explosions in general industry. Base the standard on current National Fire Protection Association (NFPA) dust explosion standards (including NFPA 654 and NFPA 484), and include at least

- Hazard assessment,
- engineering controls,
- housekeeping,
- building design,
- explosion protection,
- operating procedures, and
- worker training.''

The second CSB recommendation requested that OSHA revise its Hazard Communication Standard (HCS) (29 CFR 1910.1200) to clarify the coverage and requirements related to combustible dust. This recommendation is being addressed in a separate rulemaking.

The third and fourth CSB recommendations suggested that OSHA, respectively, communicate with the United Nations Economic Commission for Europe the need to amend the Globally Harmonized System to address combustible dust hazards, and provide combustible dust-related training through the OSHA Training Institute. Both of these recommendations have been accomplished.

The fifth CSB recommendation suggested that OSHA initiate a Special Emphasis Program for Combustible Dust, to include an outreach program focused on the information in OSHA's Safety and Health Information Bulletin, *Combustible Dust in Industry: Preventing and Mitigating the Effects of Fire and Explosions.* The Agency went beyond CSB's recommendation and implemented a National Emphasis Program (NEP) to increase OSHA's enforcement activities throughout the country and to focus on specific industry groups that experienced either frequent combustible dust incidents or combustible dust incidents with catastrophic consequences. The NEP was launched on October 17, 2007, and is ongoing. It was revised in 2008 to more closely focus on sugar plants.

E. Congressional Response

Interest intensified in regulatory action during the months after the sugar-plant incident in 2008. Employee unions expressed support for CSB's rulemaking recommendations. On May 1, 2008, the U.S. House of Representatives introduced a bill

[13] *Investigation Report, Dust Explosion, West Pharmaceutical Services, Inc.,* U.S. Chemical Safety and Hazard Investigation Board (CSB), September 2004.

[14] CSB, 2005, *Investigation Report, Combustible Dust Fire and Explosions, CTA Acoustics, Inc.,* February 2005.

[15] CSB, 2003, *Investigation Report, Hayes Lemerz Dust Explosions and Fire,* September 2003.

[16] U.S. Chemical Safety and Hazard Investigation Board Investigation Report No. 2008–05–1–GA, *Sugar Dust Explosion and Fire;* September 2009.

[17] U.S. Chemical Safety and Hazard Investigation Board Investigation Report No. 2006–H–1, *Combustible Dust Hazard Study;* November 2006, p. 31.

entitled H.R. 5522, *Worker Protection Against Combustible Dust Explosions and Fires Act of 2008.* This bill directed OSHA to issue an interim combustible dust rule and an amendment to the HCS in 90 days, and a final rule in 18 months. H.R. 5522 was passed by the House and referred to the Senate.

Two Congressional hearings were held on H.R. 5522. The first hearing was held by the House Committee on Education and Labor on March 12, 2008, and the second hearing was held by the Subcommittee on Employment and Workplace Safety of the Senate Housing, Education, Labor and Pensions Committee on July 29, 2008. Assistant Secretary of Labor Ed Foulke testified for OSHA at these hearings; also testifying were representatives of CSB, NFPA, and the Georgia sugar plant that sustained the 2008 explosion.

On February 4, 2009, H.R. 849, *Worker Protection Against Combustible Dust Explosions and Fires Act of 2009,* was introduced into the current session of Congress. The provisions of this resolution are the same as H.R. 5522.

F. Existing OSHA Standards

The Agency does not have a single, comprehensive standard that addresses combustible dust hazards across all industries. Current OSHA standards provide limited protection from dust hazards in two ways: First, certain standards address some dust hazards for specific industries. Among these standards are the following:

- 29 CFR 1910.261—Pulp, paper, and paperboard mills.
- 29 CFR 1910.263—Bakery equipment.
- 29 CFR 1910.265—Sawmills.
- 29 CFR 1910.269—Electric power generation, transmission, and distribution.
- 29 CFR 1910.272—Grain handling facilities.

Second, some general industry standards address one or more of the elements that can contribute to dust explosions, such as ignition sources and dust accumulations, or the standards require the communication of information that employers and workers need to address dust hazards. *Among these standards are:*

- 29 CFR 1910.22(a)—Housekeeping.
- 29 CFR 1910.178—Powered industrial trucks.
- 29 CFR 1910 Subpart Q—Welding, Cutting, and Brazing.
- 29 CFR 1910. 269—Electric power generation, transmission, and distribution.
- 29 CFR 1910.307—Hazardous (classified) locations.
- 29 CFR 1910.334(d)—Occasional use of flammable or ignitable materials.
- 29 CFR 1910.1200—Hazard Communication.

As noted earlier, OSHA's existing standards for combustible dust do not provide a comprehensive set of requirements to fully address all of the prevention and mitigation methods specific to combustible dust hazards. Accordingly, some ignition sources are specifically covered (*e.g.,* electrical installations, powered industrial trucks), while other ignition sources are not covered (*e.g.,* mechanical sparks, friction, open flames). Additionally, OSHA standards address the accumulation of fugitive dust (*i.e.,* dust that escapes from equipment or areas where it is normally present), but do not include measures that would prevent the escape of dust in the first place. Also, many built-in engineering controls (including the design of facilities, explosion venting, suppression systems, and explosion protection systems) are not addressed in the OSHA standards. OSHA is asking a series of questions about the need to address these areas in a new combustible dust standard to afford adequate and complete protection to workers.

G. Consensus and Industry Standards

NFPA issues a number of national consensus standards that address the hazards of combustible dust. For example, NFPA 654, *Standard for the Prevention of Fire and Dust Explosions from the Manufacturing, Processing, and Handling of Combustible Particulate Solids,* addresses the hazards of combustible dust in a general manner. Specific industries are excluded from NFPA 654, but are covered by other NFPA standards, including NFPA 61, *Standard for the Prevention of Fires and Dust Explosions in Agricultural and Food Processing Facilities;* NFPA 484, *Standard for Combustible Metals;* NFPA 655, *Standard for Prevention of Sulfur Fires and Explosions;* and NFPA 664, *Standard for the Prevention of Fires and Explosions in Wood Processing and Woodworking Facilities.*

These five NFPA combustible dust standards have mandatory secondary references to a large number of other standards. The 2006 edition of NFPA 654 mandates compliance with 36 other NFPA standards. These 36 secondary references, in turn, reference additional standards. In effect, no one standard comprehensively addresses the hazards of combustible dust, which may pose difficulties for some employers trying to develop programs to mitigate combustible dust hazards. In addition, the provisions of these five NFPA standards differ, which may add to these difficulties. Some elements of protection are addressed in some standards but not in others; other elements are addressed in different ways in the various standards. For example, NFPA 61, 484, and 654 contain provisions for drive belts, while NFPA 655 and 664 have no provisions directly addressing drive belts.

In addition to the NFPA standards listed above, NFPA issues a number of standards that cover the design and installation of protection systems specific to deflagration and explosion hazards, including combustible dust. Two of these standards are NFPA 68, *Standard on Explosions Protection by Deflagration Venting,* and NFPA 69, *Standard on Explosion Prevention Systems.* NFPA also has a series of standards that cover automatic fire suppression and alarm systems for a variety of facilities and hazards, but are not specific to combustible dust, deflagrations, or explosions.

A large majority of State and local jurisdictions in the United States have adopted the NFPA standards because both of the model fire codes used in this country (*i.e.,* International Code Council's *International Fire Code,* and NFPA's *Fire Code*) make these NFPA standards mandatory. However, the 2006 report on CSB's combustible dust study indicates that enforcement of these fire codes at the State and local level is ''inconsistent and largely ineffective.'' For example, the 2008 sugar-plant incident occurred in Georgia, a State having a fire code that mandated compliance with, among other combustible dust-related consensus standards, NFPA 61, *Standard for the Prevention of Fires and Dust Explosions in Agricultural and Food Processing Facilities.*

NFPA standards are updated on a regular basis, usually every three years. In the Agency's experience, consensus standards incorporated by reference into OSHA rules quickly become out of date, making it difficult for employers to comply when the out-of-date consensus standards become difficult to obtain. Furthermore, OSHA cannot legally update NFPA or other consensus standards used in its rules by referring to the ''current'' or ''most recent'' edition of the consensus standards.

Despite the aforementioned challenges with the application and enforcement of NFPA standards, the standards are used to a significant extent throughout industry, particularly by large companies, engineering consultants, and firms designing facilities with combustible dust hazards. Therefore, OSHA is asking for comment

on how best to incorporate the provisions of the consensus standards.

H. National Emphasis Program Analysis

OSHA analyzed the results of its Combustible Dust National Emphasis Program (NEP) to better understand where combustible dust hazards exist and where improvements may be needed to ensure that workers are protected from combustible dust hazards. Between November 1, 2007, and February 24, 2009, OSHA conducted 813 inspections under this NEP—665 in States under Federal OSHA authority, and 148 in States having an OSHA-approved State Plan. OSHA cited employers for 3,662 violations.

Of the 665 Federal NEP inspections, 160 citations were issued under the General Duty Clause (GDC) for hazards related to combustible dust. Therefore, the rate of GDC usage for combustible-dust-related hazards in the NEP inspections was 24 percent during the time period noted above (These statistics were derived from the information available at the time this notice was developed; the numbers may change over time through the informal conference and settlement process.)

The 160 GDC violations referenced 32 different industry or consensus standards developed by 6 different standards-developing organizations. The eleven most frequently referenced consensus standards were as follows, in descending order of frequency:

- NFPA 654, *Standard for the Prevention of Fire and Dust Explosions from the Manufacturing, Processing, and Handling of Combustible Particulate Solids.*
- NFPA 664, *Standard for the Prevention of Fires and Explosions in Wood Processing and Woodworking Facilities.*
- NFPA 61, *Standard for the Prevention of Fires and Dust Explosions in Agricultural and Food Processing Facilities.*
- NFPA 69, *Standard on Explosion Prevention Systems.*
- NFPA 484, *Standard for Combustible Metals.*
- NFPA 68, *Standard on Explosion Protection by Deflagration Venting.*
- ASME B20.1, *Standard for Conveyors and Related Equipment.*
- ANSI/ITSDF B56.1, *Safety Standard for Low and High Lift Trucks.*
- FM Global Loss Prevention Data Sheet 7–76, *Prevention and Mitigation of Combustible Dust Explosions and Fires.*
- NFPA 505, *Standard on Powered Industrial Trucks.*
- NFPA 86, *Standard on Ovens and Furnaces.*

It has been necessary to cite the GDC extensively to address the various aspects of combustible dust hazards. GDC citations focused on each of the elements that could contribute to a dust fire or explosion, including containment or control of dust, isolation or control of ignition sources, and explosion venting or suppression systems. *The following hazards were the most commonly cited GDC violations:*

- Baghouse dust collectors located inside a building without proper explosion protection systems, such as explosion venting or explosion suppression systems.
- Deflagration isolation systems not provided to prevent deflagration propagation from dust collectors to other parts of the plant.
- Rooms with excessive dust accumulations not equipped with explosion relief venting to the exterior.
- Horizontal surfaces not minimized to prevent accumulation of dust.
- Air from dust collectors recycled through ductwork back into the work area.
- Legs of bucket elevator enclosures not equipped with explosion relief venting.
- Explosion vents on bucket elevator enclosures directed into work areas and not to a safe, outside location away from platforms, means of egress, or other potentially occupied areas.
- Pulverizers not provided with explosion venting or deflagration suppression systems.
- Dust collection system ductwork not constructed of metal.
- Open-flame propane heater used for comfort heating in an area where agricultural products were milled.
- Equipment (such as grinders and shakers) not maintained to minimize the leakage of combustible dust into the surrounding area.
- Electric grinders used in dust hazard areas without a hot-work permit system.

This list provides some indication of the areas in which current standards do not cover combustible dust hazards in general industry. Only the last two items on the list are administrative or operational in nature, involving maintenance, work practices, policies, and procedures. The other ten items involve engineering controls, such as fixed facilities or protection features built into the plant or the processing systems. These specific GDC violations point to areas that may be appropriate to cover in a prospective OSHA standard for combustible dust. Therefore, OSHA arranged the questions it is asking to solicit information separately for engineering controls and administrative controls.

The main finding of this NEP analysis is the unusually high rate of GDC use in combustible dust inspections (24 percent). Ordinarily, the GDC is used on a much more limited basis. For the same time period between November 1, 2007 and February 24, 2009, the 48,969 Federal OSHA inspections that were conducted outside the NEP yielded 1,736 GDC citations (a rate of 3.5 percent). Therefore, the GDC was used almost seven times as often for combustible-dust-related citations than for all other citations. This unusually high proportion suggests the need for a comprehensive OSHA standard.

I. Regulatory Issues

The CSB recommended that OSHA issue a standard to prevent combustible dust fires and explosions. The CSB determined that many tragic accidents in the past decade could have been avoided or minimized if employers had complied with applicable national consensus standards. OSHA recognizes that regulatory action needs to be considered as part of its overall approach to protecting workers from combustible dust hazards. The Agency already has made significant efforts to address the need for additional information and training on combustible dust hazards. Among these efforts are OSHA's SHIB, fact sheet, and poster; additional information provided on the Agency's Web site; outreach to employers; and specialized training for compliance officers. In addition, through the NEP, OSHA also enhanced compliance through strengthened enforcement of existing standards and citations under the General Duty Clause.

The existing regulatory regime is fragmented and incomplete. The Agency's analysis of the combustible dust NEP, above, shows that existing OSHA standards do not regulate important elements of combustible dust hazards. The consensus standards related to combustible dust are large, complex, numerous, and interrelated, which make it difficult for employers to comply with them. In addition, where these consensus standards have been adopted as part of State or local codes, available evidence shows that they are poorly enforced at the local and State levels.[18] Therefore, OSHA has preliminarily concluded that national consensus standards alone, even when

[18] U.S. Chemical Safety and Hazard Investigation Board Investigation Report No. 2006–H–1, *Combustible Dust Hazard Study;* November 2006, page 68.

adopted by State or local governments, are insufficient to adequately protect workers from these hazards.

As noted earlier, combustible dust hazards are present in a wide range of industries. Many different materials, both organic and inorganic, can produce dust capable of fueling explosions. OSHA plans to evaluate affected industries to determine the most effective way to regulate the combustible dust hazards present in these industries. It may be appropriate for OSHA to treat specific industries differently, based at least in part on current national consensus standards.

OSHA must consider many factors in developing a comprehensive standard for combustible dust. Some of these factors relate directly to the characteristics of the hazard and the range of variables encountered in the workplace, which affect the combustibility or explosibility of dusts. For any dust materials having a specific chemical composition, the chance of a combustible dust deflagration depends on many variables, including:

- Size of particles
- Shape of particles
- Particle surface-area-to-volume ratio
- Agglomeration (how well particles stick together)
- Impurities present in the material
- Moisture content of the material
- The predisbursal dust layer depth and location
- The concentration of particles in a dust cloud
- The spatial distribution of particles in a dust cloud (the variation in concentration throughout a dust cloud)
- Oxygen concentration
- Turbulence in the space or area
- Characteristics of the ignition source (including magnitude and level of energy)
- Location of the ignition source in relation to the dust cloud

Many more variables come into play for combustible dust incidents than for scenarios involving flammable gases, flammable liquids, or larger-sized flammable solids. The ignition of vapor-air mixtures, especially at rest, is much more predictable and reproducible than the ignition of combustible dust. Consequently, some mitigation methods used to address combustible dust hazards are not straightforward. Prescriptive requirements may not be reasonable or effective in such a scenario.

Another factor involves whether and how to integrate current and future national consensus standards into a regulatory scheme. One means of doing so may be for OSHA to require compliance with various NFPA standards, rather than to develop a government-unique standard. Some of the issues with this approach are discussed earlier in section I(G) of this notice. Another approach may be to reference NFPA standards as acceptable compliance options.

OSHA must also consider the interrelationship of a combustible dust standard and other OSHA standards that address different features of the hazard, for example, the hazard communication, electrical, grain handling, and other standards noted earlier in section I(F) of this notice.

The information currently available indicates that the risk of combustible dust explosions is considerable and that a single, comprehensive standard addressing all of these hazards will likely provide clarity for employers and increased safety for exposed workers. OSHA is requesting information and comment from the public to evaluate what regulatory action it should take to further address combustible dust hazards within the general industry standards.

II. Request for Data, Information, and Comments

OSHA is providing the following questions to facilitate the collection of needed information and to facilitate public comment on relevant issues. OSHA invites commenters to respond to any questions for which they have specific knowledge, data, or information, regardless of their involvement with combustible dust, *e.g.,* employer, employee, consultant, researcher, fire or building code enforcement official. Commenters also are encouraged to address any aspect of combustible dust safety that they believe would assist the Agency in considering appropriate regulatory action on the matter. OSHA requests that commenters provide a detailed response to questions, including a rationale or reasoning for the position taken, rather than simply replying ''yes'' or ''no.'' Also, relevant data that may be useful to OSHA's deliberations, or that may assist it in conducting an analysis of the impacts of future Agency actions, should be submitted. To assess the costs, benefits, or feasibility of any possible regulatory intervention, the Agency needs specific quantitative information on various safety measures. Therefore, for those recommendations involving specific interventions, any data in terms of costs and benefits associated with the recommendation would be helpful. To assist it in analyzing comments, OSHA requests that commenters reference the question number to which they are responding.

A. Industry Background

OSHA is interested in determining the extent of combustible dust hazards. The following questions address the extent of the hazards, and provide a context in which to understand your answers to subsequent questions.

1. What business are you in? What NAICS industry or industries are you in?
2. How many employees do you have? How many are production employees? How many employees work in areas where combustible dusts are present? What types of jobs do they perform?
3. What is the area of your facility? What percentage of this area has combustible dusts normally present? What percentage is subject to possible fugitive dust accumulations?
4. What type or types of combustible dusts are present?
5. Would you expect other firms in your industry to have similar combustible dusts hazards or are the products or processes that generate combustible dust in your facility unusual for your industry? Why?

B. Definition of Combustible Dust

No single, universally accepted definition of combustible dust is available. Even among standards promulgated by the same standards-developing organization, the definitions vary significantly. NFPA 654 and 655 define combustible dust in general terms without regard for particle size. This approach recognizes that factors such as particle shape, agglomeration, and other characteristics listed earlier in this notice, can affect explosibility. Other standards (such as NFPA 61, 484, and 664) define combustible dust in terms of a minimum particle size. The definition in previous editions of NFPA 654 (which may still be used in some areas of the country) was also size-based.[19] Furthermore, OSHA's grain standard uses a size-based definition for ''fugitive grain dust.''

Many different materials may form combustible dust, and several laboratory tests are available to characterize them. Some of these tests help determine a dust's basic explosibility. Other tests yield results on the degree of

[19] The 2006 edition of NFPA 654 explains in Annex section A.3.3.4 the reason that the previous size-based definition is no longer used: ''Dusts traditionally have been defined as a material 420 μm or smaller (capable of passing through a U.S. No. 40 standard sieve). Combustible particulates with an effective diameter of less than 420 μm should be deemed to fulfill the criterion of the definition. However, flat platelet-shaped particles, flakes, or particles of fibers with lengths that are large compared to their diameter usually do not pass through a 420 μm sieve yet still pose a deflagration hazard.''

explosibility; these tests are useful for designers of built-in protective features or systems. In some cases, the hazards of certain dusts are widely known (for example, wood dust). In these cases, basic testing to determine whether the dust is explosive may not be necessary. OSHA is interested in data on the extent to which different materials are, or may form, combustible dust.

6. Do you determine whether a dust is considered a combustible dust by reference to data, testing, or some other means? Please explain.

7. What additional tests do you conduct to determine the level of combustibility of a particular dust?

8. Do you have any dusts that you assume to be combustible, and, thus, preclude the need or expense of testing? If so, please indicate what type of dust.

9. Certain definitions, in particular those definitions based on particle size alone, would not cover some materials that can present an explosion hazard in certain situations. Accordingly, identify any dusts that can explode that would not be included in your definition. Would your definition include some dusts for which explosions are very rare or unknown? If so, which ones?

C. Hazard Recognition

The CSB report on its combustible dust hazard study, as well as the investigative reports of specific combustible dust incidents discussed above, show a pattern of employers and workers being either unaware of the hazards posed by combustible dust, or of the seriousness of the hazards. As a result, many workers were not adequately protected from these hazards. Employers who have recognized the hazards were made aware of them in a variety of ways. OSHA is interested in data on the contributions of in-house experts, outside consultants, insurance representatives, and local or State code authorities in improving awareness of the hazard.

10. How did you become aware that you had combustible dust present in your facility?

11. Who is responsible for determining if a dust is combustible? What expertise do they have?

12. How do you determine if dust is combustible? Do you use published data, and if so, from what source? Do you sample dust for laboratory testing, and if so, how often? Do you rely on labels or data sheets, including MSDSs, developed by others? Do suppliers provide you with information related to combustible dust? Please explain.

13. To what extent do the local code authorities, insurance representatives, or other outside experts determine the presence of combustible dust in your facility?

D. Hazard Assessment

Hazard assessments are systematic approaches to evaluating a hazard and selecting control or mitigation methods. CSB's report on its combustible dust hazard study recommends hazard assessments as necessary for the mitigation of combustible dust hazards. It should be noted that NFPA 654 refers to a hazard assessment as a ''Process Hazard Analysis.'' In addition to information about how employers perform hazard assessments, OSHA is also interested in the extent to which experts (both external and on-staff) are involved in hazard assessments.

14. Do you conduct assessments of combustible dust hazards? How often? What assessment method do you use? Describe the information you use in performing the assessment, as well as the information the assessment yields and how you use this information.

15. On whom do you rely for technical assistance when performing the assessment? In-house staff, local/State authorities, insurance representatives, or consultants?

16. How do you decide when outside expertise or assistance is necessary? How do you assess the capability of outside experts?

17. Are your employees involved in the hazard assessment? Does their involvement improve the assessment? Does their involvement improve their understanding of the hazard and its mitigation?

E. Hazard Communication and Training

OSHA's Hazard Communication Standard (HCS), 29 CFR 1910.1200, comprehensively addresses the evaluation of the potential hazards of chemicals and the communication of hazard information to workers. Regarding dusts and other particulates, as with all chemicals covered by the HCS, a hazard evaluation must be conducted, taking into consideration all discernible hazards, including explosibility. It is incumbent upon manufacturers and importers to provide information on the potential for, and control of, combustible dusts.

The HCS standard has three main components that are essential to the effective functioning of a program. First, chemical manufacturers and importers must review available scientific evidence concerning the physical and health hazards of the chemicals they produce or import to determine if they are hazardous. This procedure is called a hazard determination or hazard evaluation. Second, for every chemical found to be hazardous, the chemical manufacturer or importer must develop Material Safety Data Sheets (MSDSs) and container labels to be transmitted to downstream users of the chemicals. Employers are required to maintain an MSDS in the workplace for each hazardous chemical that they use. Third, all employers must develop a written hazard communication program and provide information and training to employees about the hazardous chemicals in their workplace.

Regarding combustible dusts, anticipated operations, uses, and downstream material processing that generate dusts should be considered normal conditions when using a substance. These conditions include operations and uses such as abrasive blasting, cutting, grinding, polishing, or crushing materials; conveying, mixing, sifting, or screening dry materials; and the build-up of dried residue from processing wet materials.

The HCS requires chemical manufacturers and importers to develop an MSDS for each hazardous chemical they produce or import. The following MSDS requirements are applicable to combustible dust hazards: Chemical and common names of the hazardous chemical and all ingredients determined to present a physical hazard, physical and chemical characteristics of the hazardous chemical, any generally applicable precautions for safe handling and use, any generally applicable control measures, date of MSDS preparation or last revision, and the name, address, and telephone number of the responsible party preparing the MSDS.

During its combustible dust study, CSB reviewed MSDSs of 140 known substances that produce combustible dusts, and found that information regarding potential combustible dust hazards was poorly or inadequately transmitted to employers and workers; according to this report, 41 percent of the MSDSs reviewed in the CSB study did not warn users about potential explosion hazards. Of the remaining 59 percent of MSDSs sampled, most of the information was not stated in a place or manner clearly recognized by employees, or not specific to hazards related to combustible dusts. The CSB concluded that many of the MSDSs did not identify the potential for combustible dust explosions that could reasonably have been anticipated during downstream material processing.

Training is also a critical component of any program to control combustible dust and prevent fires and explosions. Employees need to understand the

hazards, how to prevent the hazards, and what to do in the event of a fire or explosion.

The following questions address MSDSs and training related to combustible dust hazards.

18. Do the MSDSs you develop or use identify the risks associated with combustible dust hazards? Do they list mitigation measures? Are you aware of MSDSs that should identify combustible dust as a hazard and do not? If so, please explain.

19. Do you communicate information on the risks of, and controls for, combustible dust hazards to your employees as a part of your hazard communication program?

20. Do you train your employees on the hazards of combustible dust and its mitigation? Do you also provide refresher training? What is covered in each type of training that you provide? How many of your employees receive each type of training that you provide? How many hours of training is provided and at what frequency (on hire, annually, as needed)? Who provides the training? What are their qualifications? Do you use standardized training materials (such as films, books, and computer classes)?

21. Do you have any means of determining if employees understand the training? Do you have any means of determining if employees are applying the training? If so, describe these means.

F. Consensus, Industry, and Insurance Standards

Under the OSH Act, OSHA must consider the provisions of national consensus standards, such as those promulgated by NFPA, in its rulemaking efforts. In addition to this mandate, OSHA may consider standards that are not developed using the consensus-standards process when determining appropriate protective measures for employees. The following questions refer to these standards.

22. Do you follow the provisions in NFPA standards for combustible dust? If so, which standards? Is this use voluntary, or based on mandates by local authorities, insurance carriers, or other entities? Do you have any difficulty in using the NFPA standards because of conflicting definitions, varying requirements, secondary references to other standards, or any other reason? If so, describe these difficulties.

23. Do you use FM Global Property Loss Prevention Data Sheet 7–76, *Prevention and Mitigation of Combustible Dust Explosions and Fires,* as an aid in determining how to mitigate the hazards of combustible dust? Is this use voluntary or mandated by your insurance carrier?

24. Are there any other standards or guides you use to address the hazards of combustible dust? If so, please indicate which ones, or describe them.

G. State and Local Codes

NFPA standards carry the force of law when adopted by a jurisdiction (Federal, State, county, or municipal); these standards also can be mandated by an insurance company or other entity. In some cases, even when not mandated, employers comply with these standards (or portions of them) as a matter of policy. Many State fire codes contain mandatory references to NFPA's combustible dust-related standards either directly, or by the adoption of a model fire code. The two model fire codes used in this country (*i.e.,* International Code Council's *International Fire Code* and NFPA's *Fire Code*) both mandate compliance with NFPA's combustible-dust-related standards. Despite the existence of consensus and insurance standards, and State fire codes, major incidents continue to occur, as described earlier in this notice.

The CSB's 2006 report on its combustible dust hazard study concluded that State and local enforcement of NFPA standards was inadequate to protect workers. The reasons found include limited resources, insufficient training, and enforcement efforts that concentrate on facilities other than industrial facilities.

OSHA's National Emphasis Program for combustible dust has resulted in many employers abating combustible dust hazards in their facilities. Some employers voluntarily upgraded their facilities, procedures, and policies based on outreach and guidance material made available by a variety of organizations (including OSHA) or in response to the publicity surrounding major dust explosions. These efforts increased worker and employer awareness of the benefits of complying with NFPA standards. Nevertheless, it is difficult to project trends for hazards that result in infrequent, major incidents such as combustible dust explosions. Because of the variability of the many components required for a significant combustible dust explosion, facilities can operate for decades without an incident, yet suffer a catastrophic event after a slight change in conditions. The following questions address enforcement issues involving combustible dust.

25. Does the fire or building code (State, local, or other) in your area specifically address the hazards of combustible dust? If so, how?

26. Has your facility been inspected by State or local authorities? Is this a regular occurrence? If so, at what frequency? Were these inspections initiated by the authorities, or did you take the initiative to contact them? Did the inspections include combustible dust hazards? Did the inspection officials have expertise on combustible dust hazards? What action did you take as a result of State or local inspections?

27. Do you know if State or local enforcement efforts have been effective in controlling combustible dust hazards? If you have information on any studies of this issue other than the CSB's study (for example, studies conducted by insurance organizations, code authorities, trade associations, consultants, or unions), please provide information on them.

H. Engineering Controls

Various methods of controlling occupational hazards fall into a hierarchy in order of their effectiveness. A typical hierarchy (beginning with the most effective method) is:

- Elimination.
- Substitution.
- Engineering controls.
- Administrative controls.
- Personal protective equipment.

Administrative controls include work practices, personnel scheduling, operational procedures, and equipment maintenance. Engineering controls are fixed measures that are built into a facility or processing equipment to either remove a hazard (*i.e.,* preventing it from occurring) or to minimize the effects of an incident (after a fire or explosion has begun). OSHA believes that, for combustible dust hazards, these two types of engineering controls may belong at different levels in the hierarchy. Those engineering controls that prevent the occurrence of an incident, hereinafter referred to as ''primary engineering controls,'' belong where they are normally seen in the hierarchy; ahead of administrative controls. Those engineering controls that minimize deaths, injuries, or damage after a fire or explosion has begun, hereinafter referred to as ''secondary engineering controls,'' may be more appropriately placed in the hierarchy after administrative controls. Therefore, OSHA has grouped the questions in this section into two categories: (a) Primary engineering controls, and (b) secondary engineering controls.

Collectively, primary and secondary engineering controls often include features of building design, processing

systems, ventilation systems, protective systems, and alarm systems. In NFPA 654, these provisions are not retroactive; that is, facilities, equipment, structures, or installations that existed or were approved prior to the standard becoming effective may remain as is. While retrofitting of most equipment is not mandated under this standard, it allows the authority having jurisdiction to require retrofitting of equipment or features in situations presenting an unacceptable degree of risk.

If OSHA were to incorporate provisions for engineering controls in a combustible dust standard, it would need to address whether any of these controls should be (1) retrofitted for all existing facilities immediately, (2) mandated after a specified date or period (*i.e.,* a delayed effective date), or (3) required only for facilities built after a specified date or period *(i.e.,* a ''grandfather'' clause). The Agency is, therefore, asking the following questions regarding engineering controls.

28. Do your facilities or equipment have any of the following primary engineering controls to mitigate combustible dust hazards? If so, describe in detail where they are installed and how they function to mitigate combustible dust hazards.

a. Features to prevent escape of dust into unwanted areas.

b. Features to prevent the accumulation of dust on surfaces.

c. Oxygen concentration reduction.

d. Dilution with noncombustible dust.

e. Foreign material (such as tramp metal) separation devices.

f. Monitoring and alarms for abnormal conditions.

g. Automatic interlocks, shutoffs, or overflow systems.

h. Manual emergency controls.

i. Lightning protection systems.

j. Features to mitigate the hazards of process heating systems.

k. Features to mitigate the hazards of comfort heating systems.

l. Features to mitigate the hazards of hot surfaces.

m. Class II electrical equipment and wiring.

n. Other mitigation features or engineering controls designed or built into your facility or processing equipment to prevent the occurrence of fires or explosions.

29. Do your facilities or equipment have any of the following secondary engineering controls to mitigate combustible dust hazards? If so, please describe in detail where they are installed and how they function to help mitigate combustible dust hazards.

a. Air-material separators (dust collection systems)

b. Segregation with physical barriers.

c. Separation by distance.

d. Fire-resistant construction.

e. Deflagration pressure containment.

f. Deflagration suppression systems.

g. Automatic fire suppression systems.

h. Manual fire suppression equipment.

i. Deflagration venting.

j. Dust retention and flame arresting devices.

k. Relief valves or devices.

l. Abort gates or dampers.

m. Isolation devices to preclude deflagration propagation.

n. Evacuation alarm systems.

o. Fire, heat, smoke, flame, or spark/ember detection systems.

p. Other mitigation features or engineering controls designed or built into your facility or processing equipment to limit deaths, injuries, or damage after a fire or explosion has occurred.

30. Do you feel that secondary engineering controls should be in the preferred hierarchy of controls after administrative controls? Why or why not? Please describe incidents where secondary engineering controls were effective or ineffective.

31. How much did each fixed feature cost to install? Are there any special maintenance or operating costs associated with these features (such as energy costs, waste disposal costs, maintenance activities such as clean up)? Are there any other routine costs associated with these measures?

32. How did you decide which of these features to provide in your facility? Were these features installed during the initial construction of the facility, or retrofitted at a later time?

I. Administrative Controls

Typically, an OSHA standard includes provisions for administrative methods and work practices to control or mitigate a hazard. These provisions include operational procedures, portable equipment, equipment maintenance, or personal protective equipment. In NFPA 654, these types of provisions are retroactive, which means they apply to all facilities, both new and existing. The following questions address the use of administrative and work practice controls in your facility.

33. Does your facility have any methods that prevent or limit the escape of dust? Please describe these methods.

34. Do you have a program or policy specifically for cleaning surfaces to remove accumulated fugitive dust? What surfaces does this program cover? What is the frequency with which you remove dust from surfaces? Do you inspect hidden and non-work areas, such as ventilation systems, product or input storage areas, concealed spaces, areas above suspended ceilings, beams, and ledges, for fugitive dust accumulation?

35. Do you have criteria or measures for what amount or level of fugitive dust accumulation is tolerable (such as a specific depth over a given area, inability to discern underlying color)? Please describe these criteria and measures.

36. Do you use cleaning methods that preclude dust disbursal? Which methods do you use, and under what conditions? What methods do you prohibit, and why?

37. Do workers' assignments, in whole or in part, involve cleaning dust from surfaces? How many workers perform this task, and how many hours per week do they spend on dust removal? Can the cleaning be done with minimal interruption of the facilities' operations?

38. Do you implement ignition controls for any of the following ignition sources for areas where combustible dust may be present? If so, indicate which sources and provide details. Did you consult with your operational employees in developing these programs or policies? How do you assure that your programs or policies are followed by all relevant parties?

a. Control of static electricity.

b. Use of cartridge-actuated tools.

c. Control of open flames and sparks (including cutting, welding, grinding, chipping).

d. Control of smoking.

e. Restrictions for hot surfaces.

f. Use of powered industrial trucks (EX or DX designation).

39. Do you have a program in place for the maintenance and testing of fixed facilities, equipment, structures, or systems? If so, please describe the program.

40. Do you have or use any personal protective equipment specific to combustible dust hazards? If so, please describe the equipment, and the reasons for its use.

41. Are any of your administrative or work practice programs or policies written? If so, please provide a copy of these written documents.

J. Emergency Response

Fighting combustible dust fires, or fires near combustible dust hazards, presents unique hazards. If done incorrectly, risk of death and injury may rise for both employees and firefighters. For example, opening a containment system or using straight-stream nozzles can cause dispersion of dust, which can then become the fuel for an initial or

secondary fire or deflagration. The following questions address emergency-response procedures in your facility.

42. Do you provide facility information to industrial fire brigades or other emergency responders for the purpose of assisting their efforts to respond to fires or explosions? If so, please describe the information you provide to them.

43. Do you provide training to employees, industrial fire brigades, or other emergency responders on the hazards of fighting fires in combustible dust-producing facilities? If so, respond to the following questions, and provide details and explanation. Do you train these groups on combustible dust hazards and their mitigation? Do you also provide refresher training? What is covered in this training? How many people receive this training? How many hours of training is provided and at what frequency (on hire, annually, as needed)? Who provides the training? What are their qualifications? Do you use standardized training materials (such as films, books, and computer classes)? Do you have any means of determining if attendees understand the training? Do you have any means of determining if attendees apply the training after they receive it? Please describe any instances where the training provided affected the outcome of an incident.

K. Investigation of Incidents

Much can be learned from combustible dust fires and explosions. In some cases, frequent minor incidents failed to garner the attention of employers, leading to complacency in the workplace. In other cases, minor incidents shielded the catastrophic potential of combustible dust hazards.

Many of the provisions included in the consensus standards addressing combustible dust have been refined over the years based on loss experience. Potentially, even more can be learned by studying incidents in which protective features effectively prevented death or injury, or incidents considered near misses. Some possible characterizations of near misses are situations under which a combustible dust cloud nearly ignited, a fire caused no deflagration or explosion, or a deflagration or explosion resulted in no injury or death. The following questions address your facility's responses to combustible dust fires, explosions, and near misses.

44. Have you had any combustible-dust-related fires, explosions, or near misses? Is so, describe these incidents in detail, and indicate what changes were implemented to prevent a reoccurrence. How do you define or characterize a near miss?

45. Are combustible-dust-related fires, explosions, or near misses investigated? If so, indicate how thoroughly, who performs them, and what professional qualifications they have. Do you document investigation results? If so, please provide examples of such documentation.

46. Does such a fire, explosion, or near miss cause a new hazard assessment to be conducted? Do these incidents cause you to review your engineering or administrative controls?

L. Regulatory Approach

OSHA is considering a variety of regulatory approaches to eliminate or mitigate combustible dust hazards. Your comments on the following issues will help OSHA decide how best to protect workers effectively from combustible dust hazards.

47. OSHA recognizes that the risk from combustible dust hazards varies with the type of material involved and the conditions present, the particular processes used at a facility, and the number of workers exposed. These hazards exist in facilities ranging from a woodworking shop with one employee to a large manufacturing plant with thousands of workers. Should OSHA scale its requirements to be more or less restrictive depending on either the size of, or type of dust present in, the facility? How should this scaling be done (*i.e.,* how should the provisions of a standard be applied to different facilities)? Are there situations or conditions that should limit the provisions that apply? If so, please explain.

48. Given the various definitions in the consensus standards, how should OSHA define combustible dust—by minimum particle size, without regard for particle size, or should the definition vary for the type of dust? Provide the technical basis for your response.

49. Data indicates that mineral dusts (such as silicates, sulphates, nitrates, carbonates, phosphates, cement, salt, gypsum, sand, and limestone) are not explosible. Should OSHA exclude mineral dusts or any other dust from coverage? If so, which dusts? Please provide the technical data substantiating the lack of explosibility.

50. Some dusts (such as wood dust) are widely understood to be combustible, and are explosible under a wide range of conditions. Should OSHA consider certain dusts explosible under any conditions, thereby precluding the need for testing? Alternatively, should OSHA permit employers to make this determination? If so, for which types of dust? Please explain your responses.

51. The NFPA combustible-dust-related standards have some similar provisions, but also have some provisions that vary for different types of dusts. Other NFPA standards have provisions that apply only to specific dusts. Should an OSHA standard cover different types of dusts separately, together, or in some other manner? Please explain your response.

52. The approach suggested by the CSB and others contains many of the elements in OSHA's Process Safety Management (PSM) Standard. Should an OSHA standard take an approach similar to the PSM Standard, *e.g.,* by requiring the development and implementation of a site-specific plan tailored to the facility and hazards in question? Please provide a rationale for your response.

53. NFPA 654 contains a provision for combustible dust hazard assessment, which helps refine the actions required for adequate safety under the specific conditions present in a facility. OSHA recognizes that this approach may not be necessary for all types and sizes of facilities. For example, a small furniture shop may be able to safely operate under a fixed set of requirements for the well-understood hazards of wood dust. Should every provision of an OSHA combustible dust standard be addressed in a hazard assessment, or just provisions involving engineering controls? Should the hazard assessment vary according to the size or type of facility? Please explain your response.

54. It has been suggested that OSHA incorporate NFPA standards by reference to address combustible dust hazards. The Agency is concerned with a number of issues regarding this approach. These concerns include, but are not limited to:

a. The scope of NFPA standards exceeding OSHA's mandate to protect only employees.

b. The multitude of mandatory primary references, secondary references, and other subordinate references in each NFPA standard that could result in an unnecessary burden on employers.

c. The differences between the various NFPA combustible-dust-related standards.

d. The frequent updating of standards by NFPA, making the OSHA standard outdated.

e. The limited availability of older editions of NFPA standards.

f. The difficulty involved in readily updating the consensus standards referenced in an OSHA combustible dust standard to the current or most

recent edition of the consensus standards.

g. The fact that OSHA cannot legally update NFPA or other consensus standards used in its rules by referring to the ''current'' or ''most recent'' edition of the consensus standards.

How do you think the Agency should make use of NFPA standards in a prospective OSHA standard? If the NFPA standards are not directly incorporated by reference into the OSHA standard, would it be appropriate for the OSHA standard to reference NFPA standards as compliance alternatives (*e.g.,* if an employer complies with the referenced NFPA standard applicable to an operation, OSHA would deem the employer to be in compliance with the applicable provision of the OSHA standard)?

55. Outreach efforts (both public and private), employer awareness, and OSHA's enforcement have increased in response to various combustible dust incidents over the last decade. As a result, many employers continue to upgrade their facilities and update their operating procedures to prevent and control combustible dust hazards. Would an OSHA combustible dust standard increase employee safety beyond the level already attained through current Federal efforts, State and local requirements, and voluntary standards? What approach would most effectively increase the safety of employees? Please provide a rationale for your response.

56. In 2003, OSHA concluded in its regulatory review that no significant changes were needed to OSHA's standard on Grain handling facilities at that time. Are any revisions needed to the portions of this standard that address fires and explosions? Are revisions to this standard necessary to harmonize it with the treatment of other dusts? Should the existing provisions of the standard that address fires and explosions be covered under a combustible dust rule? If OSHA retained the standard and issued a combustible dust standard that applied to other facilities and processes, would portions of your plant be covered by both standards? If so, would this present a problem? Please explain your response.

57. OSHA anticipates that administrative and work practice controls would be included in a combustible dust standard. For instance, several OSHA standards already address the accumulation of fugitive combustible dust, but do not address the escape of dust. Some ignition sources are covered under current OSHA standards (such as electrical and powered industrial trucks), but other, easily controlled ignition sources, would likely be addressed in a prospective OSHA combustible dust standard (such as open flames, sparks, hot surfaces, static electricity, tools, and smoking). Engineering controls can be more costly and take longer to implement than administrative controls. Should an OSHA combustible dust standard have requirements for engineering controls to control fugitive combustible dust? Which engineering controls should or should not be required, and under what circumstances? Should OSHA require retrofitting of engineering controls, and if so, which controls? What time period should OSHA allow for retrofitting? What are the costs associated with retrofitting these controls?

58. Workers are often in the best position to understand how processes work and the characteristics of the materials involved. Workers also may be in the best position to see how variations in procedures or equipment can affect their safety. Should operational employees participate in the development of engineering and administrative controls? Will this participation improve their safety? Please explain your response.

59. Facilities, processes, and materials are subject to change over time. These changes can affect potential hazards, and, thereby, the means used to mitigate those hazards. If these changes are not examined to determine if corresponding changes in protection or prevention are necessary, worker safety could be decreased. Should change management be a component of an OSHA standard? Why or why not?

60. A fire, explosion, or near-miss, could indicate that improvements are necessary to provide an adequate level of employee safety. Improvements may depend on the incident's severity or consequences. Should investigations of fires or explosions be a part of an OSHA combustible dust standard? Should a fire or explosion be classified for reporting purposes in terms of its severity, effect, size, or duration? If so, provide details. Should investigations and reporting of near-misses be a part of an OSHA standard? Please explain your response.

61. Should an OSHA combustible dust standard address the hazards of fighting fires in combustible-dust-producing facilities? If so, should the standard address fire fighting by designated employees, an employer's industrial fire brigade, or other emergency responders? In your response, provide details on hazards specific to fighting fires in or near combustible dust.

M. Economic Impacts and Benefits

As part of the process of developing a standard, OSHA must estimate the costs, economic impacts, and benefits of the standard. OSHA also analyzes the benefits of its standards in terms of reduced deaths, injuries, and property loss. The following questions will provide OSHA with needed economic impact and benefits information.

62. What are the potential economic impacts associated with the promulgation of a standard specific to the hazards of combustible dust? Describe these impacts in terms of benefits from the reduction of incidents and injuries; effects on revenue and profit; and any other relevant impact measure. If you have any examples of estimates of the costs of controlling combustible dust hazards, please provide them.

63. What changes, if any, in market conditions would reasonably be expected to result from issuing a standard on combustible dust? Describe any changes in market structure or concentration, and any effects on services, that would reasonably be expected from issuing such a standard.

64. Would a comprehensive OSHA standard on combustible dust reduce fire and explosion hazards? How would an OSHA standard address any noncompliance problem (such as, noncompliance with the housekeeping standard or the GDC)?

N. Impacts on Small Entities

In developing a standard, OSHA must determine whether it will have a significant impact on a substantial number of small businesses. If the standard has such impacts, OSHA is required to develop a regulatory flexibility analysis and assemble a Small Business Regulatory Enforcement Fairness Act (SBREFA) Panel prior to publishing a proposal. Regardless of the significance of the impacts, OSHA seeks ways of minimizing the burdens on small businesses consistent with OSHA's statutory and regulatory requirements and objectives. OSHA has preliminarily determined that 330,000 small firms owning 351,000 establishments and employing 6.5 million employees are in industries that experienced combustible dusts fires or explosions in the past.

65. How many, and what type of small firms, or other small entities, have combustible dust hazards, and what percentage of their industry (NAICS code) do these entities comprise?

66. How, and to what extent, would small entities in your industry be affected by an OSHA standard

regulating combustible dust? Do special circumstances exist that make controlling combustible dust more difficult or more costly for small entities than for large entities? Describe these circumstances.

O. Compliance Assistance

As indicated above, OSHA has provided outreach and guidance documents, and training, related to combustible dust hazards. Through the following questions, the Agency seeks information on the effectiveness and benefits of its outreach, guidance, and training efforts, as well as suggestions for future products.

67. Are you familiar with any of the following guidance and outreach products OSHA has produced? Which of these products have you used as an aid in determining what to do about combustible dust in your facility?

a. Safety and Health Information Bulletin—*Combustible Dust in Industry: Preventing and Mitigating the Effects of Fire and Explosions.*

b. Web site Safety and Health Topics Page—*Combustible Dust.*

c. Hazard Alert Fact Sheet—*Combustible Dust Explosions.*

d. Poster—*Combustible Dust—Does your company or firm process any of these products or materials in powdered form?*

68. What types of materials, products, or outreach would assist you and employees in addressing combustible dust hazards? Do small businesses have special needs with respect to the form or content of such materials? Would dust-specific or industry-specific materials be useful?

69. Do you prefer paper publications such as booklets, fact sheets, and quick cards, or electronic tools such as OSHA safety and health topics pages and eTools?

III. Public Participation

Submit comments in response to this document by (1) hard copy, (2) fax transmission (facsimile), or (3) electronically through the Federal Rulemaking Portal. Because of security-related procedures, a significant delay may occur in receiving comments by regular mail. Contact the OSHA Docket Office at (202) 693–2350 for information about security procedures concerning the delivery of materials by express delivery, hand delivery, and messenger service.

All comments and submissions are available for inspection and copying at the OSHA Docket Office at the Technical Data Center, Room N–2625, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210. Comments and submissions are also available at *http://www.regulations.gov.* OSHA cautions commenters about submitting personal information such as Social Security numbers and birth dates. Contact the OSHA Docket Office at (202) 693–2350 for information about accessing materials in the docket.

Electronic copies of this **Federal Register** notice, as well as news releases and other relevant documents, are available at OSHA's Web page: *http://www.osha.gov/index.html.*

IV. Authority and Signature

This document was prepared under the direction of Jordan Barab, Acting Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, pursuant to sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), 29 CFR part 1911, and Secretary's Order 5–2007 (72 FR 31160).

Jordan Barab,

Acting Assistant Secretary of Labor for Occupational Safety and Health.

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Federal Register

Wednesday,
October 21, 2009

Part IV

Millennium Challenge Corporation

Notice of Entering Into a Compact With the Republic of Senegal; Notice

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 09–18]

Notice of Entering Into a Compact With the Republic of Senegal

AGENCY: Millennium Challenge Corporation.

ACTION: Notice.

SUMMARY: In accordance with Section 610(b)(2) of the Millennium Challenge Act of 2003 (Pub. L. 108–199, Division D), the Millennium Challenge Corporation (MCC) is publishing a summary and the complete text of the Millennium Challenge Compact between the United States of America, acting through the Millennium Challenge Corporation, and the Republic of Senegal. Representatives of the United States Government and the Republic of Senegal executed the Compact documents on September 16, 2009.

Dated: September 23, 2009.

Henry Pitney,

Acting General Counsel, Millennium Challenge Corporation.

Summary of Millennium Challenge Compact With the Republic of Senegal

The five-year Millennium Challenge Compact with the Republic of Senegal (''Compact'') will provide up to $540 million to reduce poverty and accelerate economic growth. The Compact aims to enable improved agricultural productivity and to expand access to markets and services through critical infrastructure investments in roads and irrigation sectors (''Program'').

1. Roads Rehabilitation Project ($324 million)

The Roads Rehabilitation Project seeks to expand access to markets and services and reduce transportation time and costs by improving the condition of certain strategic roads. Specifically, the project will support the rehabilitation and upgrading of portions of National Road No. 2 (RN2), the northernmost road in Senegal, which borders the Senegal River, and National Road No. 6 (RN6), located in Casamance, the poorest region of Senegal, in the south. The government of Senegal has prioritized both roads in its Road Sector Master Plan, and their rehabilitation is in line with the national policy of increasing growth through road creation, renovation, and maintenance. The RN2 serves as the primary road to transport and export products from irrigation areas along the Senegal River, thereby complementing the Compact's Irrigation and Water Resources Management Project (described below). The RN2 is also a strategic road, connecting Dakar harbor to Mauritania and Mali, and to southern cities in Senegal. The RN6 is the only road available to transport local agricultural products from Casamance to the rest of Senegal. It is also a strategic road, connecting Senegal with Guinea Bissau, Guinea (Conakry), and Mali. The improvement of both roads is expected to stimulate domestic and trans-border traffic and commerce. The primary activities for the Roads Rehabilitation Project are as follows:

- The RN2 activity will rehabilitate and upgrade approximately 120 kilometers of road, from Richard Toll to Ndioum (a primarily agricultural and agricultural processing area of Senegal), and replace or upgrade associated structures, such as bridges and culverts, to eliminate flooding, improve road safety, and provide reliable, year-round access to markets, schools, and hospitals, including during the rainy seasons.
- The RN6 activity will rehabilitate and upgrade approximately 256 kilometers of road, from Ziguinchor to the crossroads at the town of Kounkane, and will replace or upgrade associated structures, resulting in reduced transport costs and time and improved access to markets and social services.

2. Irrigation and Water Resources Management Project ($170 million)

The Irrigation and Water Resources Management Project—comprising infrastructure investments in the Senegal River Delta and Department of Podor areas—seeks to improve the productivity of the agricultural sector by extending and improving the quality of the irrigation system in certain agriculture-dependent areas of northern Senegal. The Project conforms to Senegal's 1998 Master Plan for poverty reduction and agricultural development in the Senegal River Valley and is designed to address the following three factors contributing to low agricultural yields: (i) Poor quality of the existing irrigation and drainage infrastructure; (ii) insufficient delivery of available water to agricultural areas; and (iii) lack of an appropriate drainage system, which leads to soil salinity. Specifically, the project will support investments in the Senegal River Valley intended to: (i) Increase the volume of irrigation water in the Senegal River Valley to develop approximately 8,500–10,500 hectares of additional irrigated land; (ii) eliminate the risk of abandonment of approximately 26,000 hectares of existing irrigable land; and (iii) provide additional supply of water for human and animal use in the project areas. The project will also support a land tenure security activity, to provide for, or maintain, a secure land tenure environment for all of the inhabitants of the region directly affected by the project. The project may also invest in complementary social safeguard measures, such as day care centers and multi-purpose livestock centers.

3. Administration

The Compact also includes program management and oversight costs estimated at $42 million over a five-year timeframe, including the costs of administration, management, auditing, fiscal and procurement agent services, environmental and social oversight, and funding to facilitate Compact implementation. In addition, the cost of monitoring and evaluation of the Compact is budgeted at approximately $4 million.

4. Intended Beneficiaries and Expected Results

Compact Program:

- Approximately 138,600 households, or approximately 1.66 million individuals within those households, are estimated to benefit from the Compact Program within twenty years. These estimates assume some overlap among beneficiaries in the Senegal River Valley.
- The largest number of beneficiaries—approximately 1.1 million—would be located in the Casamance. About 75% of the Program beneficiaries in the Casamance are expected to come from households living on less than 2 dollars per person per day. An estimated 42% of total Program beneficiaries in the Casamance live on $1.25 per person per day, or less. Although Program activities in the Casamance are expected to cast a wider net over beneficiaries, about 38% of total benefits generated by the Program would accrue to beneficiaries in that region. The Program would be an important preliminary contribution to the development of the Casamance and greatly facilitate other future investment there.
- Approximately 62% of Program benefits would accrue to beneficiaries in the Senegal River Valley. Here, approximately 45% of total beneficiaries are expected to be from households subsisting on less than $2 per person per day and 25% from households living on $1.25, or less. Whereas Program investments in the Senegal River Valley will affect the welfare of a smaller number of people than in the south, the investments are expected to

extend significantly and solidify gains in the reduction of poverty in the north.

Roads Rehabilitation Project:

• The RN2 Road Activity is expected to benefit approximately 21,000 households or 250,000 individuals over the next 20 years. Over the life of the investment, total average benefits per beneficiary for the RN2 are approximately $870.

• The RN6 Road Activity would benefit some 102,000 households or approximately 1.1 million people over the next 20 years. Over the life of the investment, total average benefits per beneficiary for the RN6 are approximately $530.

Irrigation and Water Resources Management Project:

• Beneficiaries of the Irrigation and Water Resources Management Project include households, owners or shareholders of farming enterprises, and households that have individuals employed in the operation of enterprise farms.

• Over the course of the investment, the Project would benefit approximately 22,390 households, or 268,700 individuals, through participation in own agricultural production or employment in agriculture.

• Assuming that households, on average, are comprised of twelve persons cultivating two hectares of irrigated land, the scale of net revenue from a holding would have a substantial impact on the welfare of poor households. Average future revenues of about purchasing power parity (''PPP'') $4,470 per two-hectare farm would increase household incomes by more than PPP $1 per person per day. For households subsisting with incomes of PPP $1.25 or less per person per day, this increment would move households from being extremely poor to being near poor (not far below or above PPP $2 per person per day).

Millennium Challenge Compact Between The United States of America Acting Through the Millennium Challenge Corporation and the Republic of Senegal

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Millennium Challenge Compact

Preamble

This Millennium Challenge Compact (this ''*Compact*'') is between the United States of America, acting through the Millennium Challenge Corporation, a United States government corporation (''*MCC*''), and the Republic of Senegal (''*Senegal*''), acting through its Government (the ''*Government*'') (individually a ''*Party*'' and collectively, the ''*Parties*'').

Recalling that the Government consulted with the private sector and civil society of Senegal to determine the priorities for the use of Millennium Challenge Account assistance and developed and submitted to MCC a proposal for such assistance focused on poverty reduction; and

Recognizing that MCC wishes to help Senegal implement a program to achieve the goal and objectives described herein (the ''Program'');

Capitalized terms used herein shall have the meanings specified in Annex V hereto.

The Parties hereby agree as follows:

Article 1. Goal and Objectives

Section 1.1 Compact Goal

The goal of this Compact is to reduce poverty in Senegal through economic growth (the ''*Compact Goal*'').

Section 1.2 Program Objective

The objective of the Program (as further described in Annex I) (the ''*Program Objective*'') is to enable improved agricultural productivity and to expand access to markets and services through critical infrastructure investments in roads and irrigation sectors.

Section 1.3 Project Objectives

The objectives of the Projects (as further described in Annex I) (each a ''*Project Objective*'' and collectively, the ''*Project Objectives*'') are as follows:

(a) The objective of the Roads Rehabilitation Project is to expand access to markets and services by improving the condition of certain strategic roads and reducing transportation time and costs.

(b) The objective of the Irrigation and Water Resources Management Project is to improve the productivity of the agricultural sector by extending and improving the quality of the irrigation system in certain agriculture-dependent areas of northern Senegal.

Article 2. Funding and Resources

Section 2.1 Program Funding

MCC hereby grants to the Government, under the terms of this Compact, an amount not to exceed Five Hundred Thirty Five Million United States Dollars (US$535,000,000) (''*Program Funding*'') for use by the Government to implement the Program. The allocation of Program Funding uses is generally described in Annex II to this Compact.

Section 2.2 Compact Implementation Funding

(a) MCC hereby grants to the Government, under the terms of this Compact, in addition to the Program Funding described in Section 2.1, an amount not to exceed Five Million United States Dollars (US$5,000,000) (''*Compact Implementation Funding''*) under Section 609(g) of the Millennium Challenge Act of 2003, as amended (the ''*MCA Act''*), for use by the Government as agreed by the Parties, which may include use for the following purposes:

(i) financial management and procurement activities;

(ii) administrative activities including start-up costs such as staff salaries and administrative support expenses such as office equipment, and computers and other information technology or capital equipment; and

(iii) other Compact implementation activities approved by MCC.

The allocation of Compact Implementation Funding among uses is generally described in Annex II to this Compact.

(b) Notwithstanding Section 7.3 of this Compact, this Section 2.2 and any other provisions of this Compact necessary to make use of Compact Implementation Funding for the purposes set forth herein, shall be effective, for purposes of Compact Implementation Funding only, as of the date this Compact is signed by MCC and the Government.

(c) Each Disbursement of Compact Implementation Funding is subject to satisfaction of the conditions to such disbursement as set forth in Annex IV.

(d) If, after the first anniversary of this Compact entering into force, MCC determines that the full amount of Compact Implementation Funding under Section 2.2(a) of this Compact exceeds the amount which reasonably can be utilized for the purposes and uses set forth in Section 2.2(a) of this Compact, MCC, by written notice to the Government, may withdraw the excess amount, thereby reducing the amount of the Compact Implementation Funding as set forth in Section 2.2(a) (such excess, the ''*Excess CIF Amount''*). In such event, the amount of Compact Implementation Funding granted to the Government under Section 2.2(a) will be reduced by the Excess CIF Amount, and MCC will have no further obligations with respect to such Excess CIF Amount.

(e) MCC, at its option by written notice to the Government, may elect to grant to the Government an amount equal to all or a portion of such Excess CIF Amount as an increase in the Program Funding, and such additional Program Funding will be subject to the terms and conditions of this Compact and any relevant supplemental agreement applicable to Program Funding.

Section 2.3 MCC Funding

Program Funding and Compact Implementation Funding are collectively referred to in this Compact as ''*MCC Funding.''*

Section 2.4 Disbursement

In accordance with this Compact and the Program Implementation Agreement, MCC will disburse MCC Funding for expenditures incurred in furtherance of the Program (each instance, a ''*Disbursement''*). Subject to the satisfaction of all applicable conditions, the proceeds of such Disbursements will be made available to the Government, at MCC's sole election, by (a) deposit to one or more bank accounts established by the Government and acceptable to MCC (each, a ''*Permitted Account''*) or (b) direct payment to the relevant provider of goods, works or services for the implementation of the Program. MCC Funding may be expended only to cover Program expenditures as provided in this Compact and the Program Implementation Agreement.

Section 2.5 Interest

The Government will pay to MCC any interest or other earnings that accrue on MCC Funding (whether by directing such payments to a bank account outside Senegal that MCC may from time to time indicate or as otherwise directed by MCC).

Section 2.6 Government Resources; Budget

(a) The Government will provide all funds and other resources, and will take all actions, that are necessary to carry out the Government's responsibilities and obligations under this Compact.

(b) The Government will use its best efforts to ensure that all MCC Funding it receives or is projected to receive in each of its fiscal years is fully accounted for in its annual budget on a multi-year basis.

(c) The Government will not reduce the normal and expected resources that it would otherwise receive or budget from sources other than MCC for the activities contemplated under this Compact and the Program.

(d) Unless the Government discloses otherwise to MCC in writing, MCC Funding will be in addition to the resources that the Government would otherwise receive or budget for the activities contemplated under this Compact and the Program.

Section 2.7 Limitations on the Use of MCC Funding

The Government will ensure that MCC Funding (or any refunds or reimbursements of MCC Funding paid by the Government in accordance with this Compact that MCC permits to be used in connection with the Program) will not be used for any purpose that would violate United States law or policy, as specified in this Compact or as further notified to the Government in writing or by posting from time to time on the MCC Web site at *http://www.mcc.gov* (the ''*MCC Web site''*), including but not limited to the following purposes:

(a) for assistance to, or training of, the military, police, militia, national guard or other quasi-military organization or unit;

(b) for any activity that is likely to cause a substantial loss of United States jobs or a substantial displacement of United States production;

(c) to undertake, fund or otherwise support any activity that is likely to cause a significant environmental, health, or safety hazard, as further described in MCC's environmental and social guidelines posted from time to time on the MCC Web site or otherwise made available to the Government by MCC (the ''*MCC Environmental Guidelines''*); or

(d) to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions, to pay for the performance of involuntary sterilizations as a method of family planning or to coerce or provide any financial incentive to any person to undergo sterilizations or to pay for any biomedical research which relates, in whole or in part, to methods of, or the performance of, abortions or involuntary sterilization as a means of family planning.

Section 2.8 Taxes

(a) Unless the Parties otherwise specifically agree in writing, the Government will ensure that each of the following is free from the payment or imposition of any existing or future taxes, duties, levies, contributions, or other similar charges (''*Taxes''*) of or in Senegal (including any such Taxes imposed by a national, regional, local, or other governmental or taxing authority of or in Senegal) (i) the Program; (ii) MCC Funding; (iii) interest or earnings on MCC Funding; (iv) any Project or activity implemented under the Program; (v) MCA-Senegal (or MFG–

MCA prior to MCA-Senegal's establishment); (vi) goods, works, services, technology, and other assets and activities under the Program or any Project; (vii) persons and entities that provide such goods, works, services, technology, and assets, or perform such activities; and (viii) income, profits, and payments with respect thereto. The Parties acknowledge and agree that ''Taxes'' include, among other things, value added and other transfer taxes (including exemption therefrom with credit), profit and income taxes, property and ad valorem taxes, import and export duties and taxes (including for goods imported and re-exported for personal use), withholding taxes, payroll taxes, social security and social insurance contributions.

(b) Without limiting the generality of the definition of Taxes as set forth in Section 2.8(a), the Parties hereby agree that the following taxes, duties, fees, and similar charges are also specifically included in the definition of ''Taxes'' requiring exemptions in accordance with this Compact: (i) Customs duties and associated fees (including redevances statistiques (RS, currently 1%), droits de douanes (DD, currently 0–20%), TVA (VAT, currently 18%), les droits des chargeurs (COSEC, currently 0.20%), and les prélèvements communautaires de l'UEMOA ou de la CEDEAO (for example, PCS, currently, 1% and CEDEAO, currently 0.5%)); (ii) value added taxes (VAT); (iii) taxes on petroleum products, including but not limited to the tax speciale sur hydrocarbons; (iv) registration and stamp taxes; (v) taxes on the corporate income of professional, accounting or consulting firms (''benefices non commerciaux'') derived from Compact-related work; (vi) taxes on the corporate income of companies or other legal persons (''benefices industriels et commerciaux'') derived from Compact-related work; and (vii) taxes on the personal income of individuals working under the Compact.

(c) Unless otherwise agreed by MCC in writing, set forth in Annex VI are procedures that the Government will implement to effectuate the exemption from Taxes required by Section 2.8(a) and Section 2.8(b) above with respect to each of the Taxes addressed therein. To the extent that there are Taxes not addressed in Annex VI, whether currently in force or established in the future, that MCC determines, in its sole discretion, are not being exempted by the Government in accordance with this Section 2.8, the Government hereby agrees that it will implement appropriate procedures (approved in writing by MCC) to ensure that such additional Taxes are exempted in accordance with this Section 2.8. For the avoidance of doubt, the identification (or lack of identification) of Taxes in Annex VI, or the description (or lack of description) of procedures to implement the required exemption from such Taxes in Annex VI, shall in no way limit the scope of the tax exemption required by this Section 2.8.

(d) Unless otherwise agreed in writing by the Parties, the provisions of Section 2.8(a) and 2.8(b) shall not apply to income Taxes on, and contributions with respect to, individuals or legal persons who are nationals of Senegal, provided that such Taxes and contributions are not discriminatory and are generally applicable to all nationals in Senegal.

(e) In complying with the tax exemption obligations set forth herein, the Government will exempt MFG–MCA, MCA-Senegal, the Fiscal Agent, the Procurement Agent, and/or any other provider of goods, services, or works in connection with the Program from any obligation imposed by the laws of Senegal to withhold any Taxes from any payments made to any natural persons or legal persons working under the Program to the extent that such natural persons or legal persons are not nationals of Senegal.

(f) For the purposes of Section 2.8(d) and 2.8(e), the term ''national'' means natural persons who are citizens or permanent residents of Senegal and legal persons who are formed under the laws of Senegal (excluding MCA-Senegal, MFG–MCA and any other entity formed for the purpose of implementing the Government's obligations hereunder); provided that in determining if a natural person is a permanent resident of Senegal or if a legal person has been formed under the laws of Senegal, the taxable status of such individual or legal person shall be based on its status at the time it is awarded or executes a Compact-related agreement or contract, and such initial determination shall not change regardless of: (i) The type of agreement or contract used to employ or engage such individual, company, or other legal person, (ii) any laws of Senegal that purport to change such status based on period of contract performance or period of time residing and/or working in Senegal, and/or (iii) any requirement under the laws of Senegal that a company or other legal person must establish a branch office in Senegal, or otherwise register or organize itself under the laws of Senegal, in order to provide goods, services, or works in Senegal.

(g) The Government will from time to time execute and deliver, or cause to be executed and delivered, such other instructions, instruments or documents, and to take or cause to be taken such other actions as may be necessary or appropriate in the determination of MCC in order to implement this Section 2.8 of the Compact. Such further assurances may include, without limitation, (i) passage of an ''arreté d'application'' (or such similar document (or documents) having the same legal effect), in form and substance satisfactory to MCC to provide specific instructions to Government agents with respect to their role in the implementation of the exemption from Taxes required by this Compact; or (ii) provision of an attestation d'exoneration to appropriate beneficiaries of the tax exemption described in this Compact.

(h) If a Tax has been levied and paid contrary to the requirements of this Section 2.8, or any agreement entered into pursuant to this Section 2.8, the Government will refund promptly to MCC (or to another party as designated by MCC) the amount of such Tax in United States Dollars or the currency of Senegal within thirty (30) days (or such other period as may be agreed in writing by the Parties) after the Government is notified in writing (whether by MCC, MFG–MCA, or MCA-Senegal) that such Tax has been paid.

(i) No MCC Funding, proceeds thereof, or Program assets may be applied by the Government in satisfaction of its obligations under this Section 2.8.

Article 3. Implementation

Section 3.1 Program Implementation Agreement

Prior to entry into force, the Government and MCC will enter into an agreement relating to, among other matters, implementation arrangements, fiscal accountability and disbursement, and use of MCC Funding (the ''*Program Implementation Agreement*'' or ''*PIA*''). The Government will implement the Program in accordance with the Compact and the PIA.

Section 3.2 Government Responsibilities

(a) The Government has principal responsibility for overseeing and managing the implementation of the Program.

(b) The Government hereby designates MCA-Senegal, an entity to be established through passage of a decree substantially in the form and substantially on the terms of the form of decree set forth in Schedule 2 to Annex

I, as the accountable entity to implement the Program and to exercise and perform the Government's rights and responsibilities with respect to the oversight, management, and implementation of the Program, including, without limitation, managing the implementation of Projects and their Activities, allocating resources, and managing procurements. Such entity will be referred to herein as ''*MCA-Senegal,*'' and will have the authority to bind the Government with regard to all Program activities. Prior to MCA-Senegal's establishment, the Government hereby designates the Mission de Formulation et du Gestion du MCA Senegal (''*MFG–MCA*''), established by Decret Nº 2008–53 dated January 29, 2008, to act on behalf of the Government with respect to the Compact and the Program. For the avoidance of doubt, the designation of MCA-Senegal (and MFG–MCA prior to MCA-Senegal's establishment) as set forth in this Section 3.2(b) will not relieve the Government of any of its obligations or responsibilities as set forth hereunder, under any related agreement (including, upon execution thereof, the PIA), or in the Program Guidelines, for which the Government remains fully responsible. MCC hereby acknowledges and consents to the designation in this Section 3.2(b).

(c) The Government will ensure that no law or regulation in Senegal now or hereinafter in effect makes or will make unlawful or otherwise prevent or hinder the performance of any of the Government's obligations under this Compact, the PIA, or any other related agreement or any transaction contemplated hereby or thereby.

(d) The Government will ensure that any assets or services funded in whole or in part (directly or indirectly) by MCC Funding will be used solely in furtherance of this Compact and the Program unless otherwise agreed by MCC in writing.

(e) The Government will take all necessary or appropriate steps to achieve the Program Objective and Project Objectives during the Compact Term.

(f) The Government will fully comply with the Program Guidelines, as applicable, in its implementation of the Program.

Section 3.3 Policy Performance

In addition to undertaking the specific policy, legal, and regulatory reform commitments identified in Annex I (if any), the Government will seek to maintain and to improve its level of performance under the policy criteria identified in Section 607 of the MCA Act, and the selection criteria and methodology used by MCC.

Section 3.4 Government Assurances

The Government assures MCC that:

(a) as of the date this Compact is signed by the Government, the information provided to MCC by or on behalf of the Government in the course of reaching agreement with MCC on this Compact is true, correct and complete in all material respects;

(b) this Compact, upon its ratification by the Government, does not, and will not, conflict with any other international agreement or other obligation of the Government or any of the laws of Senegal; and

(c) the Government will not invoke any of the provisions of its internal law to justify or excuse a failure to perform its duties or responsibilities under this Compact.

Section 3.5 Implementation Letters

From time to time, MCC may provide guidance to the Government in writing on any matters relating to this Compact, MCC Funding, or implementation of the Program (each, an ''*Implementation Letter*''). The Government will apply such guidance in implementing the Program. Without limiting the foregoing, either Party may, through its Principal Representative or any Additional Representative, as the case may be, initiate discussions that may result in a jointly agreed-upon Implementation Letter to confirm and record their mutual understanding on aspects related to the implementation of this Compact, the PIA, or other related agreements.

Section 3.6 Procurement

The Government will ensure that the procurement of all goods, works, and services by the Government, or any applicable provider providing goods, works, and services, to implement the Program will be consistent with the program procurement guidelines posted from time to time on the MCC Web site (the ''*MCC Program Procurement Guidelines*''). The MCC Program Procurement Guidelines include, among others, the following requirements:

(a) open, fair, and competitive procedures must be used in a transparent manner to solicit, award and administer contracts and to procure goods, works, and services;

(b) solicitations for goods, works, and services must be based upon a clear and accurate description of the goods, works, and services to be acquired;

(c) contracts must be awarded only to qualified contractors that have the capability and willingness to perform the contracts in accordance with their terms on a cost effective and timely basis; and

(d) no more than a commercially reasonable price, as determined, for example, by a comparison of price quotations and market prices, will be paid to procure goods, works, and services.

Section 3.7 Records; Accounting; Covered Providers; Access

(a) Government Books and Records. The Government will maintain, and will use its best efforts to ensure that all Covered Providers maintain accounting books, records, documents, and other evidence relating to the Program adequate to show, to MCC's satisfaction, the use of all MCC Funding (''*Compact Records*''). In addition, the Government will furnish or cause to be furnished to MCC, upon its request, all such Compact Records.

(b) Accounting. The Government will maintain and will use its best efforts to ensure that all Covered Providers maintain Compact Records in accordance with generally accepted accounting principles prevailing in the United States, or at the Government's option and with MCC's prior written approval, other accounting principles, such as those (i) prescribed by the International Accounting Standards Board, or (ii) then prevailing in Senegal. Compact Records must be maintained for at least five (5) years after the end of the Compact Term or for such longer period, if any, required to resolve any litigation, claims or audit findings or any statutory requirements.

(c) Providers and Covered Providers. Unless the Parties agree otherwise in writing, a ''*Provider*'' is (i) any entity of the Government that receives or uses MCC Funding or any other Program asset in carrying out activities in furtherance of this Compact or (ii) any third party that receives at least US$50,000 in the aggregate of MCC Funding (other than as salary or compensation as an employee of an entity of the Government) during the Compact Term. A ''*Covered Provider*'' is (i) a non-United States Provider that receives (other than pursuant to a direct contract or agreement with MCC) US$300,000 or more of MCC Funding in any Government fiscal year or any other non-United States person or entity that receives, directly or indirectly, US$300,000 or more of MCC Funding from any Provider in such fiscal year, or (ii) any United States Provider that receives (other than pursuant to a direct contract or agreement with MCC) US$500,000 or more of MCC Funding in any Government fiscal year or any other

United States person or entity that receives, directly or indirectly, US$500,000 or more of MCC Funding from any Provider in such fiscal year.

(d) Access. Upon MCC's request, the Government, at all reasonable times, will permit, or cause to be permitted, authorized representatives of MCC, an authorized United States inspector general, the United States Government Accountability Office, any auditor responsible for an audit contemplated herein or otherwise conducted in furtherance of this Compact, and any agents or representatives engaged by MCC or the Government to conduct any assessment, review, or evaluation of the Program, the opportunity to audit, review, evaluate, or inspect facilities and activities funded in whole or in part by MCC Funding.

Section 3.8 Audits; Reviews

(a) Government Audits. Except as the Parties may otherwise agree in writing, the Government will, on at least a semi-annual basis, conduct, or cause to be conducted, financial audits of all disbursements of MCC Funding covering the period from signing of this Compact until the earlier of the following December 31 or June 30 and covering each six-month period thereafter ending December 31 and June 30, through the end of the Compact Term. In addition, upon MCC's request, the Government will ensure that such audits are conducted by an independent auditor approved by MCC and named on the list of local auditors approved by the Inspector General of MCC (the ''*Inspector General''*) or a United States-based certified public accounting firm selected in accordance with the ''Guidelines for Financial Audits Contracted by MCA'' (the ''*Audit Guidelines''*) issued and revised from time to time by the Inspector General, which are posted on the MCC Web site. Audits will be performed in accordance with the Audit Guidelines and be subject to quality assurance oversight by the Inspector General. Each audit must be completed and the audit report delivered to MCC no later than ninety (90) days after the first period to be audited and no later than ninety (90) days after each June 30 and December 31 thereafter, or such other period as the Parties may otherwise agree in writing.

(b) Audits of United States Entities. The Government will ensure that agreements between the Government or any Provider, on the one hand, and a United States nonprofit organization, on the other hand, that are financed with MCC Funding state that the United States nonprofit organization is subject to the applicable audit requirements contained in OMB Circular A–133 issued by the United States Government Office of Management and Budget (''*OMB''*). The Government will ensure that agreements between the Government or any Provider, on the one hand, and a United States for-profit Covered Provider, on the other hand, that are financed with MCC Funding state that the United States for-profit organization is subject to audit by the applicable United States Government agency, unless the Government and MCC agree otherwise in writing.

(c) Corrective Actions. The Government will (i) use its best efforts to ensure that Covered Providers take, where necessary, appropriate and timely corrective actions in response to audits, (ii) consider whether a Covered Provider's audit necessitates adjustment of the Government's records, and (iii) require each such Covered Provider to permit independent auditors to have access to its records and financial statements as necessary.

(d) Audit by MCC. MCC will have the right to arrange for audits of the Government's use of MCC Funding.

(e) Cost of Audits, Reviews or Evaluations. MCC Funding may be used to fund the costs of any audits, reviews, or evaluations required under this Compact.

Article 4. Communications

Section 4.1 Communications

Any document or communication required or submitted by either Party to the other under this Compact must be in writing and, except as otherwise agreed with MCC, in English. For this purpose, the address of each Party is set forth below.

To MCC:

Millennium Challenge Corporation, Attention: Vice President, Compact Implementation, (in each case, with a copy to the Vice President and General Counsel), 875 Fifteenth Street, NW., Washington, DC 20005, United States of America, Facsimile: (202) 521–3700, Telephone: (202) 521–3600, E-mail: *VPImplementation@mcc.gov* (Vice President, Compact Implementation), *VPGeneralCounsel@mcc.gov* (Vice President and General Counsel).

To the Government:

Ministry of Economy and Finance, Rue Rene Ndiaye, BP 4017, Dakar, Senegal, Tel: +221 (33) 822 2899, Fax: +221 (33) 822 4195.

with a copy to:

To MFG–MCA (until MCA-Senegal's establishment), Avenue Bourguiba, Immeuble Gamma, 3eme etage, Dakar, Senegal, Tel: +221 (33) 869 1665, Fax: +221 (33) 825 0887.

Upon establishment of MCA-Senegal, MCA-Senegal will notify the Parties of its contact details.

Section 4.2 Representatives

For all purposes of this Compact, the Government will be represented by the individual holding the position of, or acting as, the Minister of Economy and Finance of Senegal, and MCC will be represented by the individual holding the position of, or acting as, Vice President, Compact Implementation (each of the foregoing, a ''*Principal Representative''*). Each Party, by written notice to the other Party, may designate one or more additional representatives (each, an ''*Additional Representative''*) for all purposes other than signing amendments to this Compact. The Government hereby irrevocably designates the Director General of MFG–MCA as an Additional Representative, to be replaced by the Director General of MCA-Senegal, upon the establishment of MCA-Senegal. A Party may change its Principal Representative to a new representative that holds a position of equal or higher rank upon written notice to the other Party.

Section 4.3 Signatures

With respect to all documents other than this Compact or an amendment to this Compact, a signature delivered by facsimile or electronic mail will be binding on the Party delivering such signature to the same extent as an original signature would be.

Article 5. Termination; Suspension; Refunds

Section 5.1 Termination; Suspension

(a) Either Party may terminate this Compact without cause in whole by giving the other Party thirty (30) days' written notice. MCC may also terminate this Compact without cause in part by giving the Government thirty (30) days' written notice.

(b) MCC may, immediately, upon written notice to the Government, suspend or terminate this Compact or MCC Funding, in whole or in part, and any obligation related thereto, if MCC determines that any circumstance identified by MCC as a basis for suspension or termination (whether in writing to the Government or by posting on the MCC Web site) has occurred, which circumstances include but are not limited to the following:

(i) The Government fails to comply with its obligations under this Compact, the PIA, or any other agreement or arrangement entered into by the Government in connection with this Compact or the Program;

(ii) an event or series of events has occurred that MCC determines makes it probable that the Program Objective or any of the Project Objectives will not be achieved during the Compact Term or that the Government will not be able to perform its obligations under this Compact;

(iii) a use of MCC Funding or continued implementation of this Compact or the Program violates or would violate applicable law or United States Government policy, whether now or hereafter in effect;

(iv) the Government or any other person or entity receiving MCC Funding or using assets acquired in whole or in part with MCC Funding is engaged in activities that are contrary to the national security interests of the United States;

(v) an act has been committed or an omission or an event has occurred that would render Senegal ineligible to receive United States economic assistance under Part I of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2151 *et seq.*), by reason of the application of any provision of the Foreign Assistance Act of 1961 or any other provision of law;

(vi) the Government has engaged in a pattern of actions inconsistent with the criteria used to determine the eligibility of Senegal for assistance under the MCA Act; or

(vii) the Government or another person or entity receiving MCC Funding or using assets acquired in whole or in part with MCC Funding is found to have been convicted of a narcotics offense or to have been engaged in drug trafficking.

(c) All Disbursements will cease upon expiration, suspension, or termination of this Compact; provided, however, MCC may permit MCC Funding to be used, in compliance with this Compact and the PIA, to pay for (i) reasonable expenditures for goods, works, or services that are properly incurred under or in furtherance of the Program before expiration, suspension, or termination of this Compact, and (ii) reasonable expenditures (including administrative expenses) properly incurred in connection with the winding up of the Program within one hundred twenty (120) days after the expiration, suspension, or termination of this Compact, so long as, with respect to (i) and (ii) herein, the request for such expenditures is submitted within ninety (90) days after such expiration, suspension, or termination.

(d) Subject to Section 5.1(c), upon the expiration, suspension, or termination of this Compact, (i) any amounts of MCC Funding not disbursed by MCC in accordance with the Compact and the PIA will be automatically released from any obligation in connection with this Compact, and (ii) any amounts of MCC Funding disbursed to the Permitted Account by MCC but not expended before the expiration, suspension or termination of this Compact, plus accrued interest thereon will be returned to MCC within thirty (30) days after the Government receives MCC's request for such return; provided, however, that if this Compact is suspended or terminated in part, MCC may request a refund for only the amount of MCC Funding allocated to the suspended or terminated portion.

(e) MCC may reinstate any suspended or terminated MCC Funding under this Compact if MCC determines that the Government or other relevant person or entity has committed to correct each condition for which MCC Funding was suspended or terminated.

Section 5.2 Refunds; Violation

(a) If any MCC Funding, any interest or earnings thereon, or any asset acquired in whole or in part with MCC Funding is used for any purpose in violation of the terms of this Compact or the PIA, including but not limited to any violation of the Program Guidelines, then MCC may require the Government to repay to MCC in United States Dollars the value of the misused MCC Funding, interest, earnings, or asset, plus interest within thirty (30) days after the Government's receipt of MCC's request for repayment. The Government will not use MCC Funding, proceeds thereof or Program assets to make such payment.

(b) Notwithstanding any other provision in this Compact or any other agreement to the contrary, MCC's right under this Section 5.2 for a refund will continue during the Compact Term and for a period of (i) five years thereafter or (ii) one year after MCC receives actual knowledge of such violation, whichever is later.

Section 5.3 Survival

The Government's responsibilities under Sections 2.4, 2.6, 2.7, 2.8, 3.7, 3.8, 5.1(c), 5.1(d), 5.2, 5.3, 6.2, 6.4, 6.9, and 8.1 of this Compact will survive the expiration, suspension or termination of this Compact.

Article 6. Compact Annexes; Amendments; Governing Law

Section 6.1 Annexes

Each annex to this Compact constitutes an integral part hereof, and references to ''Annex'' mean an annex to this Compact unless otherwise expressly stated.

Section 6.2 Amendments

(a) The Parties may amend this Compact only by a written agreement signed by the Principal Representatives.

(b) Without formally amending this Compact, the Government hereby acknowledges and agrees that the Parties, may, through the Principal Representatives or any Additional Representative, as the case may be, in writing, modify any Annex to this Compact to (i) suspend, terminate, or modify any project described in Annex I (each, a ''*Project*'' and collectively, the ''*Projects*'') or to create a new project, (ii) change the allocations of funds among the Projects, the Project activities, or any activity under Program administration or monitoring and evaluation, or between a Project identified as of the signature of this Compact and a new project, (iii) modify the terms of Section B.3 of Annex I, or (iv) add, delete, or waive any condition precedent described in Annex IV, provided that any such modification described in (i) through (iv) (1) is consistent in all material respects with the Program Objective, (2) does not cause the amount of Program Funding to exceed the aggregate amount specified in Section 2.1 of this Compact (as may be modified by operation of Section 2.2(e) of this Compact), (3) does not cause the amount of Compact Implementation Funding to exceed the aggregate amount specified in Section 2.2(a) of this Compact, (4) does not cause the Government's responsibilities or contribution of resources to be less than specified in this Compact, (5) does not extend the Compact Term, and (6) in the case of a modification to change allocations of funds among Projects or the creation of a new project, does not materially adversely affect any activity under Program administration or monitoring and evaluation.

(c) Any modification of any annex to this Compact executed in accordance with Section 6.2(b), or any modification of any other provision of this Compact pursuant to Section 6.2(a), shall be binding on the Government without the need for further action by the Government, any further parliamentary action, or satisfaction of any additional domestic requirements of Senegal.

Section 6.3 Inconsistencies

In the event of any conflict or inconsistency between:

(a) any annex to this Compact and any of Articles 1 through 8, such Articles 1 through 8 will prevail; or

(b) this Compact and any other agreement between the Parties regarding the Program, this Compact will prevail.

Section 6.4 Governing Law

This Compact is an international agreement and as such will be governed by the principles of international law.

Section 6.5 Additional Instruments

Any reference to activities, obligations, or rights undertaken or existing under or in furtherance of this Compact or similar language will include activities, obligations, and rights undertaken by or existing under or in furtherance of any agreement, document, or instrument related to this Compact and the Program.

Section 6.6 References to MCC Web site

Any reference in this Compact, the PIA, or any other agreement entered into in connection with this Compact, to a document or information available on, or notified by posting on the MCC Web site will be deemed a reference to such document or information as updated or substituted on the MCC Web site from time to time.

Section 6.7 References to Laws, Regulations, Policies, and Guidelines

Each reference in this Compact, the PIA, or any other agreement entered into in connection with this Compact, to a law, regulation, policy, guideline, or similar document (including but not limited to the Program Guidelines) will be construed as a reference to such law, regulation, policy, guideline, or similar document as it may, from time to time, be amended, revised, replaced, or extended and will include any law, regulation, policy, guideline, or similar document issued under or otherwise applicable or related to such law, regulation, policy, guideline, or similar document.

Section 6.8 MCC Status

MCC is a United States government corporation acting on behalf of the United States government in the implementation of this Compact. MCC and the United States government have no liability under this Compact, the Program Implementation Agreement, or any related agreement, are immune from any action or proceeding arising under or relating to any of the foregoing documents, and the Government hereby waives and releases all claims related to any such liability. In matters arising under or relating to this Compact, the Program Implementation Agreement, or any related agreement neither MCC nor the United States government will be subject to the jurisdiction of the courts of Senegal or of any other jurisdiction or of any other body.

Section 6.9 English Language

This Compact is executed in English and in the event of any ambiguity or conflict between this official English version and any translation prepared for the convenience of the Parties, this official English version will prevail.

Section 6.10 Counterparts; Electronic Delivery

(a) Counterparts. This Compact, and any amendment or other agreements arising out of this Compact, may be executed in one or more counterpart signatures, and each counterpart when so executed and delivered shall be an original instrument, but such counterparts together shall constitute a single agreement.

(b) Electronic Delivery. A signature to this Compact shall be delivered only as an original signature. With respect to all other signatures, including for an amendment or any other agreements arising out of this Compact, a signature delivered by facsimile or electronic mail in accordance with Section 4.1 of this Compact shall be deemed an original signature and shall be binding on the Party delivering such signature, and the Parties hereby waive any objection to such signature or to the validity of the underlying document, certificate, notice, instrument, or agreement on the basis of the signature's legal effect, validity or enforceability solely because it is in facsimile or electronic form.

Article 7. Entry Into Force

Section 7.1 Domestic Requirements

Before this Compact enters into force, the Government will take all necessary steps to ensure that immediately upon this Compact entering into force (a) this Compact and the PIA and all of the provisions of this Compact and the PIA are valid and binding and are in full force and effect in Senegal, (b) this Compact, the PIA and any other agreement entered into in connection with this Compact to which the Government and MCC are parties are international agreements under international law such that the Government may not invoke the provisions of its internal law as justification for failure to perform its obligations thereunder, and (c) no laws of Senegal (other than the constitution of Senegal), whether now or hereafter in effect, will take precedence or prevail over the terms of this Compact or the PIA.

Section 7.2 Conditions Precedent to Entry Into Force

Before this Compact enters into force:

(a) the PIA must have been executed by the parties thereto;

(b) The Government must have delivered to MCC:

(i) a certificate, in form and substance satisfactory to MCC, signed and dated by the Principal Representative of the Government, or such other duly authorized representative of the Government acceptable to MCC, certifying that the Government has satisfied the requirements of Section 7.1;

(ii) a legal opinion from the Secretariat General du Gouvernement of Senegal (or such other legal representative of the Government acceptable to MCC), in form and substance satisfactory to MCC; and

(iii) complete, certified copies of all decrees, legislation, regulations, or other governmental documents relating to the Government's domestic requirements for this Compact to enter into force and the satisfaction of Section 7.1, which MCC may post on its Web site or otherwise make publicly available; and

(c) MCC must determine that after signature of this Compact, the Government has not engaged in any action or omission that is inconsistent with the eligibility criteria for MCC Funding.

Section 7.3 Date of Entry Into Force

This Compact will enter into force on the later of (a) the date of the last letter in an exchange of letters between the Principal Representatives confirming that each Party has completed its domestic requirements for entry into force of this Compact and (b) the date that all conditions set forth in Section 7.2 have been satisfied.

Section 7.4 Compact Term

This Compact will remain in force for five years after its entry into force, unless terminated earlier under Section 5.1 (the ''*Compact Term*'').

Section 7.5 Provisional Application

Upon signature of this Compact and until this Compact has entered into force in accordance with Section 7.3, the Parties will provisionally apply the terms of this Compact and the PIA; provided that, no Program Funding will be made available or disbursed before this Compact enters into force.

Article 8. Additional Government Covenants

Section 8.1 Additional Government Resources

(a) Without limiting the generality of Section 2.6(a), the Government will contribute, through provision in the law containing the annual governmental

budget for Senegal, an amount necessary and adequate to cover all costs associated with the following (no MCC Funding, proceeds thereof, or Program assets may be applied by the Government in satisfaction of its obligations under this Section 8.1(a)):

(i) The staffing and operations of a ''Cellule d'Appui au MCA-Senegal'' (as further described in Annex I);

(ii) consultant services, including but not limited to, any such services already contracted by MFG–MCA for the purpose of producing detailed designs in connection with the Roads Rehabilitation Project; the independent audit required in connection with the Irrigation and Water Resources Management Project as described in the PIA; and any other consultant services in connection with the Program that will not be financed with MCC Funding but are required for the successful implementation of the Program, as may be required by MCC from time to time;

(iii) any incurred severance costs or other financial liabilities triggered by termination or expiration of the MFG–MCA or MCA-Senegal employee contracts, pursuant to the terms of such contracts; and

(iv) required office space for MFG–MCA, MCA Senegal, the ''Cellule d'Appui au MCA-Senegal,'' and the MCC resident country mission.

Section 8.2 Procurement

The Government, including MCA-Senegal (and MFG–MCA prior to MCA-Senegal's establishment), will exclusively use the MCC Program Procurement Guidelines in connection with Program procurements financed with MCC Funding. With respect to Program procurements financed by the Government, the Government, including MCA-Senegal (and MFG–MCA prior to MCA-Senegal's establishment), will ensure that such procurements are consistent with the general principles set forth in Section 3.6 of this Compact.

In Witness Whereof, the undersigned, duly authorized by their respective governments, have signed this Compact this 16th day of September 2009.

Done at Washington, DC.

For Millennium Challenge Corporation, on behalf of the United States of America, Name: Darius Mans, Title: Acting Chief Executive Officer.

For the Republic of Senegal, Name: Abdoulaye Diop, Title: Minister of Economy and Finance.

Annex I Program Description

This Annex I describes the Program that MCC Funding will support in Senegal during the Compact Term.

A. Program Overview

1. Background and Consultative Process

With a population of approximately 12 million inhabitants, the west African nation of Senegal was originally declared eligible for MCC assistance in 2004. Senegal shares borders in the north with Mauritania, in the east with Mali and in the south with Guinea and Guinea-Bissau, and the Gambia runs through its center, spatially separating its Casamance region (the ''Casamance'') from the rest of Senegal's territory. Based on national poverty reduction and food security priorities contained in the Government's 1998 Master Plan for agricultural development in the Senegal River Valley (the ''*Valley*'') and the Government's Road Sector Master Plan, and confirmed in broad-based Government consultations that occurred from February through July 2008, the Program focuses on poverty reduction in the Valley in northern Senegal, and the Casamance in southern Senegal.

The Valley has been targeted by the Government, numerous donors, and nongovernmental organizations (''*NGOs*'') for investment, both to encourage economic growth in this region and to increase Senegal's food security in years to come. The Valley, like the Casamance, is rich in agricultural production, especially for rice, the principal staple of the Senegalese diet. The Valley benefits from a very favorable environment for intensive irrigation; however, low agricultural yields have been a persistent problem due to the poor quality of the existing irrigation and drainage infrastructure; insufficient delivery of available water to agricultural areas; and lack of an appropriate drainage system. The Irrigation and Water Resources Management Project will address these constraints.

The Casamance is the poorest region of Senegal, but also has the highest potential for economic development after the Valley. The Casamance is rich in natural resources and has the potential for enormous agricultural productivity, which could contribute significantly both to national growth and food security in the entire country. The Government identified the Casamance's poor road transport network, which leaves few means for goods and services currently produced in the region to be exported nationally or regionally, as a major constraint to economic development in the region. The Roads Rehabilitation Project will address this constraint.

2. Description of Program and Beneficiaries

The Program Objective is to enable improved agricultural productivity and to expand access to markets and services through critical infrastructure investments in the roads and irrigation sectors. The Program consists of the Roads Rehabilitation Project and the Irrigation and Water Resources Management Project as further described in this Annex I.

By 2029, the Program is expected to benefit approximately 1.66 million individuals, or approximately 138,600 households. The largest number of beneficiaries—approximately 1.1 million—would be located in the Casamance. About 75% of the Program beneficiaries in the Casamance are expected to come from households living on less than 2 dollars per person per day. An estimated 42% of total Program beneficiaries in the Casamance live on US$1.25 per person per day, or less. Although Program activities in the Casamance are expected to cast a wider net over beneficiaries, about 38% of total benefits generated by the Program would accrue to beneficiaries in that region. Approximately 62% of Program benefits would accrue to beneficiaries in the Valley. Here, approximately 45% of total beneficiaries are expected to be from households subsisting on less than US$2 per person per day and 25% from households living on US$1.25, or less. Whereas Program investments in the Valley will affect the welfare of a smaller number of people than in the south, they together are expected to extend significantly and solidify gains in the reduction of poverty in the north. The Program would be an important preliminary contribution to the development of the Casamance and greatly facilitate other future investment there.

3. Environmental and Social Accountability

The two Projects, both of which are classified as Category A due to potential site-specific environmental and social impacts, will be implemented in compliance with the MCC Environmental Guidelines, MCC's guidance on the integration of gender in program implementation delivered by MCC to the Government or posted on the MCC Web site (the ''*MCC Gender Policy*''), and the MCC Guidance on the Implementation of Resettlement Activities (or any other MCC policy comparable to the World Bank's Operational Policy on Involuntary Resettlement in effect as of July 2007 (''*OP 4.12*'') notified to the Government

from time to time) (the ''*MCC Resettlement Guidance*''). The Government will also ensure that the Projects comply with all national environmental laws and regulations, licenses and permits, except to the extent such compliance would be inconsistent with this Compact. The Government will: (a) Undertake and complete any environmental review required by MCC or under the laws of Senegal; (b) implement to MCC's satisfaction environmental and social mitigation measures identified in such environmental review; and (c) commit to fund environmental mitigation, (including costs of resettlement) in excess of MCC Funding not specifically provided for in the budget for any Project. The Government will ensure that all construction contractors develop, implement and monitor an HIV/AIDS awareness program acceptable to MCC.

B. Description of the Projects

Set forth below is a description of each of the Projects that the Government will implement, or cause to be implemented, using MCC Funding to advance the applicable Project Objective. In addition, specific activities that will be undertaken within each Project (each, an ''*Activity*''), including sub-activities, are also described. To the extent that there are cost savings with respect to a Project's implementation, such savings, with express written approval by MCC, may be used to expand the scope of any activity undertaken as part of the Program, consistent with the Program Objective and subject to the limitations set forth in Section 6.2 of this Compact.

1. Roads Rehabilitation Project

(a) Summary of Project and Activities.

The Roads Rehabilitation Project is designed to increase beneficiary access to domestic and international markets through improved road quality and a reduction in travel times and costs. The road sector plays a critical role in Senegal. About 99% of goods produced in Senegal are transported by roads, and 95% of domestic travel is done by road. The roads addressed by the Roads Rehabilitation Project, national road no. 2 (''*RN2*'') and national road no. 6 (''*RN6*''), are prioritized in the Government's Road Sector Master Plan, and their rehabilitation is in line with the national policy of increasing growth through road creation, renovation, and maintenance to facilitate transport of manufactured products, minerals, and agricultural production, and to encourage tourism throughout the country.

The RN2 is the northernmost road of Senegal, bordering the Senegal River. It links the capital city of Dakar to St. Louis, the second largest city of Senegal, and continues toward the eastern region of Senegal to the city of Kidira, close to the border with Mali. The RN2 serves as the primary road to transport and export products from irrigation areas along the Senegal River. It is also a strategic connector road from Dakar Harbor to Mauritania and Mali and to southern cities in Senegal. The RN6 links Senegal with Guinea Bissau, Guinea (Conakry), and Mali. The RN6 is also a strategic road that allows transportation of local agricultural products and other goods and services from the Casamance to the rest of Senegal without having to travel through the Gambia. The RN6 provides the only domestic land access to and from the Casamance. For local agricultural producers to transport their products from the Casamance to the rest of Senegal, the only land alternative to the RN6 is a road through the Gambia and a ferry boat across the Gambia River.

The Roads Rehabilitation Project consists of the following Activities:

(i) RN2 Road Activity.

MCC Funding will be used to rehabilitate and upgrade approximately 120 kilometers of the RN2 road, from Richard Toll to Ndioum, and replace or upgrade associated structures, such as bridges and culverts, to eliminate flooding and improve road safety. The RN2's improvement is expected to stimulate domestic and trans-border traffic and commerce generally as well as specifically provide reliable, year-round access to markets, schools, and hospitals, including during the rainy seasons, throughout the primarily agricultural and agricultural processing area where the Activity is focused. Specifically, MCC Funding will support:

(1) Construction Costs. These costs include, without limitation, pavement strengthening, road widening, road safety improvements, replacement or upgrading of associated structures, such as bridges and culverts, and any activity associated with the environmental management plan developed with respect to the Activity.

(2) Non-Construction Costs. These costs include, without limitation, studies, construction supervision, implementation of any resettlement action plan developed with respect to the Activity, and other project management costs to be incurred in connection with the RN2 Road Activity.

(ii) RN6 Road Activity.

MCC Funding will be used to rehabilitate and upgrade approximately 256 kilometers of the RN6 road from Ziguinchor, and replace or upgrade associated structures of the RN6. Specifically, MCC Funding will support:

(1) Construction Costs. These costs include, without limitation, pavement strengthening, road widening, road safety improvements, and replacement or upgrading of associated structures, such as bridges and culverts, and any activity associated with the environmental management plan developed with respect to the Activity.

(2) Non-Construction Costs. These costs include, without limitation, studies, construction supervision, implementation of any resettlement action plan developed with respect to the Activity, and other project management costs to be incurred in connection with the RN6 Road Activity.

(b) Beneficiaries.

The RN2 Road Activity is expected to benefit approximately 21,000 households or 250,000 individuals over the next 20 years. At present there are about 9,290 households, or 111,500 beneficiaries residing along the RN2. The RN6 Road Activity would affect some 102,000 households or approximately 1.1 million people over the next 20 years. At present there is a population of about 44,000 households, or 474,000 people along the road; but about 15,600 households outside the road catchment would also initially benefit, as much traffic also originates and ends outside the particular segments of the RN6 being upgraded by the RN6 Road Activity. Over the life of the investment, total average benefits per beneficiary for the RN2 are approximately US$870. Similarly, total average benefits per beneficiary for the RN6 are approximately US$530.

(c) Environmental and Social Mitigation Measures.

The RN2 Road Activity and the RN6 Road Activity are classified as ''Category A.'' The Activities will produce site-specific and possibly cumulative environmental and social impacts. Environmental impact assessments have been initiated for both Activities; both will produce environmental management plans. The Roads Project will be implemented in accordance with MCC Environmental Guidelines, the MCC Gender Policy, and the MCC Resettlement Guidance, which will ensure that any necessary mitigation measures will be taken with respect to the issues identified in the environmental impact assessments and environmental management plans.

(d) Donor Coordination.

The Roads Rehabilitation Project conforms both to the Economic Community of West African States' standards, as well as to standards used

by other donors in projects that link to Program investments. The two donor organizations also involved in road construction are the European Union (''*EU*'') for the RN2 and the African Development Bank for the RN6. The U.S. Agency for International Development (''*USAID*'') is not significantly involved in investments in the road sector in Senegal.

(e) Sustainability.

Senegal has appropriate laws, structures, capacity, systems, and governance to continually improve sustainability of the road sector. The Government has shown willingness to strengthen the maintenance funding regime, and the country has shown much progress in its maintenance funding performance. An autonomous agency, the Agence Autonome de Transports Routiers, or the Independent Agency for Road Transportation (''AATR''), was created with the assistance of other donors to take responsibility for road development and maintenance in Senegal. AATR has been the beneficiary of rapid capacity development measures with the support of other donors. As a result, the agency is now operating with technically capable staff within both its headquarters and its regional offices. Several institutional strengthening measures have been implemented by AATR, including the systemization of road inventory and road condition, and prioritization of maintenance activities based on traffic, condition, cost-benefit, and hydraulics. Maintenance funding has been increasing rapidly since 1989. The available road maintenance funds were 3 billion CFA in 1989; 15 billion CFA in 1995; 18 billion CFA in 2007; and 37 billion CFA in 2009. As a result of this increase in maintenance funding, road conditions have improved significantly: only 35% of paved roads were deemed to be in ''good'' or ''average'' condition in 2000, but 60% were deemed to be in 2007.

The Government has created a road fund managed by an autonomous unit and governed by a board of directors with members from the public and private sectors (the ''*Road Fund*''). In 2008, the Road Fund was migrated to a second generation fund, whereby fuel levy collections were deposited directly through adoption of a funding law. The law allows for fuel levies of about 35 CFA for super diesel, 32 CFA for diesel, and 16 CFA for gasoline.

Nevertheless, there is a persistent gap between the need for maintenance and available funds. The 2009 budget gap is currently 26%; the 2009 available maintenance budget provides only 74% of the annual road maintenance funding actually required for 2009. As part of the Program, the Government has agreed on a schedule to reduce and eventually eliminate any annual funding gap by 2015. Measurable progress monitors are set forth in the Program Implementation Agreement as conditions precedent to disbursement for the Roads Rehabilitation Project.

(f) Policy, Legal and Regulatory Reforms.

There are no policy, legal, or regulatory reforms required to implement the Roads Rehabilitation Project, other than those that may be required with respect to the Government's need to satisfy conditions precedent in connection with reducing the funding gap with respect to the road maintenance fund.

2. Irrigation and Water Resources Management Project

(a) Summary of Project and Activities.

The Valley, the other region in Senegal rich in agricultural production, benefits from a very favorable environment for intensive irrigation for several reasons. First, there is a long irrigation history and experience in the Valley (some irrigation schemes have existed for more than 30 years). Second, the region has strong Government support and a reliable institution for maintenance and technical support through the regional, semi-autonomous agency responsible for all aspects of agricultural development in the Valley, the Société Nationale d'Aménagement et d'Exploitation des Terres du Delta du fleuve Sénégal et des Vallées du fleuve Sénégal et de la Falémé (''*SAED*''). Third, farmer associations, supported by SAED, have demonstrated their capability to manage and maintain large irrigation schemes. Finally, organized commercialization exists throughout the region, although improvements are still required along the value chain.

Optimal agricultural production in the Valley could supply Senegal with more than a significant share of its agricultural products, especially rice, the principal staple of the Senegalese diet. However, low agricultural yields have resulted in several thousand hectares of abandoned land. Three factors contribute directly to low yields: (i) Poor quality of the existing irrigation and drainage infrastructure; (ii) insufficient delivery of available water to agricultural areas; and (iii) lack of an appropriate drainage system, which leads to soil salinity.

The Irrigation and Water Resources Management Project—comprising infrastructure investments in the Senegal River Delta (the ''*Delta*'') and Department of Podor (the ''*Podor*'') areas—conforms to Senegal's 1998 Master Plan for poverty reduction and agricultural development in the Valley and is designed to address the factors contributing to low agricultural yields described above. The Project will: (1) Increase the volume of irrigation water in the Valley to develop approximately 8,500–10,500 hectares of additional irrigated land; (2) eliminate the risk of abandonment of approximately 26,000 hectares of existing irrigable land; and (3) provide additional supply of water for human and animal use in the Delta, Podor, and adjoining areas. The Project will also rehabilitate drainage canals, which will further eliminate the risk of abandonment of irrigated land, as well as increase crop yields. The Project will also support a land tenure security activity, to provide for, or maintain, a secure land tenure environment for all of inhabitants of the region directly affected by the Project. The Project may also invest in complementary social safeguard measures.

The Irrigation and Water Resources Management Project consists of the following Activities:

(i) Delta Activity.

Irrigation in the Delta, situated in the northwestern section of Senegal, is heavily influenced by the operation level of the Diama Dam, situated at the mouth of the Senegal River. Currently, 31,080 hectares represents the total theoretically irrigable land in the area of the Delta targeted by the Project. However, due to insufficient water delivery and poor drainage, only 11,800 hectares are cultivated at any time over the year. MCC Funding will be used for improvements to the irrigation and drainage channels in the Delta. Specifically, MCC Funding will support:

(1) Irrigation and Drainage Construction Activities. With respect to irrigation, these consist of weed removal, dredging, profiling of berms, and increasing levee heights, along with the rehabilitation or replacement of associated structures and pumping stations along eight irrigation sections. With respect to drainage, these consist of construction of a pump station, a bridge, a siphon, elevation of the levees and construction of compensatory channels. More details with respect to the Delta Activity construction activities are set forth in Schedule 1 attached to this Annex I.

(2) Non-Construction Activities. These costs include, without limitation, studies, construction supervision, and other project management costs to be incurred in connection with the Delta Activity.

(ii) Podor Activity.

Senegal's 1998 Master Plan for poverty reduction and agricultural development in the Valley specifies the installation of 28 irrigation sites in the Podor, and one of these sites is at N'Gallenka. The Podor Activity, focused on the site of N'Gallenka, expands the Program's irrigation investments east of the Delta, into an area that is far more economically depressed than the Delta. The N'Gallenka site was chosen because of its high potential for rice production, sufficiency of water resources, available population, cost of dikes per hectare, and existing irrigation facilities. Furthermore, demonstration of the cost-effectiveness of irrigation expansion in Podor should attract other private sector and donor investment in this area of high potential returns. MCC Funding will be used for the development of primary and secondary irrigation and drainage channels, and associated structures at the N'Gallenka site. Specifically, MCC Funding will support the construction costs associated with the development of the primary and secondary irrigation and drainage channels and associated structures, as well as related non-construction costs (studies, construction supervision, and other project management costs).

(iii) Social Safeguard Measures Activity.

The Government is actively seeking support to strengthen irrigation investments in the Valley with social development activities designed to diversify current livelihood strategies, slow emigration from the Delta, link Podor to markets, and improve the ability of women and youth to take advantage of the economic opportunities presented by the improved prospects for agricultural production. The Program may support the Government's efforts by financing certain social safeguard measures directly related to the Irrigation and Water Resources Management Project. Specifically, MCC Funding may be used for the construction of day care facilities, as well as the construction and initial operation of agricultural storage and information centers, and livestock multipurpose centers. In each case, these social safeguard measures are intended to complement the objectives of the Irrigation and Water Resources Management Project and/or to mitigate potential adverse impacts of the Project. For instance, the day care facilities should allow women to spend more time engaged in revenue-generating activities on the newly irrigated lands that will be allocated through the Project, while still providing their children with quality care. The agricultural storage and information centers are intended to provide much-needed price information and technical resources to decrease crop loss due to poor storage conditions. Finally, the livestock multipurpose centers are intended to provide much-needed technical resources and supplies to livestock owners, thereby reassuring pastoralists that might otherwise be marginalized by the Project because of the reduced amount of rangeland available for their herds. It should be noted that any use of MCC Funding for the Social Safeguard Measures Activity is entirely contingent upon the following three conditions being met: (1) Provision by the Government of any supplemental information required by MCC, in form and substance satisfactory to MCC, to enable MCC to make a funding decision with respect to this Activity (this may include, inter alia, a comprehensive operational plan for each measure that describes diligenced costs, staffing and equipment information and requirements, and information on day-to-day operations and maintenance of the centers, both during the Compact Term and afterwards); (2) a decision by MCC in writing agreeing to fund the Activity, in whole or in part, together with any conditions to such agreement; and (3) satisfaction of the first two conditions prior to the third anniversary of this Compact's entry into force.

(iv) Land Tenure Security Activity.

To improve the investment climate in the Project area and to mitigate the potential for land conflict due to increased demand for irrigated land as a result of the Irrigation and Water Resources Management Project, the Land Tenure Security Activity will support development and implementation of transparent, fair, and efficient processes for land allocation to ensure equitable and secure access to land in the irrigated perimeters. It will also equip local authorities with tools, such as manuals of procedures and land registries, to improve land management, and reinforce capacity through communication and training on the newly provided tools as well as existing land management tools. The Land Tenure Security activity will primarily support the allocation and formalization of land use rights by local rural councils (''*CRs*'') and local communal councils (''*CCs*'') according to existing Senegalese land law. Specifically, MCC Funding will support:

(1) Design and implementation of a participatory and multi-step process for allocation by the CRs and CCs to producer groups and individual producers of parcels in irrigated perimeters developed or improved through the Irrigation and Water Resources Management Project. Land allocations will be formalized according to Senegalese land law through award of titres d'affectation (land certificates) to all holders of land rights in the irrigated perimeters. The process will include documentation of existing rights, identification and mapping of improved parcels, development of criteria for selection of beneficiaries, and transparent selection followed by award of the titres d'affectation and recordation of all land allocations in registers to be maintained by the CRs and CCs.

(2) Reinforcement of land management capacity of CRs (and CCs), producer groups (GIEs and GPFs), and selected government agencies responsible for supporting rural community land management. Activities will center on development of new tools designed to adapt and more efficiently apply Senegalese land law in the context of the Valley, including a land allocation manual and land registry, and training on existing tools such as land occupation and allocation plan (''*POAS*'') and the Charter for the Irrigated Domain (''*CDI*'').

(b) Beneficiaries.

Beneficiaries of the Irrigation and Water Resources Management Project include households, owners or shareholders of farming enterprises, and households that have individuals employed in the operation of enterprise farms. The Project would benefit approximately 22,390 households, or 268,700 individuals, through participation in own agricultural production or employment in agriculture. Assuming that households would, on average, cultivate two hectares of irrigated area, the scale of net revenue from a holding would have a substantial impact on the welfare of poor households. Average household size is about twelve persons. Average future revenues of about purchasing power parity (PPP) US$4,470 per two-hectare farm would increase household incomes by more than PPP US$1 per person per day. For households subsisting with incomes of PPP US$1.25 or less per person per day, this increment would move households from being extremely poor to being near poor (not far below or above PPP US$2 per person per day). It is estimated that the full development of the irrigated areas targeted by the Project will provide employment for approximately 9,000 households (benefits accruing to approximately 105,000 persons).

(c) Environmental and Social Mitigation Measures.

The Irrigation and Water Resources Management Project is classified as ''Category A.'' Environmental impact assessments have been initiated, and they will produce environmental management plans. The Project will be implemented in accordance with MCC Environmental Guidelines, the MCC Gender Policy, and the MCC Resettlement Guidance, which will ensure that any necessary mitigation measures will be taken with respect to the issues raised above.

(d) Donor Coordination.

The Government, from the earliest days of project identification and development, partnered and coordinated with all of the stakeholders in the Valley to ensure that (i) MCC's investments would be complementary to other existing and planned investments throughout the region, and (ii) would be supported by Government agencies, donors, and NGOs. All donors have endorsed the Program investments in the Valley because they recognize the need for significant investment in the region's infrastructure to complement their own investments. The current field-level focal points for donor coordination and collaboration are SAED and the Support Program for Local Development, respectively responsible for implementation of programs sponsored by the World Bank (''*PDMAS*'') and the Agence Française de Développement (the French Development Agency (''*AFD*'')).

The principal donors investing in the region are USAID, the U.S. Department of Agriculture (''*USDA*''), the EU, AFD, the Japanese Development Agency, and the World Bank. USAID, for example, is increasing agricultural productivity through improvements to the agricultural value chain, including improving the quality and availability of inputs, cold storage and warehousing, and access to credit, and it is also implementing a natural resource management program that focuses on forest management for the production of select products (timber, resin, fruit, and crafts) for regional and international markets. The USDA, through its ''Food for Progress'' program, partners with NGOs such as Counterpart International to work directly with farmers and farmers' associations to provide training in agricultural best practices. AFD's ''Programme d'Appui aux Communautés Rurales'' (''*PACR*''), or ''Technical Assistance Program for Rural Communities,'' shares common objectives and geographical focus with the Land Tenure Security Activity; accordingly, MCC and AFD expect to coordinate closely implementation of the respective initiatives and target opportunities for synergy.

(e) Sustainability.

SAED is responsible for maintaining primary and secondary irrigation systems throughout the Valley. SAED's considerable human resources, technical capacity and experience have been enhanced in recent decades through the agency's central role in implementation of several international donor-sponsored programs, such as the PDMAS project and specific activities of the PACR. It also provides technical assistance and training to farmers for them to maintain tertiary irrigation systems.

However, project maintenance activities in the Delta are funded with fees collected from farmers, and with funds provided by the Government to cover the gap between annual maintenance costs and total fees collected. Fee collection from farmers in the Delta zone is poor, with a collection efficiency of only 30%. Poor collection is primarily attributable to unreliable water supply and inadequate water availability. A lack of transparency in collection is also a contributor to poor collection efficiency. In order to improve collection of water user fees and to make more maintenance funds available for SAED to undertake required, periodic maintenance work, the Government will take specific steps agreed by MCC to improve collection of water user fees; these include the Government conducting an independent audit of maintenance, including roles, responsibilities, current arrangements, service performance and collection performance, as well as a financial analysis of maintenance, with the objective of identifying principal issues and recommending an action plan to improve sustainability (the ''*Irrigation Maintenance Action Plan*''). The Irrigation Maintenance Action Plan must be approved by the Ministry of Agriculture and implementation of the action plan—with measurable targets and a progress monitoring mechanism to evaluate performance and outcomes of implementation—will be monitored throughout the Compact Term.

(f) Policy, Legal and Regulatory Reforms.

There are no policy, legal, or regulatory reforms required to implement the Irrigation and Water Resources Management Project other than those that may be required by the Irrigation Maintenance Action Plan and implementing measures arising out of the Land Tenure Security Activity, such as the passage of an arrêté by the appropriate administrative authorities establishing land allocation committees and describing land allocation principles.

3. Implementation Framework

(a) Overview.

The implementation framework and the plan for ensuring adequate governance, oversight, management, monitoring and evaluation, and fiscal accountability for the use of MCC Funding are summarized below. MCC and the Government will enter into the Program Implementation Agreement, and any other agreements in furtherance of this Compact, all of which, together with this Compact, set out certain rights, responsibilities, duties and other terms relating to the implementation of the Program.

(b) MCC.

MCC will take all appropriate actions to carry out its responsibilities in connection with this Compact and the Program Implementation Agreement, including the exercise of its approval rights in connection with the implementation of the Program.

(c) MCA-Senegal (and, prior to its establishment, MFG–MCA).

The Government will establish MCA-Senegal through passage of a decree in substantially the form and on substantially the terms of the form of decree set forth in Schedule 2 to this Annex I (the ''*Establishment Decree*''). In accordance with Section 3.2(d) of this Compact, MCA-Senegal will act on the Government's behalf to implement the Program and to exercise and perform the Government's rights and responsibilities with respect to the oversight, management, and implementation of the Program, including, without limitation, managing the implementation of Projects and their Activities, allocating resources, and managing procurements. The Government will ensure that MCA-Senegal takes all appropriate actions to implement the Program, including the exercise and performance of the rights and responsibilities designated to it by the Government pursuant to this Compact and the Program Implementation Agreement. Without limiting the foregoing, the Government will also ensure that MCA-Senegal has full decision-making autonomy, including, inter alia, the ability, without consultation with, or the consent or approval of, any other party, to (i) enter into contracts in its own name, (ii) sue and be sued, (iii) establish an account in a financial institution in the name of MCA-Senegal and hold MCC Funding in that account, (iv) expend MCC Funding, (v) engage one or more fiscal agents who will act on behalf of MCA-Senegal on terms acceptable to MCC, (vi) engage one or more procurement agents who

will act on behalf of MCA-Senegal, on terms acceptable to MCC, to manage the acquisition of the goods, works, and services required by MCA-Senegal to implement the activities funded by this Compact, and (vii) competitively engage one or more auditors to conduct audits of its accounts. In accordance with Section 3.2(d) of this Compact, MFG–MCA, established by Décret N°2008–53 dated January 29, 2008, will act on behalf of the Government with respect to the Compact and the Program until MCA-Senegal is established. For the avoidance of doubt, the Government will take all appropriate actions to ensure that MCA-Senegal is established as soon as possible after the ratification of this Compact, and, in any event, in accordance with the applicable condition precedent to the disbursement of Compact Implementation Funding set forth in Annex IV to this Compact.

MCA-Senegal will be administered and managed by the following bodies: (1) Le Conseil de Surveillance, acting as its board of directors (the ''*Board*''); (2) la Direction Générale, acting as its management unit (the ''*Management Unit*''); and (3) le Comité des Parties Prenantes, acting as its stakeholders committee (the ''*Stakeholders Committee*''). The governance of MCA-Senegal will be set forth in more detail in the Establishment Decree, the Program Implementation Agreement, and the internal regulations of MCA-Senegal (''*MCA-Senegal Bylaws*''), which will, collectively, set forth the responsibilities of the Board, the Management Unit, and the Stakeholders Committee. The MCA-Senegal Bylaws will be developed and adopted in accordance with MCC's Guidelines for Accountable Entities and Implementation Structures, published on the MCC Web site (the ''*Governance Guidelines*''), and will be in form and substance satisfactory to MCC.

(i) Board (le Conseil de Surveillance).

(1) Composition. MCA-Senegal will be governed by the Board, which will consist of voting members representing those Government ministries and civil society and private sector organizations set forth in the Establishment Decree. The Board will also consist of those non-voting observers set forth in the Establishment Decree. All voting members will be named in writing by their respective Government ministries and civil society and private sector organizations, as applicable, and must be sufficiently senior and qualified to make decisions on behalf of their respective ministries and civil society and private sector organizations, as applicable. Each voting member named to serve on the Board, and any replacement for any voting member or any alteration of the size or composition of the Board, shall be subject to MCC prior approval.

(ii) Roles and Responsibilities. The Board will be responsible for overseeing the implementation of the Program and will have final decision-making authority over the implementation of the Program. The Board will meet regularly; the frequency of meetings will be set forth in the MCA-Senegal Bylaws and will be in accordance with the Governance Guidelines. The specific roles of the voting members and non-voting observers will be set forth in the Establishment Decree and the MCA-Senegal Bylaws.

(iii) Management Unit (la Direction Générale).

(1) Composition. The Management Unit, which will be led by a competitively selected Director General, will be composed of competitively recruited Directors with expertise in the key components of the Program, including, without limitation, a Roads Director, an Irrigation and Water Resources Management Director, and a Land Tenure Security Director, as well as a Deputy Director General, a Chief Financial Officer, a General Counsel, and other key Directors, including, without limitation, an Environmental and Social Assessment Director, a Procurement Director, a Monitoring and Evaluation Director, and a Communications Director. The Management Unit will also include such other managers and officers as may be agreed by the Government and MCC, including, without limitation, an internal auditor and a Human Resources Officer. The Directors will be supported by appropriate additional staff to enable the Management Unit to execute its roles and responsibilities.

(iv) Roles and Responsibilities. The Management Unit will be based in Dakar, Senegal, and will be responsible for managing the day-to-day implementation of the Program, with oversight from the Board. The Management Unit will serve as the principal link between MCC and the Government, and will be accountable for the successful execution of the Program, each Project, and each Activity. As a Government entity, MCA-Senegal will be subject to Government audit requirements. As a recipient of MCC Funding, MCA-Senegal will also be subject to MCC audit requirements.

(v) Stakeholders' Committee (le Comité des Parties Prenantes).

(1) Composition. Pursuant to the Establishment Decree, the composition of the Stakeholders Committee will be determined by the Board in accordance with the Governance Guidelines and subject to MCC approval. Without limiting the foregoing, the Establishment Decree provides that the Stakeholders Committee will be composed of, inter alia, Program beneficiaries, regional and local government representatives, entities with an interest or involvement in the implementation of the Program, key NGOs, and any applicable civil society and private sector representatives. In addition, the Board may establish regional, informal stakeholders committees in the project intervention zones composed of, inter alia, Program beneficiaries, regional and local government representatives, entities with an interest or involvement in the implementation of the Program, key NGOs, and any applicable civil society and private sector representatives. The establishment and composition of any such regional, informal stakeholders committees will also be subject to MCC approval.

(2) Roles and Responsibilities. Consistent with the Governance Guidelines, the Stakeholders Committee (and any informal, regional stakeholders committees established by the Board) will be responsible for continuing the consultative process throughout implementation of the Program. While the Stakeholders Committee (and any informal, regional stakeholders committees established by the Board) will not have any decision-making authority, it will be responsible for, inter alia, reviewing, at the request of the Board or the Management Unit, certain reports, agreements, and documents related to the implementation of the Program in order to provide advice and input to MCA-Senegal regarding the implementation of the Program.

(d) The ''Cellule d'Appui au MCA–Sénégal.''

As referenced in Article 8 of the Compact, the Government will contribute to the Program, inter alia, through the establishment of and financial support for a ''Cellule d'Appui au MCA–Sénégal'' (the ''*Cellule*''). Exclusively Government-funded and exclusively Government-run, the Cellule's focus would be distinct from, but related to, the Program. The Cellule will contain staff to perform certain functions, which may include, but are not limited to, the following:

(i) Guichet Unique. Certain Cellule staff will be engaged to assist MCA-Senegal and contractors working on the Program with navigating the tax exemption procedures to ensure that they benefit from the tax exemptions provided by the Compact.

(ii) Administration and Finance. Certain Cellule staff will be engaged to perform administration and finance functions with respect to the Cellule's operations, any mesures d'accompagnement described in paragraph b above, the start up or closure of MCA-Senegal, and any Government financial obligations arising out of the Compact, including, but not limited to, Sections 2.6(a) or 8.1 of the Compact.

(iii) Monitoring Eligibility Criteria. Certain Cellule staff will be engaged to monitor and evaluate Senegal's level of performance under the policy criteria identified in Section 607 of the MCA Act, and the selection criteria and methodology used by MCC.

(iv) Mesures d'Accompagnement. To the extent the Government undertakes certain social development activities outside of the Program in the Project areas (such activities may be designed to, inter alia, diversify current livelihood strategies, slow emigration from the Delta, link Podor to markets, and improve the ability of women and youth to take advantage of the economic opportunities presented by an improved environment for agricultural production), the Cellule may contain staff to manage the implementation of such social development activities.

(e) Implementing Entities.

Subject to the terms and conditions of this Compact and any other related agreements entered into in connection with this Compact, the Government and MCC have identified certain principal public institutions that may or will serve as implementing entities (each, an ''*Implementing Entity*'') to implement and carry out certain Projects and/or Activities (and/or any component thereof) in furtherance of this Compact. Such Implementing Entities include, but are not limited to, (i) AATR, for the Roads Rehabilitation Project and (ii) SAED, for the Irrigation and Water Resources Management Project. The Government will ensure that the roles and responsibilities of each Implementing Entity and other appropriate terms are set forth in an agreement between MCA-Senegal and each Implementing Entity, which agreement must be in form and substance satisfactory to MCC (each an ''*Implementing Entity Agreement*'').

(f) Fiscal Agent.

Unless MCC otherwise agrees in writing, the Government will engage a fiscal agent (a ''*Fiscal Agent*''), who will be responsible for assisting the Government with its fiscal management and assure appropriate fiscal accountability of MCC Funding, and whose duties will include those set forth in the Program Implementation Agreement.

(g) Procurement Agent.

Unless MCC otherwise agrees in writing, the Government will engage one or more procurement agents (each, a ''*Procurement Agent*'') to carry out and certify specified procurement activities in furtherance of this Compact. The roles and responsibilities of each Procurement Agent will be set forth in the Program Implementation Agreement or such agreement as the Government enters into with each Procurement Agent, which agreement shall be in form and substance satisfactory to MCC. Each Procurement Agent will adhere to the procurement standards set forth in the MCC Program Procurement Guidelines and ensure procurements are consistent with the procurement plan adopted by the Government pursuant to the Program Implementation Agreement, unless MCC otherwise agrees in writing.

Schedule 1 of Annex I Delta Activity Construction Activities

The work on the main irrigation channels of the Delta Activity consists of weed removal, dredging, profiling of berms, and increasing levee heights, as well as the rehabilitation or replacement of the associated structures and pumping stations of the following sections:

Irrigation section	Length/targeted flow rate	Associated improvements
Gorom Amont	25 km/30 m3s-1	Ronkh Intake: increase of gravity flow capacity from 20m3s-1 to 30m3s-1 by reopening two additional gates and increase of pumping capacity from 8.3m3s-1 to 20m3s-1.
Gorom Aval	22 km/23 m3s-1	Intake G: construction of an additional control bridge with four gates to increase the gravity flow capacity from 20m3s-1 to 40m3s-1; Rehabilitation of the Boundoum Dam Bridge.
Lampsar Amont	20 km	Replacement of the Boundoum Bridge with a control bridge.
Lampsar Aval	24 km/12 m3s-1	Replacement of the Lampsar Bas Bridge with a control bridge; Repairs on the Bango Bridge.
Ngalam	8 km	Rehabilitation of the Ndiaoudoun Bridge.
Djawel	4 km	Rehabilitation of the Djawel Bridge.
Kassack	20 km	Rehabilitation of the Demba and Diambar Bridges.
Djeuss		Partial transformation into a main drainage channel.

Schedule 2 to Annex I Form of MCA-Senegal Decree

Republic of Senegal

One People—One Goal—One Faith

Order No. * * * establishing the Millennium Challenge Account Senegal (hereinafter, ''*MCA-Senegal*'').

The President of the Republic,

Having regard to Constitution of the Republic of Senegal (hereinafter, ''*Senegal*''), and in particular articles 43 and 76 thereof;

Having regard to the Millennium Challenge Compact (hereinafter, the ''*Compact*'') signed on [*insert signature and date*] between the Republic of Senegal (hereinafter ''*Senegal*''), acting through its government (hereinafter, the ''*Government*'') and the government of the United States of America, acting through the Millennium Challenge Corporation (hereinafter, ''*MCC*);

Having regard to Law No. [*insert number and date*] whereby the National Assembly authorized the President of Senegal to ratify the Compact;

Having regard to Letter No. [*insert number and date*] whereby the President ratified the Compact;

Having regard to Order No. 2008–53 of January 29, 2008 establishing the Mission to Develop and Manage the Millennium Challenge Account Senegal;

Whereas the Compact establishes the general terms and conditions under which MCC offers to grant an amount not to exceed [*insert amount in words and figures*] to the Government for a program to reduce poverty in Senegal through economic growth (hereinafter, the ''*Program*'');

Considering the Government's commitment established in the Compact (Annex I: Program description) to establish a separate legal entity with financial autonomy to coordinate and execute the Program;

Orders

Article 1: Establishment; Legal Capacity

An autonomous entity, ''*MCA-Senegal*'' is hereby established as a juristic person with financial autonomy to assume responsibility for managing the Program for Senegal. MCA-Senegal shall be a unit within the Office of the Prime Minister. MCA-Senegal shall have full legal capacity and financial autonomy, including, *inter alia,* the ability to enter into contracts and agreements; to open, maintain and close bank accounts; to recruit personnel through competitive processes and terminate them; and to appear as a party to legal proceedings.

Article 2: Responsibilities of MCA-Senegal

MCA-Senegal shall:

- Assume responsibility, on behalf of the Government, for overseeing the activities associated with management and implementation of the Program;
- Represent the Government, in consultation with the responsible Government agencies, in negotiations with MCC regarding technical, financial and administrative issues relating to the Compact;
- Execute legal instruments on behalf of the Government in its relationships with stakeholders or other persons involved in managing, monitoring and implementing the Program for the Government.

Article 3: MCA-Senegal Management Bodies

In performing its functions, MCA-Senegal shall be supported by a deliberative body, an executive body and an advisory body:

- The Supervisory Board shall serve as the deliberative body,
- The Management Unit (*direction générale*) shall serve as the executive body,
- The Stakeholders Committee shall serve as the advisory body.

No member of the Supervisory Board, the Management Unit or the Stakeholders Committee or other representative of MCA-Senegal shall have a direct or indirect conflict of interest with the performance of the functions for which MCA-Senegal is responsible.

Article 4: Powers of the Supervisory Board

The MCA-Senegal Supervisory Board shall have the broadest powers to act in all circumstances and make decisions concerning the objectives, policies, administration and oversight of the Management Unit's operations.

To this end, the Supervisory Board shall:

- Determine the strategic objectives of the Program,
- Approve the administrative organization of MCA-Senegal,
- Approve any decision to dissolve MCA-Senegal or modify its structure,
- Adopt the MCA-Senegal annual activity report prepared by the Executive Director,
- Approve the MCA-Senegal annual budget,
- Approve the financial statements prepared by the Executive Director within three months after the close of the fiscal year,
- Recruit the Executive Director,
- Approve the Executive Director's contract, the Management Unit organization chart and the form of employment contract for key personnel,
- Terminate the Executive Director and approve the termination of executive or key personnel of MCA-Senegal,
- Approve plans to award contracts, and
- Perform all other tasks prescribed by MCC directives or the internal regulations of the Supervisory Board.

The decisions of the Supervisory Board shall be subject to MCC's no objection.

Article 5: Composition of the Supervisory Board

The Supervisory Board shall be composed of the following members with voting rights (individually a ''*Member*''):

- A representative of the Prime Minister,
- A representative of the Minister of Foreign Affairs,
- A representative of the Minister of Economy and Finance,
- A representative of the Minister of Infrastructure,
- A representative of the Minister of the Environment,
- A representative of the Minister of Decentralization and Local Authorities,
- A representative of the Minister of Justice,
- A representative of the Minister of Agriculture,
- A representative of the Minister of Social Development and Gender,
- Two representatives from the most representative employer organizations,
- Two representatives from the most representative society organizations, including one woman.

Each Member shall have one vote.

The following individuals shall serve in an advisory capacity on the Supervisory Board as nonvoting permanent observers:

- A representative of MCC,
- The Executive Director of MCA-Senegal.

The Supervisory Board Members representing the Government shall be designated in writing by their respective ministers. They shall have the authority and powers to represent their ministries and make all decisions during Supervisory Board meetings. The term of office of a Member representing the Government shall expire with that of the minister concerned or following the respective minister's written decision to replace the Member.

The Members representing civil society and employer organizations shall be designated in writing by their organization's deliberative body. The Members representing civil society and employer organizations shall have all powers in the context of their mission to act on behalf of their organization. The term of office of a Member representing a civil society or employer organization shall expire following the written decision of the respective organization's deliberative body to replace the Member.

The terms of Supervisory Board members shall commence upon their appointment.

MCC's no objection shall be required for any proposal or modification of the Supervisory Board's composition.

Article 6: Supervisory Board Operations

The Supervisory Board shall meet as often as required and at least once each quarter. It shall be convened by a representative of the Office of the Prime Minister or at the request of at least four (4) Members. The rules governing the procedures for convening meetings, establishing a quorum and adopting decisions shall be established by the internal regulations.

The Executive Director of MCA-Senegal shall serve as secretary of the Supervisory Board.

The Members of the Supervisory Board shall receive no remuneration. However, each Member of the Supervisory Board shall be entitled to reimbursement of reasonable expenses incurred in connection with attendance at Supervisory Board meetings, in accordance with MCC directives.

The Supervisory Board may decide to retain the services of experts and specialists to assist it in performing its functions. Such experts and specialists shall participate in Supervisory Board meetings in an advisory capacity.

The Supervisory Board may, if necessary, establish committees formed of Members and/or observers to which it may delegate tasks related to its functions.

Article 7: Stakeholders Committee

The Stakeholders Committee shall be an advisory body responsible for monitoring projects and providing technical assistance to the Management Unit and Supervisory Board, to which it may also provide opinions.

The Stakeholders Committee shall consist of the project beneficiaries, the entities involved in or having an interest in Program execution, and representatives from the Government, employer organizations and civil society.

The members of the Stakeholders Committee representing the Government shall be appointed by their respective ministries, and the members representing employer and civil society organizations by their respective organizations.

The Supervisory Board shall designate the members of the Stakeholders Committee and determine its composition and operating procedures.

The Supervisory Board may decide to establish local stakeholder subcommittees in the Program's area of influence. The members of such subcommittees shall be designated under the same terms and conditions as the national Stakeholders Committee.

Article 8: Management Unit

MCA-Senegal shall be managed by a Management Unit headed by an Executive Director. The Executive Director shall be recruited by the Supervisory Board in accordance with MCC directives.

The process of recruiting members of the Management Unit personnel shall be subject to MCC's no objection.

The key personnel of MCA-Senegal shall be recruited or terminated by the Executive Director in accordance with MCC directives and subject to the Supervisory Board's approval.

The Executive Director shall provide day-to-day oversight and supervision of MCA-Senegal's operations and shall serve as the Additional Representative within the meaning of the Compact. He shall prepare the work of the Supervisory Board and implement the policies it establishes.

The duties of the Executive Director shall include:

- Exercising administrative and management authority over all personnel and departments of MCA-Senegal,
- Reporting to interested parties, including the Supervisory Board and the Stakeholders Committee, on progress in implementing the Program,
- Preparing and executing the MCA-Senegal budget in accordance with the provisions of article 9,
- Preparing an annual activity report and submitting it to the Supervisory Board for approval,
- Preparing the financial statements and submitting them to the Supervisory Board for approval,
- Performing all other tasks prescribed by MCC directives or the Supervisory Board.

Article 9: MCA-Senegal Budget

MCA-Senegal shall have a budget outlining its receipts and expenditures.

MCA-Senegal's receipts shall consist of the budget appropriation provided in the Compact. MCA-Senegal's funding shall also consist of an annual budget appropriation from the Government as provided by the Compact and related agreements, which shall be managed by the MCA-Senegal Support Unit (*Cellule d'Appui*) provided in the Compact.

All MCA-Senegal funding, whether provided under the Compact or by the Government, shall be used exclusively to fulfill the responsibilities of MCA-Senegal as described in article 2.

In accordance with article 8, the budget shall be prepared and executed by the Executive Director under the supervision of the Supervisory Board.

Article 10: Audit and Oversight

MCA-Senegal shall be subject to audits by the Inspector General of Finance, the Auditor General (*Inspection Générale d'Etat*) and the Court of Auditors (*Cour des Comptes*) as provided, inter alia, by Law No. 90–07 June 26, 1990. As provided by the Compact and related agreements and MCC directives, it shall also be subject to audits by independent firms, MCC, the Inspector General of the United States Agency for International Development, and the United States Government Accountability Office.

Article 11: Effects of the Order

This order repeals Order No. 2008–53 of January 29, 2008 establishing the Mission to Develop and Manage the Millennium Challenge Account Senegal (hereinafter, ''MFG–MCA''). The Government of Senegal shall replace the MFG–MCA in the exercise of its rights and the performance of its legal and contractual obligations, including employer and tax obligations and monies payable by MFG–MCA to service providers; however, provided it expressly indicates its intent to do so, MCA-Senegal may: (1) Receive the benefit of services performed for MFG–MCA and exercise the rights attached to those powers (without assuming any obligations); or (2) assume the obligations and rights that had been performed for the benefit of MG–MCA.

Article 12: Transitory Provisions

Without prejudice to the other provisions of this order, the Supervisory Board shall meet either at the request of at least four Members or at the initiative of the Prime Minister or his representative until the internal regulations of the Supervisory Board are adopted.

The meetings of the Supervisory Board shall be convened by the Prime Minister or his representative, who shall chair the meetings.

The Supervisory Board shall have a quorum if one-half of its Members are present or represented. The decisions of the Supervisory Board, other than the decision to adopt the internal regulations, shall be adopted by an absolute majority of the Members present or represented. An absolute majority of the Supervisory Board Members shall be required to adopt the internal regulations or written decisions.

Article 13: Execution of the Order

The Prime Minister, the Minister of Foreign Affairs; the Minister of Economy and Finance; the Minister of the Interior; the Minister of the Environment and Protection of Nature, Retention Basins and Artificial Lakes; the Minister of Infrastructure and National Planning; the Minister of Decentralization and Local Authorities; the Minister of Justice; the Minister of Social Development and Gender; each with respect to his or her ministry, shall be responsible for executing this order, which shall be published in the Official Journal.[1]

Executed at Dakar, this_____

By the President of the Republic
Abdoulaye Wade
The Prime Minister

Annex II Multi-Year Financial Plan Summary

This Annex II summarizes the Multi-Year Financial Plan for the Program.

1. General

A multi-year financial plan summary (''*Multi-Year Financial Plan Summary*'') is attached hereto as Exhibit A. By such time as specified in the PIA, the Government will adopt, subject to MCC approval, a Multi-Year Financial Plan that includes, in addition to the multi-year summary of estimated MCC Funding and the Government's contribution of funds and resources, the

[1] The exact titles to be confirmed.

annual and quarterly funding requirements for the Program (including administrative costs) and for each project, projected both on a commitment and cash requirement basis.

EXHIBIT A—MULTI-YEAR FINANCIAL PLAN SUMMARY

[Multi-year financial plan (US$)]

Project	CIF	Year 1	Year 2	Year 3	Year 4	Year 5	Total
1. Irrigation & Water Resources Management Project:.							
Infrastructure Activity							
Land Tenure Security Activity							
Social Safeguard Measures							
Sub-Total	0	19,812,280	69,915,184	63,538,624	16,667,272	75,500	170,008,860
2. Roads Rehabilitation Project:							
National Road #2							
National Road #6							
Sub-Total	0	48,695,302	101,844,436	95,320,317	56,859,947	21,342,497	324,062,499
3. Monitoring and Evaluation (M&E):							
Monitoring and Evaluation							
Sub-Total	0	571,500	771,500	546,500	671,500	1,196,500	3,757,500
4. Program Administration and Audit [1]:							
MCA-Senegal							
Fiscal Agent/Procurement Agent							
Audit							
Sub-Total	5,000,000	7,248,022	7,324,764	7,403,964	7,383,539	7,810,852	42,171,141
Grand Total	5,000,000	76,327,104	179,855,884	166,809,405	81,582,258	30,425,349	540,000,000

[1] These amounts do not include any costs required to be borne by the Government pursuant to the Compact, including, but not limited to Sections 2.6(a) and Section 8.1 of the Compact.

Annex III Description of the Monitoring and Evaluation Plan

This Annex III (this ''*M&E Annex*'') generally describes the components of the Monitoring and Evaluation Plan (''*M&E Plan*'') for the Program. The actual content and form of the M&E Plan will be agreed to by MCC and the Government, and may be modified from time to time without requiring an amendment to this Annex III.

1. Overview

MCC and the Government will formulate, agree to and the Government will implement, or cause to be implemented, an M&E Plan that specifies (a) how progress toward the Compact Goal, Program Objective and Project Objectives will be monitored, (''*Monitoring Component*''), (b) a process and timeline for the monitoring of planned, ongoing, or completed Project Activities to determine their efficiency and effectiveness, and (c) a methodology for assessment and rigorous evaluation of the outcomes and impact of the Program (''*Evaluation Component*''). Information regarding the Program's performance, including the M&E Plan, and any amendments or modifications thereto, as well as progress and other reports, will be made publicly available on the Web site of MCA-Senegal and elsewhere.

2. Program Logic

The M&E Plan will be built on a logic model which illustrates how the Program, Projects and Activities contribute to poverty reduction and economic growth in Senegal. In sum, the goal of the Program is to contribute to economic growth and poverty reduction by: (a) increasing household and firm incomes through increased irrigated agricultural production and productivity on irrigated perimeters; and (b) increasing household and firm access to domestic and international markets through improved road quality and reduced travel times and costs.

3. Monitoring Component

To monitor progress toward the achievement of the impact and outcomes, the Monitoring Component of the M&E Plan will identify (a) the Indicators (as defined below), (b) the definitions of the Indicators, (c) the sources and methods for data collection, (d) the frequency for data collection, (e) the party or parties responsible, and (f) the timeline for reporting on each Indicator to MCC.

Further, the Monitoring Component will track changes in the selected Indicators for measuring progress towards the achievement of the objectives during the Compact Term. Before the initiation of implementation activities for each Project, MCA-Senegal will collect baseline data on the selected Indicators or verify already collected baseline data.

(a) Indicators. The M&E Plan will measure the results of the Program using quantitative, objective and reliable data (''*Indicators*''). Each Indicator will have benchmarks that specify the expected value and the expected time by which that result will be achieved (''*Target*''). The M&E Plan will be based on a logical framework approach that classifies Indicators as goal, outcome, output, and process milestones. The Compact Goal Indicators (''*Goal Indicators*'') will measure the general contribution of the Projects to the national economic growth and poverty reduction. Second, the Project Objective and outcome Indicators (''*Project Objective and Outcome Indicators*'') will measure the final result of each Project. Third, output Indicators and process milestones (''*Activity Indicators*'') will measure the early and intermediate results of the Project Activities. For each Project Objective and Outcome Indicator and each Activity Indicator, the M&E Plan will define a strategy for obtaining and verifying the value of such Indicator prior to undertaking any activity that affects the value of such Indicator (such value, a ''*Baseline*''). All Indicators will be disaggregated by gender, income level and age, and beneficiary types to the extent practicable. Subject to prior written approval from MCC, MCA-Senegal may add Indicators or refine the

definitions and Targets of existing Indicators.

(i) Goal. The M&E Plan will contain the Goal Indicators listed below specifying the definition, baseline, and end of Compact Target for each. The economic analysis estimates that:

- Over a 20-year period, the Irrigation and Water Resources Management Project is expected to contribute to an average increase in net revenue of 35% among beneficiaries.
- Over a 20-year period, benefits of the RN2 Road Activity are expected to be comparable to an average increase of 13 percent of annual consumption among the catchment area population (5 kilometers on either side of the road).[2]
- Over a 20-year period, benefits of the RN6 Road Activity are expected to be comparable to an average increase of 9 percent of annual consumption among the catchment area population (5 kilometers on either side of the road).

(ii) Project Objective and Outcome Indicators and Activity Indicators. The M&E Plan will contain Project Objective and Outcome Indicators, which will measure the two Projects and are listed below with their definitions, baselines and targets. Prior to the initiation of implementation of an Activity, MCC and MCA-Senegal will agree on a final set of Activity Indicators. The M&E Plan will contain these Indicators or will be amended to contain these Indicators.

IRRIGATION AND WATER RESOURCES MANAGEMENT PROJECT OBJECTIVE AND OUTCOME INDICATORS

Irrigation and water resources management project	Indicator	Definition	Baseline value	Year 5 target
Project Objective: Increased irrigated agricultural production and productivity on newly irrigated perimeters in the Delta and N'Gallenka.	Volumes of irrigated rice production (Tons).	Total quantity of rice cultivated by year on the irrigated areas (irrigation and dry season).	55,000	263,000
	Agricultural cropping intensity	Total number of hectares cultivated by year/Total irrigated area.	0.95	1.50
	Area of land under irrigation (hectares).	Total number of hectares of land using irrigation for agricultural production.	11,800	[3] 39,740
Outcomes	**Indicator**	**Definition**	**Baseline value**	**Year 5 target**
Increased efficiency of water infrastructure for irrigated agriculture.	Efficiency of irrigation infrastructure (m^3/s).	Water flow over time in the Lampsar canal.	13	65
Improved land tenure management on irrigated perimeters.	Percent of allocated parcels with "titres d'affectation" [4].	Total numbers of parcels with land titles (*i.e.,* "titres d'affectation")/total numbers of parcels allocated.	0	[5] 100%
	Percent of "titres d'affectation" registered at the CRs.	Total numbers of registered land titles (*i.e.,* "titres d'affectation")/total numbers of parcels allocated.	0	100%
	Percent of new land conflicts resolved	Total numbers of new conflicts resolved/total numbers of new conflicts registered.	0	95%

ROADS REHABILITATION PROJECT OBJECTIVE AND OUTCOME INDICATORS

National road #2	Indicator	Definition	Baseline value	Year 5 target
Activity Objective: Increased access to domestic and international markets.	Average Annual Daily Traffic	Total number of vehicles on rehabilitated road.	RichardToll-Ndioum: 870.	RichardToll-Ndioum: 1240.
	Transport times	Travel time saved due to improved conditions on rehabilitated road.	TBD [6]	50% reduction.
Outcomes	**Indicator**	**Definition**	**Baseline value**	**Year 5 target**
Improved road quality	International Roughness Index (proxy for vehicle operating costs).	Measurement of pavement roughness on rehabilitated road.	RichardToll-Ndioum: 8.4.	RichardToll-Ndioum: 2.4.
Extended road network	Kms of road rehabilitated	Total number of kilometers of road rehabilitated.	0	120 km.
National road #6	**Indicator**	**Definition**	**Baseline value**	**Year 5 target**
Activity Objective: Increased access to domestic and international markets.	Average Annual Daily Traffic	Total number of vehicles on rehabilitated road.	Ziguinchor-Tanaf: 540 Tanaf-Kolda: 820 ..... Kolda-Kounkane: 1200	Ziguinchor-Tanaf: 680. Tanaf-Kolda: 1490 Kolda-Kounkane: 1850.

[2] **Note:** some of the beneficiaries of the RN2 will overlap with those of the Irrigation and Water Resources Management Project.

ROADS REHABILITATION PROJECT OBJECTIVE AND OUTCOME INDICATORS—Continued

National road #2	Indicator	Definition	Baseline value	Year 5 target
	Transport times	Travel time saved due to improved conditions on rehabilitated road.	TBD	50% reduction.
Outcomes	**Indicator**	**Definition**	**Baseline value**	**Year 5 target**
Improved road quality	International Roughness Index (IRI) (proxy for vehicle operating costs).	Measurement of pavement roughness on rehabilitated road.	15	2.5.
Extended road network	Kms of road rehabilitated	Total number of kilometers of road rehabilitated.	0	260 km[7].

(b) Data Collectionand Reporting. The M&E Plan will establish guidelines for data collection and reporting, and identify the responsible parties. Compliance with data collection and reporting timelines will be conditions for Disbursements for the relevant Project Activities as set forth in the Program Implementation Agreement. The M&E Plan will specify the data collection methodologies, procedures, and analysis required for reporting on results at all levels. The M&E Plan will describe any interim MCC approvals for data collection, analysis, and reporting plans.

(c) Data Quality Reviews. As determined in the M&E Plan or as otherwise requested by MCC, the quality of the data gathered through the M&E Plan will be reviewed to ensure that data reported are as valid, reliable, and timely as resources will allow. The objective of any data quality review will be to verify the quality and the consistency of performance data across different implementation units and reporting institutions. Such data quality reviews also will serve to identify where those levels of quality are not possible, given the realities of data collection.

(d) Management Information System. The M&E Plan will describe the information system that will be used to collect data, store, process and deliver information to relevant stakeholders in such a way that the Program information collected and verified pursuant to the M&E Plan is at all times accessible and useful to those who wish to use it. The system development will take into consideration the requirement and data needs of the components of the Program, and will be aligned with MCC existing systems, other service providers, and ministries.

(e) Role of MCA-Senegal. The monitoring and evaluation of this Compact spans across two discrete Projects and will involve a variety of governmental, non-governmental, and private sector institutions. MCA-Senegal holds full responsibility for implementation of the M&E Plan. MCA-Senegal will oversee all Compact-related monitoring and evaluation activities conducted for each of the Projects, ensuring that data from all implementing entities is consistent, accurately reported and aggregated into regular Compact performance reports as described in the M&E Plan.

4. Evaluation Component

The Evaluation Component of the M&E Plan will contain three types of evaluations: Impact Evaluations, Project Performance Evaluations, and Special Studies. Plans for each type of evaluation will be finalized before any Disbursement for specific Program or Project activities. The Evaluation Component of the M&E Plan will describe the purpose of the evaluation, methodology, timeline, required MCC approvals, and the process for collection and analysis of data for each evaluation. The results of all evaluations will be made publicly available in accordance with MCC's guidelines for monitoring and evaluation plans posted from time to time on the MCC Web site (the ''*MCC Policy for Monitoring and Evaluation of Compacts and Threshold Programs*'').

(a) Impact Evaluation. The M&E Plan will include a description of the methods to be used for impact evaluations and plans for integrating the evaluation method into Project design. Based on in-country consultation with stakeholders, the strategies outlined below were jointly determined as having the strongest potential for rigorous impact evaluation. The M&E Plan will further outline in detail these methodologies. Final impact evaluation strategies are to be jointly determined before the approval of the M&E Plan. The following is a summary of the potential impact evaluation methodologies:

(i) Irrigation and Water Resources Management Project.

An impact evaluation will be conducted to estimate the causal relationship between the project and its objective of increasing agricultural production and productivity; as well as its long-term goal of increasing household and firms' incomes. The evaluation will likely use a difference-in-difference methodology comparing three geographic zones: (1) Areas expected to benefit from the irrigation systems rehabilitation under the project, (2) areas that will benefit from irrigation systems extension, and (3) a comparison area that is not covered by the Compact. Surveys conducted in all three areas before and after the project will allow rigorous analysis to estimate the project's incremental contribution to the targeted objectives and goals.

(ii) Roads Rehabilitation Project.

Similarly, a difference-in-difference methodology will be used to estimate the causal relationship between road rehabilitation and increased economic activity. Surveys will be conducted before and after road rehabilitation in two zones: (1) one area within five kilometers of each side of the road[8]; (2) one area outside of the five kilometer corridor. Analyzing conditions among the two groups over two points in time will allow estimates of the project's incremental impact.

(b) Final Evaluation. The M&E Plan will make provision for Final Project level evaluations (''*Final Evaluations*''). With the prior written approval of MCC, MCA-Senegal (or MCC independently) will engage independent evaluators to

[3] Incremental increase of 19,490 hectares rehabilitated and 8,000 hectares in extension in the Delta region, and 440 hectares in extension in N'Gallenka. All hectares are expected to be formalized under the land tenure security activity.

[4] See the Land Tenure Security Activity section of this document for definitions of French terms.

[5] The total number of parcels to be allocated and registered will be determined by the land allocation criteria.

[6] Baseline values for travel times will be available with final results of the ongoing studies.

[7] Final value to be confirmed.

[8] The economic analysis used 5 kilometers on either side of the road as an estimated ''catchment area'' of beneficiaries.

design the Final Evaluations to be conducted at the end of each Project. The Final Evaluations will review progress during Compact implementation and provide a qualitative context for interpreting monitoring data. They must at a minimum (i) evaluate the efficiency and effectiveness of the Project Activities; (ii) determine if and analyze the reasons why the Compact Goal, Program Objective and Project Objective(s) were or were not achieved; (iii) identify positive and negative unintended results of the Program; (iv) provide lessons learned that may be applied to similar projects; and (v) assess the likelihood that results will be sustained over time.

(i) Special Studies. The M&E Plan will include a description of the methods to be used for special studies funded through this Compact or by MCC. Plans for conducting the special studies will be determined jointly between MCA-Senegal and MCC before the approval of the M&E Plan. The M&E Plan will identify and make provision for any other special studies, ad hoc evaluations, and research that may be needed as part of the monitoring and evaluating of this Compact. Either MCC or MCA-Senegal may request special studies or ad hoc evaluations of Projects, Project Activities, or the Program as a whole prior to the expiration of the Compact Term. When MCA-Senegal engages an evaluator, the evaluator will be externally contracted and independently source selected by MCA-Senegal. The aforementioned engagement will be subject to the prior written approval of MCC, following a tender in accordance with the MCC Program Procurement Guidelines, and in accordance with any relevant Implementation Letter or supplemental agreement. Contract terms must ensure non-biased results and the publication of results.

(c) Request for Ad Hoc Evaluation or Special Study. If MCA-Senegal requires an ad hoc independent evaluation or special study at the request of the Government for any reason, including for the purpose of contesting an MCC determination with respect to a Project or Activity or to seek funding from other donors, no MCC Funding or MCA-Senegal resources may be applied to such evaluation or special study without MCC's prior written approval.

5. Other Components of the M&E Plan

In addition to the Monitoring and Evaluation Components, the M&E Plan will include the following components for the Program, Projects and Project Activities, including, where appropriate, roles and responsibilities of the relevant parties and providers:

(a) Costs. A detailed cost estimate for all components of the M&E Plan.

(b) Assumptions and Risks. Any assumption or risk external to the Program that underlies the accomplishment of the Program Objective, Project Objectives and Activity outcomes. However, such assumptions and risks will not excuse any Party's performance unless otherwise expressly agreed to in writing by the Parties.

6. Implementation of the M&E Plan

(a) Approval and Implementation. The approval and implementation of the M&E Plan, as amended from time to time, will be in accordance with this Annex III, the Program Implementation Agreement and any other relevant supplemental agreement, and the MCC Policy for Monitoring and Evaluation of Compacts and Threshold Programs.

Annex IV Conditions to Disbursement of Compact Implementation Funding

This Annex IV sets forth the conditions precedent applicable to Disbursements of Compact Implementation Funding (each a ''*CIF Disbursement''*). Capitalized terms used in this Annex IV and not defined in this Annex IV or in the Compact have the meanings assigned to such terms in the form of Program Implementation Agreement attached to the Compact as Annex VII. Upon execution of the Program Implementation Agreement, each CIF Disbursement shall be subject to the terms and conditions of the Program Implementation Agreement (including, without limitation, Section 3.3 thereof).

1. Conditions to All CIF Disbursements (Including the Initial CIF Disbursement)

Each of the following conditions precedent must have been met to MCC's satisfaction prior to each CIF Disbursement:

(a) Delivery by MFG–MCA (or, upon its establishment, MCA-Senegal) to MCC of a complete, correct, and fully executed Disbursement Request for the relevant Disbursement Period, together with any applicable Periodic Reports covering such Disbursement Period, in each case in form and substance satisfactory to MCC and submitted in accordance with the Reporting Guidelines. Each Disbursement Request shall include the following reference number: GR09SEN09010.

(b) MCC is satisfied, in its sole discretion, that: (i) Each activity being funded by such CIF Disbursement is necessary, advisable, or is otherwise consistent with the goal of facilitating the implementation of the Compact; (ii) there has been no violation of, and the use of the requested funds for the purposes requested will not violate, the limitations on the use or treatment of (x) MCC Funding, as set forth in this Compact, including under Section 2.7, or (y) Compact Implementation Funding; (iii) no material default or breach of any covenant, obligation, or responsibility of the Government or MFG–MCA (or, upon its establishment, MCA-Senegal) under this Compact, the Program Implementation Agreement, any supplemental agreement, or any Program Guidelines has occurred or is continuing; and (iv) any Taxes paid with MCC Funding through the date ninety (90) days prior to the start of the applicable Disbursement Period have been reimbursed by the Government in full in accordance with this Compact.

(c) MCC is satisfied, in its sole discretion, that MFG–MCA (or, upon its establishment, MCA-Senegal) is sufficiently mobilized in order for MFG–MCA (or MCA-Senegal, as the case may be) to be able to fully perform its obligations and act on behalf of the Government.

(d) MFG–MCA (or, upon its establishment, MCA-Senegal), shall have adopted a Procurement Plan, in form and substance satisfactory to MCC, with respect to the Compact Implementation Funding, and such Procurement Plan remains in full force and effect.

(e) MFG–MCA (or, upon its establishment, MCA-Senegal), shall have adopted an Fiscal Accountability Plan, in form and substance satisfactory to MCC, and such Fiscal Accountability Plan remains in full force and effect.

2. Conditions to Specific CIF Disbursements (and Each CIF Disbursement Thereafter)

Each of the following conditions precedent must have been met to MCC's satisfaction prior to the applicable CIF Disbursement:

(a) Prior to any CIF Disbursement on or after January 1, 2010, MCA-Senegal shall be fully formed and in good standing under the laws of Senegal.

(b) Prior to any CIF Disbursement on or after January 1, 2010, the Fiscal Agent shall have been duly appointed, and MCA-Senegal shall have duly executed the Fiscal Agent Agreement, and such agreement shall be in full force and effect without modification, alteration, rescission, or suspension of any kind, unless otherwise agreed by MCC, and no material default has occurred or is continuing thereunder.

(c) Prior to any CIF Disbursement on or after January 1, 2010, the Procurement Agent shall have been duly appointed, and MCA-Senegal shall have duly executed the Procurement Agent Agreement, and such agreement shall be in full force and effect without modification, alteration, rescission, or suspension of any kind, unless otherwise agreed by MCC, and no material default has occurred or is continuing thereunder.

(d) Prior to any CIF Disbursement on or after January 1, 2010, the Bank shall have been duly appointed, and MCA-Senegal and the Fiscal Agent shall have duly executed the Bank Agreement, and such agreement shall be in full force and effect without modification, alteration, rescission, or suspension of any kind, unless otherwise agreed by MCC, and no material default has occurred or is continuing thereunder.

(e) Prior to the deposit of any CIF Disbursement into any Permitted Account in accordance with an approved Disbursement Request, MCC shall have received satisfactory evidence of the establishment of such Permitted Account.

Annex V Definitions

AATR has the meaning provided in paragraph 1(e) of Part B of Annex I.

Additional Representative has the meaning provided in Section 4.2.

Activity has the meaning provided in Part B of Annex I.

Activity Indicators has the meaning provided in paragraph 3(a) of Annex III.

AE has the meaning provided in Schedule A of Annex VI.

AFD has the meaning provided in paragraph 2(d) of Part B of Annex I.

Approval Documents has the meaning provided in Schedule B of Annex VI.

Audit Guidelines has the meaning provided in Section 3.8(a).

Baseline has the meaning provided in paragraph 3(a) of Annex III.

Bilateral Agreement has the meaning provided in Schedule A of Annex VI.

Board has the meaning provided in paragraph 3(c) of Part B of Annex I.

Casamance has the meaning provided in paragraph 1 of Part A of Annex I.

CCs has the meaning provided in paragraph 2(a)(iv) of Part B of Annex I.

Cellule has the meaning provided in paragraph 3(d) of Part B of Annex I.

CIF Disbursement has the meaning provided in Annex IV.

CDI has the meaning provided in paragraph 2(a)(iv)(2) of Part B of Annex I.

Compact has the meaning provided in the Preamble.

Compact Contract has the meaning provided in Schedule C of Annex VI.

Compact Goal has the meaning provided in Section 1.1.

Compact Implementation Funding has the meaning provided in Section 2.2(a).

Compact Records has the meaning provided in Section 3.7(a).

Compact Term has the meaning provided in Section 7.4.

Covered Provider has the meaning provided in Section 3.7(c).

CRs has the meaning provided in paragraph 2(a)(iv) of Part B of Annex I.

DD has the meaning provided in Schedule B of Annex VI.

Delta has the meaning provided in paragraph 2(a) of Part B of Annex I.

DGD has the meaning provided in Schedule B of Annex VI.

DGID has the meaning provided in Schedule A of Annex VI.

Disbursement has the meaning provided in Section 2.4.

Establishment Decree has the meaning provided in paragraph 3(c) of Part B of Annex I.

EU has the meaning provided in paragraph 1(d) of Part B of Annex I.

Evaluation Component has the meaning provided in paragraph 1 of Annex III.

Excess CIF Amount has the meaning provided in Section 2.2(d).

Exempt Person has the meaning provided in Schedule D of Annex VI.

Exempt Vendor has the meaning provided in Schedule C of Annex VI.

Fuel Approval Documents has the meaning provided in Schedule E of Annex VI.

Final Evaluations has the meaning provided in paragraph 4(b) of Annex III.

Fiscal Agent has the meaning provided in paragraph 3(f) of Part B of Annex I.

Goal Indicators has the meaning provided in paragraph 3(a) of Annex III.

Government has the meaning provided in the Preamble.

Governance Guidelines has the meaning provided in paragraph 3(c) of Part B of Annex I.

Implementation Letter has the meaning provided in Section 3.5.

Implementing Entity has the meaning provided paragraph 3(e) of Part B of Annex I.

Implementing Entity Agreement has the meaning provided in paragraph 3(e) of Part B of Annex I.

Indicators has the meaning provided in paragraph 3(a) of Annex III.

Inspector General has the meaning provided in Section 3.8(a).

Irrigation Maintenance Action Plan has the meaning provided in paragraph 2(e) of Part B of Annex I.

Management Unit has the meaning provided in paragraph 3(c) of Part B of Annex I.

M&E Annex has the meaning provided in Annex III.

M&E Plan has the meaning provided in Annex III.

MCA Act has the meaning provided in Section 2.2(a).

MCA-Senegal has the meaning provided in Section 3.2(b).

MCA-Senegal Bylaws has the meaning provided in paragraph 3(c) of Part B of Annex I.

MCC has the meaning provided in the Preamble.

MCC Environmental Guidelines has the meaning provided in Section 2.7(c).

MCC Funding has the meaning provided in Section 2.3.

MCC Gender Policy has the meaning provided in paragraph 3 of Part A of Annex I.

MCC Policy for Monitoring and Evaluation of Compacts and Threshold Programs has the meaning provided for in paragraph 4 of Annex III.

MCC Program Procurement Guidelines has the meaning provided in Section 3.6.

MCC Resettlement Guidance has the meaning provided in paragraph 3 of Part A of Annex I.

MCC Web site has the meaning provided in Section 2.7.

MFG–MCA has the meaning provided in Section 3.2(b).

MoEF has the meaning provided in Schedule A of Annex VI.

Monitoring Component has the meaning provided in paragraph 1 of Annex III.

Multi-Year Financial Plan Summary has the meaning provided in paragraph 1 of Annex II.

NGOs has the meaning provided in paragraph 1 of Part A of Annex I.

OMB has the meaning provided in Section 3.8(b).

OP 4.12 has the meaning provided in paragraph 3 of Part A of Annex I.

PACR has the meaning provided in paragraph 2(d) of Part B of Annex I.

Party and Parties has the meaning provided in the Preamble.

PDMAS has the meaning provided in paragraph 2(d) of Part B of Annex I.

Permitted Account has the meaning provided in Section 2.4.

POAS has the meaning provided in paragraph 2(a)(iv)(2) of Part B of Annex I.

Podor has the meaning provided in paragraph 2(a) of Part B of Annex I.

Principal Representative has the meaning provided in Section 4.2.

Procurement Agent has the meaning provided in paragraph 3(g) of Part B of Annex I.

Program has the meaning provided in the Preamble.

Program Funding has the meaning provided in Section 2.1.

Program Guidelines means collectively the Audit Guidelines, the MCC Environmental Guidelines, the Governance Guidelines, the MCC Program Procurement Guidelines, the Reporting Guidelines, the MCC Policy for Monitoring and Evaluation of Compacts and Threshold Programs, and any other guidelines, policies or guidance papers from time to time published on the MCC Web site.

Program Implementation Agreement or *PIA* has the meaning provided in Section 3.1.

Program Objective has the meaning provided in Section 1.2.

Project(s) has the meaning provided in Section 6.2(b).

Project Objective(s) has the meaning provided in Section 1.3.

Project Objective and Outcome Indicators has the meaning provided in paragraph 3(a) of Annex III.

Provider has the meaning provided in Section 3.7(c).

RN2 has the meaning provided in paragraph 1(a) of Part B of Annex I.

RN6 has the meaning provided in paragraph 1(a) of Part B of Annex I.

Road Fund has the meaning provided in paragraph 1(e) of Part B of Annex I.

SAED has the meaning provided in paragraph 2(a) of Part B of Annex I.

Senegal has the meaning provided in the Preamble.

Stakeholder's Committee has the meaning provided in paragraph 3(c) of Part B of Annex I.

Target has the meaning provided in paragraph 3(a) of Annex III.

Taxes has the meaning provided in Section 2.8(a).

TE has the meaning provided in Schedule B of Annex VI.

Temporary Admission Request has the meaning provided in Schedule B of Annex VI.

United States Dollars means the lawful currency of the United States of America.

US$ means United States Dollars.

USAID has the meaning provided in paragraph 1(d) of Part B of Annex I.

USDA has the meaning provided in paragraph 2(d) of Part B of Annex I.

Valley has the meaning provided in paragraph 1 of Part A of Annex I.

Vendor has the meaning provided in Schedule A of Annex VI.

Annex VI Specific Tax Exemption Mechanisms

Schedule A Value Added Tax (VAT)[9]

Legal Basis for Exemption

1. The Compact.
2. The Agreement dated May 13, 1961, by and between the United States Government and the Government relating to Economic, Financial and Technical Assistance, which entered into force on May 13, 1961 (the ''*Bilateral Agreement*'').
3. Applicable provisions of the Code Général des Impôts.
4. Applicable textes d'application.

Beneficiaries of Exemption

MFG–MCA (to be replaced by MCA-Senegal, both of which shall be referred to herein collectively as ''*MCA-Senegal*''), each Implementing Entity and any individuals or legal persons providing services, goods or works in connection with the Compact Program (each a ''*Vendor*'').

Procedures

A. Local Purchases by MCA-Senegal

- MCA-Senegal requests a final invoice free of VAT (''hors TVA'') for the services, goods or works to be purchased from the applicable supplier.[10]
- MCA-Senegal submits the final invoice to the ''Direction Generale des Impots et Domaines'' (''*DGID*'') of the Ministry of Economy and Finance (''*MoEF*''), requesting exoneration from VAT, together with (i) a reference to the registered Compact or (ii) a copy of the instrument of Compact ratification and the applicable Compact tax provisions. For the avoidance of doubt, MCA-Senegal may also submit the final invoice together with a copy of its ''Attestation d'Exoneration'' (''*AE*'') and a copy of the Compact.
- Within forty-eight (48) hours, DGID stamps the final invoice and returns the same to MCA-Senegal and the purchase(s) can be made by MCA-Senegal free of VAT (''hors TVA'').

B. Local Purchases by Any Implementing Entity or Any Vendor

- The Implementing Entity/Vendor requests a final invoice free of VAT (''hors TVA'') for the goods or services to be purchased from the applicable supplier.[11]
- The Implementing Entity/Vendor submits the final invoice to MCA-Senegal for approval and onward submission to DGID.
- MCA-Senegal submits a request to DGID with the final invoice, requesting exoneration from VAT, together with (i) a reference to the registered Compact or (ii) a copy of the instrument of Compact ratification and the applicable Compact tax provisions. For the avoidance of doubt, MCA-Senegal may also submit the final invoice together with a copy of its AE and a copy of the Compact.
- Within forty-eight (48) hours, DGID stamps the final invoice and returns the same to MCA-Senegal.
- MCA-Senegal delivers the stamped, final invoice to the Implementing Entity/Vendor as soon as practicable and the purchase(s) can be made by the Implementing Entity/Vendor free of VAT (''hors TVA'').

Schedule B Customs Duties

Legal Basis for Exemption

1. The Compact.
2. The Bilateral Agreement.
3. Applicable provisions of the Code des Douanes.
4. Applicable textes d'application.

Beneficiaries of the Exemption

MCA-Senegal, each Implementing Entity and any Vendor importing goods in connection with the Compact Program.

Procedures

A. Purchases of Imported Goods by MCA-Senegal

- MCA-Senegal obtains a pro forma invoice free of all customs duties, including but not limited to VAT and any other applicable Taxes (''hors taxes—hors douane''), for the specific items being imported for Compact-related work, and completes a ''Titre d'Exoneration'' (''*TE*''), which can be obtained from the Chamber of Commerce.[12]
- MCA-Senegal properly signs the TE and submits a request to the ''Direction Generale des Douanes'' (''*DGD*'' of the MoEF requesting the exoneration of all customs duties, including but not limited to VAT and any other applicable Taxes (''hors taxes—hors douane''), on the goods to be imported. The TE and seven (7) copies of the pro forma invoice are attached to the request.
- Within forty-eight (48) hours, the DGD stamps the TE, and the pro forma invoices, and returns all of the documents (collectively, the ''*Approval Documents*'') to MCA-Senegal.
- MCA-Senegal provides the Approval Documents to its ''Commissionnaire Agréé en Douane'' to prepare a ''Declaration de Douane'' (''*DD*''), which can be obtained at the

[9] To the extent that VAT is imposed at the port of entry (''*bureau d'entrée*'') on imported goods, together with custom duties, the applicable tax exemption procedures are described in *Schedule B* below.

[10] For efficiency, the request should reflect the amount of goods needed for several months.

[11] For efficiency, the request should reflect the amount of goods needed for several months.

[12] The TE is actually completed by MCA-Senegal's ''*Commissionnaire Agréé en Douane*'' with the appropriate customs codes for each item to be imported.

port of entry. The ''Commissionnaire Agréé en Douane'' files the DD, together with the Approval Documents, with the ''Bureau Des Douanes d'Importation.''

• Within seventy-two (72) hours, the imported goods can be retrieved free of all customs duties, including but not limited to VAT and any other applicable Taxes (''hors taxes—hors douane'').

B. Purchases of Imported Goods by Any Implementing Entity or Any Vendor

• The Implementing Entity/Vendor submits a request to MCA-Senegal, which shall include (i) seven (7) copies of a pro forma invoice free of all customs duties, including but not limited to VAT and any other applicable Taxes (''hors taxes—hors douane''), for the specific items being imported for Compact-related work and (ii) a completed TE.[13]

• MCA-Senegal, on the Implementing Entity/Vendor's behalf, submits a request to DGD requesting the exoneration of all customs duties, including but not limited to VAT and any other applicable Taxes (''hors taxes—hors douane''), on the goods to be imported. The TE and the pro forma invoices are attached to the request.

• Within forty-eight (48) hours, the DGD stamps the Approval Documents and returns the Approval Documents to MCA-Senegal.

• MCA-Senegal provides the stamped Approval Documents to the Implementing Entity/Vendor as soon as practicable.

• The Implementing Entity/Vendor provides the Approval Documents to its ''Commissionnaire Agréé en Douane'' to prepare a DD, which can be obtained at the port of entry. The ''Commissionnaire Agréé en Douane'' files the DD, together with the Approval Documents, with the ''Bureau Des Douanes d'Importation.''

• Within seventy-two (72) hours, the imported goods can be retrieved free of all customs duties, including but not limited to VAT and any other applicable Taxes (''hors taxes—hors douane'').

C. Temporary Admission of Equipment, Including but Not Limited to Automobiles and Household Goods, by Vendors[14]

• The Vender obtains a pro forma invoice free of all customs duties, including but not limited to VAT and any other applicable Taxes (''hors taxes—hors douane''), for the equipment, including but not limited to automobiles and household goods, to be imported and prepares a ''temporary admission of equipment'' request (a ''*Temporary Admission Request*'').

• MCA-Senegal, on the Vendor's behalf, submits the Temporary Admission Request and seven (7) copies of the pro forma invoice to the Director of Studies and Legislation within DGD as soon as practicable.

• Within seventy-two (72) hours, DGD stamps the Temporary Admission Request and the pro forma invoices, which permits the applicable equipment to be imported free of all customs duties, including but not limited to VAT and any other applicable Taxes (''hors taxes—hors douane''), for a period of twelve (12) months.

• MCA-Senegal provides the stamped Temporary Admission Request to the Vendor as soon as practicable.

• The Vendor, through its ''Commissionnaire Agréé en Douane,'' completes the procedures for the importation of goods set forth in Section B of this Schedule B.

• Thereafter, COTECNA, the control structure approved by the Government (or any successor entity thereto), must validate the purchase price of the equipment, as indicated on the pro forma invoice. COTECNA will identify the origin of the equipment, obtain the actual price of such equipment, and issue a certificate of value, confirming or denying the price set forth in the pro forma invoice. If the purchase price is denied, COTECNA Sénégal saisira COTECNA du pays d'origine du matériel à importer qui contactera à son tour le fournisseur dudit matériel pour avoir son prix réeUne fois ce prix obtenu, COTECNA Sénégal fournit alors l'avis de notification qui confirme ou infirme le prix déclaré; et dans ce cas, un redressement peut être effectué pour porter la vraie valeur dans la déclaration de douane en admiDGD will correct the purchase price as set forth in the Temporary Admission Request and in its internal records. The time required for COTECNA to validate the purchase price of the equipment varies, but in any case shall not delay the time required for DGD to stamp the Temporary Admission Request and the pro forma invoice.

• The stamped Temporary Admission Request also exempts the applicable equipment from any fees and/or charges associated with the ''service des mines,'' including without limitation any registration, sticker and/or license fees.

• The Temporary Admission Request must be renewed every twelve (12) months until the earlier of (i) the completion of the applicable agreement or contract, (ii) the end of the work related to the Compact Program and/or (iii) the expiration or termination of the Compact.

• If the duration of the work related to the Compact Program exceeds twelve (12) months, the Vendor shall submit two requests to MCA-Senegal (for onward submission to the Director of Studies and Legislation within the DGD) prior to the expiration of original Temporary Admission Request:

○ A request for exemption from any Taxes payable on the consumption of equipment previously admitted by the DGD; and

○ A request for renewal of the Temporary Admission Request.

• Upon the earlier of (i) the completion of the applicable agreement or contract, (ii) the end of the work related to the Compact Program and/or (iii) the expiration or termination of the Compact, the equipment must be re-exported or placed in a bonded warehouse. DGD must provide prior authorization for the equipment to be released for consumption in Senegal, and the pro rata share of any applicable Taxes must be paid at such time in accordance with the laws of Senegal.

Schedule C Corporate Income Tax

Legal Basis for Exemption

1. The Compact.
2. The Bilateral Agreement.
3. Applicable provisions of the Code Général des Impôts.
4. Applicable textes d'application.

Beneficiaries

All Vendors (including companies or other legal persons), other than Vendors formed under the laws of Senegal (each an ''*Exempt Vendor*''); provided that in determining if a Vendor has been formed under the laws of Senegal for the purposes of this Schedule C, the status of such Vendor shall be based on its status as of the time it is awarded or executes a Compact-related agreement or contract, and such initial determination shall not change regardless of: (i) The type of agreement or contract used to employ or engage such Vendor, (ii) any laws of Senegal

[13] The TE is actually completed by the Implementing Entity/Vendor's ''*Commissionnaire Agréé en Douane*'' with the appropriate customs codes for each item to be imported.

[14] The Government permits the temporary, tax exempt admission of equipment, including but not limited to automobiles and household goods, if such equipment will be re-exported upon the earlier of (i) the completion of the applicable contract or (ii) the expiration or termination of the Compact; *provided that* such equipment, including but not limited to automobiles and household goods, is used solely for Compact-related work. If the equipment, including but not limited to automobiles and household goods, is later sold in Senegal or is used in Senegal in connection with work that is not related to the Compact Program, then the *pro rata* share of the applicable Taxes must be paid at such time in accordance with the laws of Senegal.

that purport to change such status based on period of contract performance or period of time residing and/or working in Senegal and/or (iii) any requirement under the laws of Senegal that a company or other legal person must establish a branch office in Senegal, or otherwise register or organize itself under the laws of Senegal, in order to provide goods, services or works in Senegal.

Procedures

- Any Exempt Vendor earning only Compact-related corporate income in Senegal in any given fiscal year shall be exempt from paying any applicable Taxes on such Compact-related corporate income and shall declare such Compact-related corporate income in its year-end tax filing with DGID solely for informational purposes.
- Any Exempt Vendor earning Compact-related corporate income and non-Compact-related corporate income in any given fiscal year shall:
  - Submit and register each Compact-related contract or agreement (each a ''*Compact Contract*'') with DGID, together with a certification from MCA-Senegal confirming that the goods, services or works to be provided under the Compact Contract form a part of the Compact program.
  - At the end of any such fiscal year, the Exempt Vendor shall be permitted to exclude, the gross income derived from any Compact Contract(s) (as verified by the registered Compact Contract(s)) for the purposes of determining its corporate income tax liability in Senegal for any such fiscal year. The Exempt Vendor shall declare such Compact-related gross corporate income in its year-end tax filing wth DGID solely for informational purposes.
  - For example, if an Exempt Vendor earned US$100,000 of gross corporate income under a Compact Contract(s) and an additional US$500,000 in other Senegal-related gross corporate income, the Exempt Vendor shall be permitted to exclude, the US$100,000 for the purposes of determining its corporate income tax liability in Senegal for such fiscal year.

Schedule D Individual Income Tax

Legal Basis for Exemption

1. The Compact.
2. The Bilateral Agreement.
3. Applicable provisions of the Code Général des Impôts.
4. Applicable textes d'application.

Beneficiaries

All individuals, other than citizens and permanent residents of Senegal, working in connection with the Compact Program (each an ''*Exempt Person*''); provided that in determining if an individual is a permanent resident for the purposes of this Schedule D, the status of such individual shall be based on his/her status as of the time that such individual is awarded or executes a Compact-related agreement or contract, and such initial determination shall not change regardless of: (i) The type of contract used to employ or engage such individual and/or (ii) any laws of Senegal that purport to change such status based on period of contract performance or period of time residing and/or working in Senegal.

Procedures

- Any Exempt Person earning only Compact-related personal income in Senegal in any given fiscal year shall be exempt from paying any applicable Taxes on such Compact-related personal income, and shall declare such Compact-related personal income in its year-end tax filing with DGID solely for informational purposes.
- Any Exempt Person earning Compact-related personal income and non-Compact-related personal income in any given fiscal year shall be permitted to exclude the gross amount of such Compact-related personal income for the purposes of determining his/her personal income tax liability in Senegal for any such fiscal year. The Exempt Person shall declare such Compact-related gross personal income in its year-end tax filing with DGID solely for informational purposes.

Schedule E Fuel Tax

Legal Basis for Exemption

1. The Compact.
2. The Bilateral Agreement.
3. Applicable provisions of the Code Général des Impôts.
4. Applicable provisions of the Code des Douanes.
5. Applicable textes d'application.

Beneficiaries

Any fuel purchased for use exclusively in connection with the Compact Program.

Procedures

A. Purchases of Fuel by MCA-Senegal Through Gas Coupons

- MCA-Senegal obtains a pro forma invoice from a Senegal-based oil company for a particular quantity of fuel free of all of customs duties, including but not limited to VAT, the ''tax speciale sur hydrocarbons'' and any other applicable Taxes (''hors taxes—hors douane''), and completes a TE, which can be obtained from the Chamber of Commerce.[1]
- MCA-Senegal properly signs the TE and submits a request to DGD requesting the exoneration of all customs duties, including but not limited to VAT, the ''tax speciale sur hydrocarbons'' and any other applicable Taxes (''hors taxes—hors douane''), on the fuel to be imported. The TE and seven (7) copies of the pro forma invoice are attached to the request.
- Within seventy-two (72) hours, DGD stamps the TE and the pro forma invoices (collectively, the ''*Fuel Approval Documents*'') and returns the same to MCA-Senegal.
- Thereafter, MCA-Senegal submits the Fuel Approval Documents to DGID requesting the exoneration of any additional Taxes.
- Within seventy-two (72) hours, DGID stamps the Fuel Approval Documents and returns the same to MCA-Senegal.
- The stamped Fuel Approval Documents shall entitle MCA-Senegal to purchase free from customs duties, including but not limited to VAT, the ''tax speciale sur hydrocarbons'' and any other applicable Taxes (''hors taxes—hors douane''), for the price set forth in the pro forma invoice, gas coupons from the Senegal-based oil company equal to, in the aggregate, the quantity of fuel represented on the pro forma invoice.
- Subject to the specific terms of the arrangement with the Senegal-based oil company, the gas coupons can be redeemed at the oil company's various gas stations in Senegal. Each coupon entitles the bearer to the quantity of fuel set forth on such coupon.

B. Purchase of Fuel by Implementing Entities/Vendors Through Gas Coupons

- The Implementing Entity/Vendor submits a request to MCA-Senegal, which shall include (i) seven (7) copies of a pro forma invoice from a Senegal-based oil company for a particular quantity of fuel free of all of customs duties, including VAT, the ''tax speciale sur hydrocarbons'' and any other applicable Taxes (''hors taxes—hors douane''), and (ii) a completed TE.[2]
- MCA-Senegal, on the Implementing Entity/Vendor's behalf, submits a request to DGD requesting the exoneration of all customs, including VAT, the ''tax speciale sur

[1] The TE is actually completed by MCA-Senegal's ''*Commissionnaire Agréé en Douane*'' with the appropriate customs code.

[2] The TE is actually completed by the Implementing Entity/Vendor's ''*Commissionnaire Agréé en Douane*'' with the appropriate customs code.

hydrocarbons'' and any other applicable Taxes (''hors taxes—hors douane''), on the fuel to be imported. The TE and pro forma invoices are attached to the request.

• Within seventy-two (72) hours, DGD stamps the Fuel Approval Documents and returns the same to MCA-Senegal.

• Thereafter, MCA-Senegal submits the Fuel Approval Documents to DGID requesting the exoneration of any additional Taxes.

• Within seventy-two (72) hours, DGID stamps the Fuel Approval Documents and returns the same to MCA-Senegal.

• MCA-Senegal provides the stamped Fuel Approval Documents to the Implementing Entity/Vendor as soon as practicable.

• The stamped Fuel Approval Documents shall entitle the Implementing Entity/Vendor to purchase free from customs duties, including but not limited to VAT, the ''tax speciale sur hydrocarbons'' and any other applicable Taxes (''hors taxes—hors douane''), for the price set forth in the pro forma invoice, gas coupons from the Senegal-based oil company equal to, in the aggregate, the quantity of fuel represented on the pro forma invoice.

• Subject to the specific terms of the arrangement with the Senegal-based oil company, the gas coupons can be redeemed at the oil company's various gas stations in Senegal. Each coupon entitles the bearer to the quantity of fuel set forth on such coupon.

C. Purchases of Fuel by MCA-Senegal To Be Imported in Bulk

• MCA-Senegal obtains a pro forma invoice from an oil company for a particular quantity of fuel free of all of customs duties, including but not limited to VAT, the ''tax speciale sur hydrocarbons'' and any other applicable Taxes (''hors taxes—hors douane''), and completes a TE.[3]

• MCA-Senegal properly signs the TE and submits a request to DGD requesting the exoneration of all customs duties, including but not limited to VAT, the ''tax speciale sur hydrocarbons'' and any other applicable Taxes (''hors taxes—hors douane''), on the fuel to be imported. The TE and seven (7) copies of the pro forma invoice are attached to the request.

• Within seventy-two (72) hours, DGD stamps the Fuel Approval Documents and returns the same to MCA-Senegal.

• Thereafter, MCA-Senegal submits the Fuel Approval Documents to DGID requesting the exoneration of any additional Taxes.

• Within seventy-two (72) hours, DGID stamps the Fuel Approval Documents and returns the same to MCA-Senegal.

• MCA-Senegal provides the Fuel Approval Documents to its ''Commissionnaire Agréé en Douane'' to prepare a DD, which can be obtained at the port of entry. The ''Commissionnaire Agréé en Douane'' files the DD, together with the Fuel Approval Documents, with the ''Bureau Des Douanes d'Importation.''

• Within seventy-two (72) hours, the fuel can be retrieved free of all of customs duties, including VAT, the ''tax speciale sur hydrocarbons'' and any other applicable Taxes (''hors taxes—hors douane'').

D. Purchases of Fuel by an Implementing Entity/Vendor To Be Imported in Bulk

• The Implementing Entity/Vendor submits a request to MCA-Senegal, which shall include (i) seven (7) copies of a pro forma invoice from an oil company for a particular quantity of fuel free of all of customs duties, including VAT, the ''tax speciale sur hydrocarbons'' and any other applicable Taxes (''hors taxes—hors douane''), and (ii) a completed TE.[4]

• MCA-Senegal, on the Implementing Entity/Vendor's behalf, submits a request to DGD requesting the exoneration of all customs, including VAT, the ''tax speciale sur hydrocarbons'' and any other applicable Taxes (''hors taxes—hors douane''), on the fuel to be imported. The TE and pro forma invoices are attached to the request.

• Within seventy-two (72) hours, DGD stamps the Fuel Approval Documents and returns the same to MCA-Senegal.

• Thereafter, MCA-Senegal submits the Fuel Approval Documents to DGID requesting the exoneration of any additional Taxes.

• Within seventy-two (72) hours, DGID stamps the Fuel Approval Documents and returns the same to MCA-Senegal.

• MCA-Senegal provides the stamped Fuel Approval Documents to the Implementing Entity/Vendor as soon as practicable.

• The Implementing Entity/Vendor provides the Fuel Approval Documents to its ''Commissionnaire Agréé en Douane'' to prepare a DD, which can be obtained at the port of entry. The ''Commissionnaire Agréé en Douane'' files the DD, together with the Fuel Approval Documents, with the ''Bureau Des Douanes d'Importation.''

• Within seventy-two (72) hours, the fuel can be retrieved free of all of customs duties, including VAT, the ''tax speciale sur hydrocarbons'' and any other applicable Taxes (''hors taxes—hors douane'').

Schedule F Registration Tax, Registration Fees and Stamp Duty

Legal Basis for Exemption

1. The Compact.
2. The Bilateral Agreement.
3. Applicable provisions of the Code Général des Impôts.
4. Applicable textes d'application.

Beneficiaries

MCA-Senegal and any Vendors, for any act or transaction related to the Compact Program that is subject to registration fees, stamp duty and/or any other registration taxes.

Procedures

A. MCA-Senegal

• At the time MCA-Senegal presents the applicable Compact Contract to DGID to be stamped and/or registered, MCA-Senegal shall present a copy of the Compact

• Upon presentation of such documentation, DGID shall stamp and/or register the applicable Compact Contract without charge and free from any applicable Taxes.

B. Vendors

• At the time a Vendor presents the applicable Compact Contract to DGID to be stamped and/or registered, the Vendor shall present a copy of the Compact, together with a certification from MCA-Senegal confirming that the goods, services or works to be provided under the Compact Contract form a part of the Compact program.

• Upon presentation of such documentation, DGID shall stamp and/or register the applicable Compact Contract without charge and free from any applicable Taxes.

[FR Doc. E9–23328 Filed 10–20–09; 8:45 am]

BILLING CODE 9211–03–P

[3] The TE is actually completed by MCA-Senegal's ''*Commissionnaire Agréé en Douane*'' with the appropriate customs code.

[4] The TE is actually completed by the Implementing Entity/Vendor's ''*Commissionnaire Agréé en Douane*'' with the appropriate customs code.

Federal Register

Wednesday,
October 21, 2009

Part V

Department of Housing and Urban Development

Buy American Exception Under the American Recovery and Reinvestment Act of 2009: Notice of National Exceptions of Section 1605 (Buy American Requirement) of the American Recovery and Reinvestment Act of 2009 Applicable to Community Planning and Development Recovery Act Funds; Notice

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5357–N–01]

Buy American Exception Under the American Recovery and Reinvestment Act of 2009: Notice of National Exceptions of Section 1605 (Buy American Requirement) of the American Recovery and Reinvestment Act of 2009 Applicable to Community Planning and Development Recovery Act Funds

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: In accordance with the American Recovery and Reinvestment Act of 2009, Public Law 111–5, 123 Stat. 115 (2009) (Recovery Act), and implementing guidance of the Office of Management and Budget (OMB), this notice advises that national exceptions to the Buy American requirements of the Recovery Act have been determined applicable for projects using Community Development Block Grant-Recovery (CDBG–R) funds and Neighborhood Stabilization Program 2 (NSP2) funds.

FOR FURTHER INFORMATION CONTACT: Stanley Gimont, Director, Office of Block Grant Assistance, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7286, Washington, DC 20410, telephone number 202–708–3587. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at 800–877–8339. FAX inquiries may be sent to Mr. Gimont at 202–401–2044. Except for the ''800'' number, these telephone numbers are not toll free.

SUPPLEMENTARY INFORMATION: The Recovery Act appropriated $1 billion in CDBG–R funds to states and local governments to carry out eligible activities on an expedited basis. The Recovery Act also appropriated $2 billion for the second round of NSP2, ''[f]or the provision of emergency assistance for the redevelopment of abandoned and foreclosed homes.'' 123 Stat. 217. Section 1605(a) of the Recovery Act imposes a Buy American requirement on Recovery Act funds used for a project for the construction, alteration, maintenance, or repair of a public building or public work. The section provides that all of the iron, steel, and manufactured goods used in the project must be produced in the United States. Section 1605(b) provides that the Buy American requirement shall not apply in any case or category of cases in which the head of a federal department or agency finds that: (1) Applying the Buy American requirement would be inconsistent with the public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of satisfactory quality; or (3) inclusion of iron, steel, and manufactured goods will increase the cost of the overall project by more than 25 percent. Section 1605(c) provides that if the head of a federal department or agency makes a determination pursuant to section 1605(b), the head of the department or agency shall publish a detailed written justification in the **Federal Register.**

In accordance with section 1605(c) of the Recovery Act and OMB's implementing guidance published on April 23, 2009 (74 FR 18449), this notice advises the public that the Secretary determined it was necessary to approve certain exceptions to the Buy American requirement based on findings under section 1605(b) with respect to work using CDBG–R or NSP2 funds. Those exceptions are as follows:

1. If another federal agency (*e.g.,* Department of Commerce, Department of Energy, or Environmental Protection Agency) has granted a Buy American exception under section 1605(b) for a project, HUD will accept that agency's determination and permit the grantee to apply that exception for the remainder of CDBG–R or NSP2 funded work in that project.

2. If another HUD Program Office (*e.g.,* Office of Public and Indian Housing) has granted a Buy American exception under section 1605(b) for a specific project, and a written determination supports its application to another request, the grantee may apply that exception for the CDBG–R or NSP2 funded work in that project. To use this exception, the grantee must submit to CPD a written determination justifying the applicability of the previously granted exception to the relevant portion of the project. CPD must concur in that determination.

3. For publicly owned housing [1] assisted with CDBG–R or NSP2 funds, when such property contains fewer than 8 units.[2]

4. When the size of the CDBG–R grant from HUD to a grantee or (in the case of State CDBG–R) from a state to a state grant recipient is less than $100,000.

5. When the size of a contract funded with the CDBG–R or NSP2 grant is less than the simplified acquisition threshold described in 24 CFR 85.36 (currently $100,000), regardless of the size of the grantee.

6. Any project that is substantially under contract or under construction prior to acceptance of the CDBG–R or NSP2 funds.

The above national exceptions are based on a determination of inconsistency with the public interest. In addition to these exceptions, a list of items already determined to be domestically nonavailable can be found at 48 CFR 25.104(a) (FAR List). HUD does not need to provide an exception or any additional justification to allow grantees to use items currently on the FAR List of domestically nonavailable items at 48 CFR 25.104(a). The procedures to apply if any of those articles are manufactured goods needed in a project covered by the Buy American requirement are found at 48 CFR 25.103(b)(1). See also 2 CFR 176.80. At this time, HUD is not adding to the FAR List. If a grantee wants to use items on the FAR List or to have items added to the FAR List or to a HUD list, the grantee must follow the CPD Implementation Guidance for the Buy American requirement.

Additional information about these exceptions can be found in the CPD Implementation Guidance for the Buy American requirement. To review the Guidance, visit the CPD page on HUD's Client Information and Policy System (HUDCLIPS) at: *http://www.hud.gov/offices/adm/hudclips/notices/cpd/.*

Background

HUD generally requires that grantees use American-made iron, steel and manufactured goods throughout Recovery Act-assisted projects subject to the Buy American requirement. However, there are certain circumstances under which exceptions to the Buy American requirement will be appropriate in accordance with section 1605(b). In administering Recovery Act programs, HUD must also apply the Buy American requirement in a manner that does not undermine the broader purposes and objectives of the Act, as well as statutory provisions

[1] For purposes of this exception, ''publicly owned'' housing includes, but is not limited to, public housing as defined in 24 CFR 5.100; residential structures owned by other governmental entities listed in 2 CFR 176.140; and public facilities designed to provide shelter to persons with special needs and owned by governmental entities listed in 2 CFR 176.140.

[2] For purposes of this exception, ''such property contains fewer than 8 units'' is to be construed in a manner consistent with the Davis-Bacon exemption under section 110 of the Housing and Community Development Act of 1974. This exemption has been interpreted to include property containing 7 or fewer units. Typically, single-family properties are excluded under this exemption.

specific to CDBG–R and NSP2 funding. First and foremost, the Recovery Act was enacted to provide an immediate stimulus to the U.S. economy. As stated in section 3 of the Recovery Act:

> GENERAL PRINCIPLES CONCERNING USE OF FUNDS.—The President and the heads of Federal departments and agencies shall manage and expend the funds made available in this Act so as to achieve the [specified] purpose * * * including commencing expenditures and activities as quickly as possible consistent with prudent management.

123 Stat. at 116. In addition, the Recovery Act includes quick expenditure provisions specific to CDBG–R and NSP2 grants. In particular, the statute mandates that, ''in administering the [CDBG–R] funds, [HUD] shall establish requirements to expedite the use of the funds.'' 123 Stat. at 217. The law also requires that ''in selecting projects to be funded, recipients shall give priority to projects that can award contracts based on bids within 120 days from the date the funds are made available to the recipients.'' *Id.* The NSP2 appropriation included another mandate for grantees to ''expend at least 50 percent of allocated funds within 2 years of the date funds become available to the grantee for obligation, and 100 percent of such funds within 3 years of such date.'' *Id.* Consistent with this intent, HUD has already established mechanisms designed to put NSP2 and CDBG–R funds to immediate use, including establishing spending/obligation deadlines in funding announcements and grant agreements, and expecting at least quarterly drawdowns from the grantee's line of credit. In order to further expedite grantees' timely use of Recovery Act funds, HUD is granting national exceptions that are all supportive and essential to carrying out these congressional mandates and balanced with the interests and intent of the Buy American requirements.

The following national exceptions based on the public interest are necessary to: (1) Avoid delay in completion and restoration of housing for low-income families and the achievement of Recovery Act deadlines; (2) avoid delays in the start of construction and completion of public facilities and improvements that will jeopardize jobs; (3) avoid the possibility of additional funding gaps on termination of certain contracts and price differentials caused by reprocurement of goods and equipment; (4) avoid loss of funding for critical projects; and (5) address current and emerging situations presented by states and local governments.

Publicly Owned Housing Fewer Than 8 Units

To expedite grantees' timely use of Recovery Act funds, HUD believes it is in the public interest to provide an exception to the Buy American requirement, to the extent that it applies to publicly owned housing projects developed with CDBG–R and NSP2 funds, when such property contains fewer than 8 units. This 8-unit threshold ensures that CDBG–R and NSP2 funds are employed in a prudent manner consistent with applicable program requirements.

Funding available under the Recovery Act has clear purposes—to stimulate the economy through measures that modernize the Nation's infrastructure, improve energy efficiency, and expand educational opportunities and access to health care. Congress clearly intends that CDBG–R funds should be invested in housing, infrastructure, and other public facilities activities that will quickly spur further economic investment, increase energy efficiency, and job creation or retention. To this end, HUD has strongly urged grantees to use CDBG–R funds for hard development costs associated with infrastructure activities that provide basic services to residents or activities that promote energy efficiency and conservation through rehabilitation or retrofitting of existing buildings. However, in the CDBG program, while HUD awards financial assistance to state and local governments, the decision concerning how the financial assistance will be expended and in what combination, if any, is left to the state or local government. Grantees may use CDBG–R funds for stimulus activities that involve publicly or privately owned structures. Buy American coverage, however, is limited to public works and public buildings. The requirement does not apply to the development of privately owned housing. This distinction may have the unintended effect of grantees moving CDBG–R funds away from publicly owned housing in favor of privately owned housing. The resulting loss of federal funding could restrict affordable housing opportunities for our Nation's most vulnerable citizens, including the elderly, disabled, or other special needs populations.

Similar unintended consequences may also affect the progress of other housing activities in the CDBG–R and NSP2 programs. NSP2 funding, in particular, is intended ''to assist states, local governments, and nonprofits in the purchase and rehabilitation of foreclosed, vacant properties in order to create more affordable housing and reduce neighborhood blight.'' H.R. Conf. Rep. No. 111–16, at 472. After acquiring abandoned and foreclosed-upon residential properties, governmental entities may still hold title to the homes during the renovation process. It is anticipated that many of these homes will be single-family homes and other small residential properties with fewer than 8 units. In small renovations, it would be impractical to research the origins of every potential manufactured good under the time constraints. A typical housing renovation uses countless materials that could be construed as ''manufactured goods.'' Grantees have brought to HUD's attention that every housing project involves the use of literally thousands of miscellaneous, generally low-cost components that are essential, but incidental, to the construction and modernization, and are incorporated into the physical structure of the project, such as nails, hinges, or other hardware, and electrical, plumbing, and finishing components. These components are subject to the Buy American requirement, but the country of manufacture and the availability of alternatives are not readily or reasonably identifiable prior to procurement in the normal course of construction and modernization of publicly owned housing. Under the requirements of the Recovery Act, it would be laborious, likely unproductive to find feasible alternatives, and disproportionate to the costs and time involved for the grantee or its contractor to pursue such inquiries.

Given the magnitude of the foreclosure crisis and the unprecedented numbers of families facing homelessness, returning abandoned and foreclosed-upon residential properties to the affordable housing stock is of critical importance. As a result, HUD has looked to identify the scope of components within the construction and development of small publicly owned housing projects. HUD has considered the disproportionate cost and delay that would be imposed on small publicly owned housing projects if HUD did not issue certain exceptions to the Buy American requirement.

De Minimis Exceptions

The national exception for jurisdictions with a CDBG–R grant of less than $100,000 will cover about 10 percent of CDBG–R grantees and will amount to a relatively small impact (approximately $11.5 million of the nearly $1 billion in CDBG–R grant awards). This exception also covers State CDBG–R grants for less than $100,000 from states to units of general

local government (state grant recipients). Another reason that Recovery Act funds have been provided to state and local governments is the recognition that state and local governments are suffering from serious budgetary constraints due to simultaneous revenue shortfalls and increased demand for services. CDBG–R funding, in particular, reaches small and rural communities. HUD understands that such communities often have to search further in order to procure American-made items and to find contractors familiar with the Buy American requirement. For these communities, it takes additional time to procure and there are increased costs associated with bringing materials and contractors in from a great distance. The additional time and allocation of scarce staff resources to finding American-made materials for relatively small grants works against state and local governments' fiscal constraints, as well as the Recovery Act's expenditure deadlines. In many cases, the administrative time and cost involved in undertaking such searches would be overly burdensome given the nature of the projects. Recognition of the lack of availability and access to resources and as relief from administrative burdens are critical to the success of small grantees and is consistent with Recovery Act objectives. As with any new requirement, implementation of the Buy American requirement will take analysis and resources that are not readily available to small grantees. The need for the expeditious and efficient use of the CDBG–R funds, balanced with the long established recognition of decreased availability of resources available to small grantees, clearly supports exception 4 above. Because the NSP2 program has a minimum grant amount of $5 million, there is no national exception for small grant size.

HUD has decided to grant an exception when a contract assisted with CDBG–R or NSP2 funds is less than the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently $100,000). This tracks the standard applied to small purchases described in 24 CFR part 85. Under 24 CFR 85.36(d)(1), small purchase procedures are relatively simple and informal methods for securing goods that do not cost more than the simplified acquisition threshold. Imposing the Buy American requirement on these small-scale projects would result in an unreasonable delay in affordable housing and infrastructure development. Therefore, HUD hereby provides notice that it is granting a limited nationwide exception of the Buy American requirement to allow the use of nondomestic iron, steel, and manufactured goods when they occur in such *de minimis* contracts assisted with CDBG–R or NSP2 funds.

Projects That Are Substantially Under Contract or Under Construction

HUD is granting an exception to the Buy American requirement for any project substantially under contract or underway prior to acceptance of the CDBG–R or NSP2 funds. Delaying these ''shovel ready'' projects, by requiring grantees to restart the design and bidding process again, would pose substantial obstacles to compliance with the above obligation and expenditure deadlines. HUD finds that impeding projects already substantially under contract or underway would be inconsistent with the public interest.

In order to be substantially under contract, a project must have the following characteristics prior to the date that HUD executes the Grant Agreement:

1. The HUD grantee has secured financial commitments for the project;

2. The HUD grantee has solicited bids for the project's construction and selected a general contractor. The general contractor has provided a price or estimate, which does not include the use of all American-made products. The HUD grantee must maintain documentation of the bid solicitation process and the bid in its files;

3. The project is in the HUD grantee's consolidated plan/annual action plan, amended consolidated plan/annual action plan, or NSP2 application (including any amendments thereto);

4. The project is ready to begin construction and will have all required zoning, building, and other necessary permits to start construction;

5. The HUD grantee can show that it is in the public interest to move ahead with the project and not rebid the construction work to ensure that all products are American-made. To support its public interest determination, the HUD grantee must maintain documentation demonstrating that rebidding will result in one or more of the following:

a. A substantial delay in the construction and completion of the project;

b. a substantial increase in a project's cost, which renders the project infeasible given the financial resources that have already been committed to it;

c. one or more lenders or funding partners or the construction contractor rescinding their commitment to the project, resulting in the project being significantly delayed or rendering it infeasible;

d. a HUD grantee missing the obligation and expenditure deadlines specified in the Recovery Act (CDBG–R funds must be expended by September 30, 2012, and for NSP2 funds, 50 percent expended within 2 years of obligation availability and100 percent within 3 years of obligation availability);

e. jobs not being created or retained;

f. negative economic consequences to a neighborhood or locality if a project is delayed or cannot be built; or

g. other compelling negative hardships related to the above; and

6. The costs and activities comply with all applicable program requirements, including environmental, labor standards, and (where applicable for CDBG–R activities) pre-award cost limitations.

Due to the national economic crisis, a HUD grantee may find that a project that was previously under construction has lost one or more of its funding commitment(s) and is now halted due to the loss of this funding commitment(s). In seeking additional funding sources, the HUD grantee may decide that the commitment of CDBG–R or NSP2 Recovery Act funds to the project is the best way to get the project back on track and to resume construction. The project's existing construction contract may include the use of materials that do not meet the Buy American requirement. The HUD grantee may take advantage of this exception in order to complete the project. To be considered as a project under construction, a project must have the following characteristics prior to the date that HUD executes the Grant Agreement:

1. The HUD grantee has secured the remaining financial commitments for the project and these sources are currently available to the project;

2. The HUD grantee has an existing construction contract and general contractor. The general contractor contract does not include the use of all American-made products. The HUD grantee has documentation of the bid solicitation process and the bid in its files;

3. The project is in the HUD grantee's consolidated plan/annual action plan, amended consolidated plan/annual action plan, or NSP2 application (including any amendments thereto);

4. The project is ready to resume construction and has received the required zoning, building, and other necessary permits to start construction;

5. The HUD grantee can show that it is in the public interest to resume construction and not rebid the construction work to ensure that all

products are American-made. To support its public interest determination, the HUD grantee must maintain documentation demonstrating that rebidding will result in one or more of the following:

a. A substantial delay of the construction and completion of the project;

b. a substantial increase in a project's cost, which renders the project infeasible given the financial resources that have already been committed to it;

c. one or more lenders or funding partners or the construction contractor rescinding their commitment to the project, resulting in the project being significantly delayed or rendering it infeasible;

d. a HUD grantee missing the obligation and expenditure deadlines specified in the Recovery Act (CDBG–R funds must be expended by September 30, 2012, and for NSP2 funds, 50 percent expended within 2 years of obligation availability and 100 percent within 3 years of obligation availability);

e. jobs not being created or retained;

f. negative economic consequences to a neighborhood or locality if a project is delayed or cannot be built; or

g. other compelling negative hardships related to the above; and

6. The costs and activities, including the initial construction, comply with all applicable program requirements, including environmental, labor standards, and (where applicable for CDBG–R projects) pre-award cost limitations.

In conclusion, HUD has determined that these exceptions are appropriate because compliance with the Buy American requirement would be disproportionate to the cost and time involved for grantees and contractors delaying work on critical Recovery Act projects and the jobs associated with those projects. In accordance with section 1605(c) of the Recovery Act, HUD hereby provides notice that it is granting limited nationwide exceptions of the Buy American requirement for the above categories of cases. For the above reasons, HUD has determined that applying the Buy American requirement to these categories of cases would be inconsistent with the public interest. This supplementary information constitutes the detailed written justification required by section 1605(c) for exceptions ''based on a finding under subsection (b).'' The exception applies only to the CDBG–R and NSP2 grant funds and not to the use of other Recovery Act funding, even if such other funds are used in conjunction with CDBG–R and NSP2 funds for a project. Any HUD grantee who wishes to use the above exceptions must maintain sufficient documentation to demonstrate the applicability of the exception and compliance with any terms or conditions set forth in the exception.

This public-interest justification does not reach the conclusion that the inclusion of iron, steel, and manufactured goods produced in the United States will automatically increase the cost of the overall project by more than 25 percent. Cost is a factor in all procurements and must be considered in accordance with 24 CFR part 85 and the cost principles at 2 CFR part 225. Cost is a factor in all of HUD's public-interest national exceptions. HUD has decided that cost-based exceptions must be made on a case-by-case basis and submitted to HUD for review under CPD Implementation Guidance for the Buy American Requirement. For additional information, visit the CPD page on HUD's Client Information and Policy System (HUDCLIPS) at: *http://www.hud.gov/offices/adm/hudclips/notices/cpd/*. Questions may be submitted to *BuyAmericanQuestions@hud.gov.*

Dated: October 14, 2009.

Mercedes M. Márquez,

Assistant Secretary for Community Planning and Development.

[FR Doc. E9–25217 Filed 10–20–09; 8:45 am]

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Federal Register

Wednesday,
October 21, 2009

Part VI

Department of Agriculture

Agricultural Marketing Service

7 CFR Parts 1000, 1001, 1005, et al.

Milk in the Northeast and Other Marketing Areas; Recommended Decision and Opportunity To File Written Exceptions on Proposed Amendments to Tentative Marketing Agreements and Orders; Proposed Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1000, 1001, 1005, 1006, 1007, 1030, 1032, 1033, 1124, 1126 and 1131

[Doc. No. AO–14–A78, et al.; DA–09–02; AMS–09–0007]

Milk in the Northeast and Other Marketing Areas; Recommended Decision and Opportunity To File Written Exceptions on Proposed Amendments to Tentative Marketing Agreements and Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule; recommended decision.

SUMMARY: This decision recommends that the producer-handler definitions of all Federal milk marketing orders be amended to limit exemption from pooling and pricing provisions to those with total route disposition of fluid milk products of 3 million pounds or less per month. The exempt plant definition would continue to limit disposition of Class I milk products to 150,000 pounds or less per month.

DATES: Comments must be submitted on or before December 21, 2009.

ADDRESSES: All comments received will be posted electronically without change, including any personal information provided. Comments (three copies) should be filed with the Hearing Clerk, United States Department of Agriculture, STOP 9200–Room 1031, 1400 Independence Avenue, SW., Washington, DC 20250–1031. You may electronically submit comments at the Federal eRulemaking portal: *http://www.regulations.gov.* Reference should be made to the title of the action and docket number.

FOR FURTHER INFORMATION CONTACT: Gino M. Tosi or Jack Rower, Senior Marketing Specialists, Order Formulation and Enforcement Branch, USDA/AMS/Dairy Programs, Stop 0231–Room 2971, 1400 Independence Avenue, SW., Washington, DC 20250–0231, (202) 720–7183, e-mail addresses: *gino.tosi@ams.usda.gov* and *jack.rower@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This decision recommends that the producer-handler provisions of all Federal milk marketing orders be amended to limit exemption from pooling and pricing to those with total route disposition of fluid milk products of 3 million pounds or less per month. The exempt plant definition would continue to limit disposition of Class I milk products to 150,000 pounds or less per month.

This administrative action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

The amendments to the rules proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have a retroactive effect. The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674) (AMAA), provides that administrative proceedings must be exhausted before parties may file suit in court. Under Section 608c(15)(A) of the AMAA, any handler subject to an order may request modification or exemption from such order by filing with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, USDA would rule on the petition. The AMAA provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review USDA's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a ''small business'' if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a ''small business'' if it has fewer than 500 employees. For the purpose of determining which dairy farms are ''small businesses,'' the $750,000 per year criterion was used to establish a milk marketing guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most ''small'' dairy farms. For purposes of determining a handler's size, if the plant is part of a company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

Producer-handlers are dairy farms that process their own milk production. These entities must operate one or more dairy farms as a pre-condition to operating processing plants as producer-handlers. The size of the dairy farm(s) determines the production level of the operation and is a controlling factor in the capacity of the processing plant and possible sales volume associated with the producer-handler entity. Determining whether a producer-handler is considered a small or large business is therefore dependent on the capacity of its dairy farm(s), where a producer-handler with annual gross revenue in excess of $750,000 is considered a large business.

The proposed amendments would obligate some large producer-handlers under the Federal milk marketing order system to the same terms as other fully regulated handlers of their respective orders provided they meet the criteria for qualification as fully regulated plants. Entities currently defined as producer-handlers under the terms of their order will be subject to the pooling and pricing provisions of the order if their total route disposition of fluid milk products is more than 3 million pounds per month.

Producer-handlers with total route disposition of 3 million pounds or less during the month will not be subject to the pooling and pricing provisions of any order as a result of this rulemaking. To the extent that current producer-handlers have route disposition of fluid milk products outside of the order's marketing areas, such route disposition will be subject to the pooling and pricing provisions of the orders if total route disposition causes them to become fully regulated.

If current producer-handlers have total route disposition of fluid milk products of more than 3 million pounds during a month, such producer-handlers will be regulated under the pooling and pricing provisions of the orders like other fully regulated handlers. Such large producer-handlers will account to the pool for their uses of milk at the applicable minimum class prices and pay the difference between their use-value of milk and the blend price of the order to that order's producer-settlement fund.

While this may cause an economic impact on those entities with more than three million pounds of route sales that are currently considered producer-handlers under the Federal order system, the impact is offset by the benefit to other small businesses. With respect to dairy farms whose milk is

pooled on Federal marketing orders, such dairy farms who have not heretofore shared in the additional revenue that accrues from the marketwide pooling of Class I sales by producer-handlers will share in such revenue. All producer-handlers who dispose of more than three million pounds of fluid milk products per month will account to all market participants at the announced Federal order Class I price for such use.

To the extent that some large producer-handlers become subject to the pooling and pricing provisions of Federal milk marketing orders, such will be determined in their capacity as handlers. Such entities will no longer have restrictions applicable to their business operations that were conditions for producer-handler status and exemption from the pooling and pricing provisions of the orders. In general, this includes being able to buy or acquire any quantity of milk from dairy farmers or other handlers instead of being limited by the current constraints of the orders. Additionally, the burden of balancing their milk production is relieved. Milk production in excess of what is needed to satisfy their Class I route disposition needs may receive the minimum price protection established under the terms of the Federal milk marketing orders. The burden of balancing milk supplies will be borne by all producers and handlers who are pooled and regulated under the terms of the orders.

During May 2009 the Northeast order had 57 pool distributing plants, 10 pool supply plants, 16 partially regulated distributing plants, 13 producer-handler plants and 40 exempt plants. Of the 83 regulated plants, 49 plants or 59 percent were considered large businesses. Of the 13,050 dairy farmers whose milk was pooled on the order, 628 farms or 5 percent were considered large businesses and 12,422 farms or 95 percent of dairy farms in the Northeast order were considered small businesses. Most of these dairy farms, large and small, could benefit by receiving a higher blend price, if the recommended 3-million pound monthly Class I route disposition limitation for producer-handlers is adopted.

During May 2009, the Appalachian order had 21 pool distributing plants, 1 pool supply plant, 2 partially regulated distributing plants, 1 producer-handler plant and 4 exempt plants. Of the 24 regulated plants, 21 plants or 88 percent were considered large businesses. Of the 2,516 dairy farmers whose milk was pooled on the order, 159 farms or 6 percent were considered large businesses and 2,357 farms or 94 percent of dairy farms in the Appalachian order were considered small businesses. Most of these dairy farms, large and small, could benefit by receiving a higher blend price, if the recommended 3-million pound monthly Class I route disposition limitation for producer-handlers is adopted.

During May 2009, the Florida order had 11 pool distributing plants, 5 partially regulated distributing plants and 2 exempt plants. The order had no pool supply plants or producer-handler plants as of May 2009. Of the 16 regulated plants, 12 plants or 75 percent were considered large businesses. Of the 249 dairy farmers whose milk was pooled on the order, 105 farms or 42 percent were considered large businesses and 144 farms or 58 percent of dairy farms in the Florida order were considered small businesses. Most of these dairy farms, large and small, could benefit by receiving a higher blend price, if the recommended 3-million pound monthly Class I route disposition limitation for producer-handlers is adopted.

During May 2009, the Southeast order had 22 pool distributing plants, 3 pool supply plants, 6 partially regulated distributing plants and 12 exempt plants. The order had no producer-handler plants as of May 2009. Of the 31 regulated plants, 28 plants or 90 percent were considered large businesses. Of the 2,992 dairy farmers whose milk was pooled on the order, 187 farms or 6 percent were considered large businesses and 2,805 farms or 94 percent of dairy farms in the Southeast order were considered small businesses. Most of these dairy farms, large and small, could benefit by receiving a higher blend price, if the recommended 3-million pound monthly Class I route disposition limitation for producer-handlers is adopted.

During May 2009, the Upper Midwest order had 24 pool distributing plants, 53 pool supply plants, 2 partially regulated distributing plants, 5 producer-handler plants and 11 exempt plants. Of the 79 regulated plants, 37 plants or 47 percent were considered large businesses. Of the 15,336 dairy farmers whose milk was pooled on the order, 1,001 farms or 7 percent were considered large businesses and 14,335 farms or 93 percent of dairy farms in the Upper Midwest order were considered small businesses. Most of these dairy farms, large and small, could benefit by receiving a higher blend price, if the recommended 3-million pound monthly Class I route disposition limitation for producer-handlers is adopted.

During May 2009, the Central order had 30 pool distributing plants, 12 pool supply plants, 1 partially regulated distributing plant, 7 producer-handler plants and 19 exempt plants. Of the 43 regulated plants, 35 plants or 81 percent were considered large businesses. Of the 3,600 dairy farmers whose milk was pooled on the order, 413 farms or 11 percent were considered large businesses and 3,187 farms or 89 percent of dairy farms in the Central order were considered small businesses. Most of these dairy farms, large and small, could benefit by receiving a higher blend price, if the recommended 3-million pound monthly Class I route disposition limitation for producer-handlers is adopted.

During May 2009, the Mideast order had 22 pool distributing plants, 2 pool supply plants, 4 partially regulated distributing plants, 1 producer-handler plant and 17 exempt plants. Of the 28 regulated plants, 8 plants or 29 percent were considered large businesses. Of the 7,238 dairy farmers whose milk was pooled on the order, 504 farms or 7 percent were considered large businesses and 6,734 farms or 93 percent of dairy farms in the Mideast order were considered small businesses. Most of these dairy farms, large and small, could benefit by receiving a higher blend price, if the recommended 3-million pound monthly Class I route disposition limitation for producer-handlers is adopted.

During May 2009, the Pacific Northwest order had 15 pool distributing plants, 8 pool supply plants, 13 partially regulated distributing plants, 5 producer-handler plants and 2 exempt plants. Of the 36 regulated plants, 20 plants or 56 percent were considered large business. Of the 657 dairy farmers whose milk was pooled on the order, 326 farms or 50 percent were considered large businesses. Because the Pacific Northwest order already fully regulates producer-handlers with monthly route distribution in excess of three million pounds per month, the proposed action will have a minimal effect on small farmers whose milk is pooled on the order.

During May 2009, the Southwest order had 19 pool distributing plants, 2 pool supply plants, 1 partially regulated distributing plant, 5 producer-handler plants and 2 exempt plants. Of the 79 regulated plants, 19 plants or 86 percent were considered large businesses. Of the 588 dairy farmers whose milk was pooled on the order, 318 farms or 54 percent were considered large businesses and 270 farms or 46 percent of dairy farms in the Southeast order were considered small businesses. Most of these dairy farms, large and small,

could benefit by receiving a higher blend price, if the recommended 3-million pound monthly Class I route disposition limitation for producer-handlers is adopted.

During May 2009, the Arizona order had 5 pool distributing plants, 1 pool supply plant, 15 partially regulated distributing plants and 1 exempt plant. The order had no producer-handler plants as of May 2009. Of the 21 regulated plants, 13 plants or 62 percent were considered large businesses. Of the 100 dairy farmers whose milk was pooled on the order, 95 farms or 95 percent were considered large businesses. Because the Arizona order already fully regulates producer-handlers with monthly route distribution in excess of 3 million pounds, the proposed action will have a minimal effect on small farmers whose milk is pooled on the order.

As of May 2009, in their capacity as producers, 15 producer-handlers would be considered large producers as their annual marketings exceed 6 million pounds of milk (500,000 pounds per month). During the same month, 22 producer-handlers would be considered small producers. Record evidence indicates that as of March 2009, seven large producer-handlers had total route sales of 2 million pounds or more per month. Therefore, seven or fewer large producer-handlers could potentially become subject to the pooling and pricing provisions of Federal milk marketing orders because of route disposition of more than 3 million pounds per month.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that these proposed amendments would have minimal impact on reporting, recordkeeping, or other compliance requirements for entities currently considered producer-handlers under Federal milk marketing orders because they would remain identical to the current requirements applicable to all other regulated handlers who are subject to the pooling and pricing provisions. No new forms are proposed and no additional reporting requirements would be necessary.

This notice does not require additional information collection that requires clearance by the Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the forms are routinely used in most business transactions. Forms require only a minimal amount of information that can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

Interested parties are invited to submit comments on the probable regulatory and informational impact of this proposed rule on small entities.

Prior Documents in this Proceeding:

Notice of Hearing: Issued April 3, 2009; published April 9, 2009 (74 FR 16296).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to proposed amendments to the tentative marketing agreement and the order regulating the handling of milk in the Northeast and all other marketing areas. This notice is issued pursuant to the provisions of the AMAA and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

Interested parties may file written exceptions to this decision with the Hearing Clerk, U.S. Department of Agriculture, STOP 9200–Room 1031, 1400 Independence Ave., SW., Washington, DC 20250–9200, by December 21, 2009 or through the Federal rulemaking portal at *http://www.regulations.gov*. Three copies of exceptions should be submitted if filed with the Hearing Clerk. All written submissions made pursuant to this notice will be made available for public inspection at the Office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)). The hearing notice specifically invited interested persons to present evidence concerning the probable regulatory and informational impact of the proposals on small businesses. Some evidence was received that specifically addressed these issues and some of the evidence encompassed entities of various sizes. Such evidence was considered in this decision.

A public hearing was held upon proposed amendments to the marketing agreements and the orders regulating the handling of milk in all Federal milk marketing orders. The hearing was held pursuant to the provisions of the AMAA, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

The proposed amendments set forth below are based on the record of a public hearing held in Cincinnati, Ohio, pursuant to a notice of hearing issued April 9, 2009.

The material issues on the record of hearing relate to:

1. Producer-handler and exempt plant definitions in all Federal milk marketing orders.

Findings and Conclusions

All orders should be amended to limit producer-handlers to total Class I route disposition of not more than 3 million pounds per month as a condition for exemption from pooling and pricing provisions. The exempt plant definition of all orders should continue to limit disposition of Class I milk products to 150,000 pounds or less per month.

The Regulatory Status of Producer-Handlers

Currently, several orders define and describe a special category of handler known as producer-handler. Under the Pacific Northwest and Arizona orders (Orders 124 and 131, respectively) producer-handlers are subject to provisions that limit Class I route disposition to 3 million pounds or less per month within the respective marketing areas. The other 8 orders have no similar route disposition limit. The 3 southeastern orders do not allow producer-handlers to purchase supplemental milk while the remaining 5 orders provide producer-handlers the opportunity to purchase limited amounts. With noted exceptions, the producer-handler definitions of all Federal milk marketing orders exempt producer-handlers from the pooling and pricing provisions.

As a result of their exemption from pooling and pricing, producer-handlers, as handlers, are not required to pay the minimum class prices established under the orders nor are they, as producers, granted minimum price protection for disposal of surplus milk. Producer-handlers, in their capacity as handlers, are not obligated to equalize their use-value of milk through payment of the difference between their use-value of milk and the respective order's blend price into the producer-settlement fund. As such, producer-handlers retain the full value of milk processed and disposed of as fluid milk products by their operation within the marketing areas.

Entities defined as producer-handlers must adhere to strict criteria that limit certain business practices including the purchase of supplemental milk. Given these limitations, producer-handlers bear the full burden of balancing their milk production between fluid and other uses. Milk production in excess of their Class I route disposition does not

enjoy minimum price protection under the orders and may be sold at whatever price is obtainable in the market.

Producer-handlers are required to submit reports to the Market Administrator to ensure compliance with the requirements for their regulatory status as producer-handlers. In this sense, producer-handlers are regulated under the orders but are not ''fully regulated'' as are other handlers who are subject to an order's pooling and pricing provisions.

The Regulatory Status of Exempt Plants

The current exempt plant definition was implemented in January 2000 and is uniform across all orders. Exempt plants are not subject to full regulation on the basis of size. At or below the monthly Class I disposition threshold for exempt plants, these entities do not impact competitive relationships among handlers in the market such that full regulation is warranted. Exempt plants may operate solely as processing operations or may have the structure of producer-handlers. Operational structure is irrelevant in so much as qualification for exempt plant status is based solely upon Class I sales volume. Exempt plants are required to occasionally submit reports and information to the Market Administrator to ensure compliance with the exempt plant definition.

Summary of Testimony

Overview of Proposals

This proceeding was held in response to two proposals jointly submitted by the National Milk Producers Federation (NMPF) and the International Dairy Foods Association (IDFA). These proposals, marked as Proposals 1 and 2 would: (1) Eliminate the producer-handler provision from all Federal milk orders; (2) increase the exempt plant monthly limit on disposition of fluid milk products from 150,000 to 450,000 pounds; and (3) require unique labeling for fluid milk products distributed by exempt plants.

This proceeding also considered 17 alternative proposals received in response to the initial proposals. These proposals suggested a range of amendments to the producer-handler, exempt plant and pooling provisions.

The following summary of evidence presented during the proceeding is organized as follows:

1. Elimination of the producer-handler provisions and amendment of the exempt plant definition to include an increased limit on monthly Class I disposition.
2. Elimination of the producer-handler provisions and adoption of grandfathering.
3. Adoption of producer-handler provisions to include a limit on monthly Class I disposition.
4. Exemption of vertically integrated operations with retail and home delivery distribution.
5. Exemption of own-farm milk.
6. Establishment of individual handler pools.

Elimination of the producer-handler provisions and amendment of the exempt plant definition to include an increased limit on monthly Class I disposition.

Proposed by NMPF and IDFA, proposals published in the hearing notice as Proposal 1 and Proposal 2, seek to simultaneously eliminate the producer-handler definition from all Federal milk orders and increase the monthly Class I route disposition limit from the current 150,000 pounds to 450,000 pounds and require unique labeling for fluid milk products distributed by exempt plants. Proposals published in the hearing notice as 19 and 22 reiterated the positions contained in Proposals 1 and 2.

Representative members and supporters of NMPF including dairy farmer members, employees and representatives of Dairy Farmers of America (DFA), Mid-West Dairymen's Company (Mid-West), Lakeshore Federated Dairy Cooperative (Lakeshore), Michigan Milk Producers Association (MMPA), Prairie Farms Dairy (Prairie Farms), Maryland & Virginia Milk Producers Cooperative Association, Inc. (MD&VA), United Dairymen of Arizona (UDA), Northwest Dairy Association-Darigold (NDA-Darigold), and St. Albans Cooperative Creamery, Inc. (St. Albans) supported either the elimination of the producer-handler provisions or an increase in the exempt plant Class I route disposition limit, or both during the hearing.

A representative of NMPF testified in support of Proposals 1 and 2. NMPF is a trade association that represents 31 dairy farmer cooperatives. The witness was of the opinion that the exemption for producer-handlers was originally based upon the assumption that producer-handlers have limited sales of fluid milk products and little influence in the market. Using USDA data, the NMPF witness demonstrated that producer-handlers have a growing share of fluid milk sales in the markets that do not restrict the Class I disposition of producer-handlers. Given that some producer-handlers now sell large volumes of fluid milk products and significantly impact the market, larger producer-handlers should not be exempt from pooling and pricing, the witness asserted.

According to the NMPF witness, large producer-handlers have a regulatory advantage associated with the price at which they acquire milk for processing and the sales revenues they retain because of the exemption they enjoy. Specifically, the witness testified that producer-handlers are essentially able to acquire their milk at the uniform price rather than the Class I price and as a result, enjoy a cost advantage over fully regulated handlers in procuring milk. The witness asserted that the uniform price is effectively the market price for producer milk and as such, the appropriate transfer price (the price at which producer-handlers transfer their internal milk supply to their plant) for analysis of the regulatory impact of producer-handlers. Additionally, producer-handlers' exemption from payment into the producer-settlement fund deprives Federal order pools of money that would otherwise be distributed among producers, the witness stated. Producer-handlers, the witness asserted, encounter the same costs from cow to bottle as other enterprises but are exempt from pool payment.

The NMPF witness testified that the potential exists for large dairy farms to become large producer-handlers. A more than 100 percent increase in dairy farms with more than 2,000 cows from 1998 to 2007 has occurred, the witness stated, noting that the monthly milk production of a 2,000-cow dairy is nearly 4 million pounds. Collectively, farms at this level of production, upon conversion to producer-handler status, could capture a large share of the Class I sales in an individual market, or nationally, the witness asserted. The witness testified that both dairy farms and handler operations are threatened by the potential for large farms to become producer-handlers. According to the witness, producer-handlers are already disruptive in most Federal order marketing areas and particularly in the Central order (Order 32) marketing area. The witness acknowledged that producer-handlers are not currently disruptive in all orders but asserted that the preemptive adoption of some uniform standards regarding producer-handler operations is necessary.

The NMPF witness explained that Proposal 2, seeking an increase in the exempt plant limit on monthly Class I disposition from 150,000 to 450,000 pounds, is based in part on a three-fold increase in milk production at the farm-level since the time when the current exempt plant limit was set. The witness

testified that plants with less than 450,000 pounds of route distribution per month have trouble competing with larger plants on a cost basis even when exempt from full regulation because the milk procurement price advantage is outweighed by higher processing costs. The witness also testified that farm size and economies-of-scale should be considered in setting an exempt plant limit, citing evidence of cost disadvantages for producer-handlers with less than 500,000 pounds of monthly production.

The NMPF witness testified that the unique labeling provision of Proposal 2 is designed to prevent milk buyers from exploiting exempt plants' price advantage through the purchase of a large supply of identically labeled milk at prices lower than those of other, fully regulated plants. Additionally, the witness testified that NMPF intends the 450,000-pound monthly limit on Class I disposition for exempt plants to apply to total sales rather than sales in a single market. According to the witness, Proposals 1 and 2 in combination would allow all but the largest producer-handlers to retain an exemption from pooling and pricing while newly exempting an additional 30 to 35 regulated or partially regulated plants. Furthermore, the witness asserted, adoption of Proposals 1 and 2 would establish more equitable rules for dairy farmers whose milk is pooled and priced under the terms of Federal milk orders.

A panel of three dairy farmer members of DFA, a separate witness representing DFA, and a witness representing both Mid-West and Lakeshore testified separately in support of Proposals 1 and 2. The DFA dairy farmer panelists own and operate separate farms in Wisconsin, Texas and Kentucky. DFA is a Capper-Volstead cooperative of approximately 10,500 farms that produce milk in 49 states. Mid-West is a Capper-Volstead cooperative representing 163 dairy farms. Lakeshore is comprised of Manitowoc Milk Producers Cooperative, Milwaukee Cooperative Milk Producers, Mid-West and Scenic Central Milk Producers Cooperative. Mid-West and Lakeshore are located primarily in Illinois and Wisconsin.

Both the DFA dairy farmer panel and the Mid-West-Lakeshore witness testified that the producer-handler exemption reduces revenues for all dairy farmers whose milk is pooled on Federal orders. The DFA witness and the Mid-West-Lakeshore witness asserted that producer-handlers also disadvantage fully regulated handlers. Specifically, the DFA witness and the Mid-West-Lakeshore witness explained that producer-handlers retain the difference between the minimum Class I price and the statistical uniform price while fully regulated handlers that are similarly situated are required to account for milk at minimum class prices and pay into the producer-settlement fund. The Mid-West-Lakeshore witness added some dairy cooperatives that own and operate fluid milk plants have assumed the same risk as producer-handlers without enjoying the ability producer-handlers have, because of their exemption, to balance surplus production by adjusting packaged milk prices relative to production volume. The Mid-West-Lakeshore witness asserted that a producer-handler in the Upper Midwest (Order 30) marketing area, for example, has a $0.14 per gallon ''advantage,'' on average, over fully regulated handlers due to its pool exemption. Similarly, the DFA witness testified that since a producer-handler in Order 32 began supplying a regional grocer about a year ago, its milk has consistently been the lowest priced brand. In some of the markets where DFA markets milk, price concessions, including premium discounts, have been needed to meet competition from producer-handlers, and some of DFA's processor-customers have expressed concern that producer-handlers are marketing milk at such low prices that it is difficult to compete, the DFA witness stated.

The DFA dairy farmer panel stated that if fully regulated processing plants were closed due to unfair producer-handler competition, outlets for milk would become fewer and located further away from producers, which would result in higher hauling costs. Ultimately, the DFA dairy farmer panel was of the opinion that the integrity of the order system would be undermined, and the future of dairy farmers jeopardized, if the producer-handler provisions were allowed to remain. The Mid-West-Lakeshore witness echoed this position, noting that while Mid-West and Lakeshore do not currently compete with any producer-handlers, a large farm under construction near a Mid-West plant was identified as a potential producer-handler whose operations could lower the revenues of Lakeshore dairy farmers. The DFA witness provided data on the number of ''larger'' dairy farms across the country, estimating the potential negative impacts on producer minimum blend prices if these farms were to become producer-handlers. Accordingly, the DFA witness asserted that Proposals 1 and 2, if adopted, would add stability to the order system, and assure regulated handlers that their competitors pay the same minimum prices.

The DFA witness testified that many producer-handlers have maintained their businesses within the 150,000-pound per month exempt plant limit on Class I disposition and the proposal to triple this size limit for the exempt plant provision would allow a reasonable expansion path for many of these operations. Furthermore, the DFA dairy farmer panel and the DFA witness asserted that a 450,000-pound per month limit would provide a majority of dairy farmers the opportunity to try on-farm processing and marketing, and if an operation is successful enough to grow the business beyond this level it would become fully regulated. The DFA witness also testified that the unique labeling component of Proposal 2 is essential because without it an incentive would exist for an integrator to ''daisy-chain'' a group of plants to process and package under the same label for the same customer. The DFA witness agreed with the position of NMPF and IDFA that the unique labeling provision would still allow for bottling under multiple labels as long as the labels were not shared across processors.

Witnesses representing MMPA, Prairie Farms and MD&VA testified separately in support of Proposals 1 and 2. MMPA is a Capper-Volstead cooperative in Michigan. Prairie Farms is a Capper-Volstead cooperative, based in Illinois, operating 35 fluid milk and dairy product processing plants, 26 of which are regulated under 5 Federal orders. MD&VA is a Capper-Volstead cooperative with more than 1,500 members, marketing member and non-member milk in 3 Federal orders in the Mid-Atlantic and Southeast. MD&VA owns and operates three fully regulated fluid milk plants, one balancing plant and has a majority interest in a second balancing plant.

The MMPA, Prairie Farms and MD&VA witnesses provided testimony that was largely in agreement with the testimony of the DFA dairy farmer panel, and the DFA and Mid-West-Lakeshore witnesses. The MMPA witness testified specifically to the increased average size of Michigan dairy farms and the possibility that these larger dairy farms may become producer-handlers. The Prairie Farms witness joined in this concern, stating that while there are currently only a few ''large'' producer-handlers in operation across the country, the potential for new ones exists. Similarly, the MD&VA witness asserted that despite the relatively small number of producer-handlers in the Appalachian and

Southeast (Federal Orders 5 and 7) marketing areas, the potential for growth in producer-handler numbers still exists. The MD&VA witness explained that the combined growth of large farms and discontinuation of smaller farm operations has created the potential for construction of bottling plants on large farms. Additionally, the MD&VA witness testified that the Appalachian and Southeast marketing areas, as deficit markets that source out-of-area milk, face the possibility of large farms located outside of the marketing areas obtaining producer-handler status and gaining advantages over fully regulated handlers who consistently supply the two markets. The MD&VA witness was of the opinion that producer-handlers should pay the same minimum prices as MD&VA's customers.

The Prairie Farms witness testified that as a fully regulated handler, Prairie Farms can compete with any other fully regulated handler but not with a producer-handler that has an unfair advantage owed to its exemption from full regulation. The MD&VA witness stated that MD&VA is billed on a monthly basis because of its pool obligation while producer-handlers are exempt, the MD&VA witness stated. Producer-handlers' exemption from pool payment is equivalent to a price advantage of $0.23 per gallon in the areas in which MD&VA markets milk, according to the MD&VA witness.

The Prairie Farms witness testified that adoption of Proposals 1 and 2 would not harm those that want to process, package and sell own-farm milk. Rather, the proposed changes recognize that when a handler reaches a certain size, the size of that operation could negatively impact fully regulated handlers and producers alike. Similarly, the MD&VA witness noted that the adoption of the NMPF proposals would provide protection to the pool which is necessary because marketwide pooling is the only way all producers and cooperatives share in the higher value associated with Class I products.

The MMPA witness also testified that an increase in the exempt plant Class I route disposition limit to 450,000 pounds per month would allow relatively small processors to meet the needs of niche markets without causing disorder, and increase overall consumer demand for dairy products and encourage the development of new dairy products.

A dairy farmer witness representing UDA testified in support of Proposals 1 and 2. UDA is the only Capper-Volstead cooperative in the state of Arizona. The witness testified in support of Proposal 1 as a preventative measure, and noted that producers in the Arizona (Order 131) marketing area have realized higher blend prices since a cap was placed on producer-handler Class I dispositions in a prior rulemaking. The UDA witness stated that plants with 450,000 pounds or less of monthly Class I disposition serve small niche markets, are not disruptive and should not be subject to full regulation.

A witness representing NDA and Darigold testified in support of Proposals 1 and 2. NDA is a Capper-Volstead cooperative comprised of 530 producers located in Washington, Oregon, Idaho, Utah, and California. NDA and Darigold Inc., wholly owned by NDA, own and operate bottling plants and manufacturing plants in the Pacific Northwest (Order 124) marketing area and Idaho.

The NDA–Darigold witness testified that the buyers in the region where NDA and Darigold operate are sophisticated and price conscious. Drawing from conversations with milk buyers, the witness illustrated that when buyers are presented the opportunity to buy Class I milk at a lower price, ruinous competition between fully regulated and unregulated handlers develops. The witness went on to explain that the combination of a buyer's desire for lower prices and the occurrence of similarly situated handlers competing on an uneven playing field creates disorderly marketing conditions within the market which drive prices below commercially reasonable levels.

The NDA–Darigold witness stated that the disorderly marketing and unfair competition that led to the changes in Orders 124 and 131 no longer exist since the implementation of the 3-million–pound limit on monthly Class I disposition in the marketing areas. The witness also noted that producers now receive a slightly higher blend price and three of the producer-handler operations affected by the rulemaking continue to operate.

The NDA–Darigold witness testified that handlers with 450,000 pounds or less of Class I sales per month should be treated uniformly under the exempt plant provision. The witness asserted that this proposed change closely reflects the AMAA's intent that regulation should apply equally to all handlers. The witness offered that aside from grandfathering certain current producer-handlers, the exempt plant provision should be the only basis for exemption from pooling and pricing in the future.

A witness appeared on behalf of St. Albans in support of Proposals 1 and 2. St. Albans is a dairy Capper-Volstead cooperative based in Vermont that processes and markets milk pooled on the Northeast order (Order 1). The witness testified that the Northeast order has more producer-handlers and exempt plants than any other order. Relying on the Order 1 Annual Statistical Bulletin for 2008, the witness stated that the Class I sales from 15 producer-handlers and 46 exempt plants are not included in the marketwide pool. The witness was of the opinion that most of the exempt plants are also producer-handlers.

The St. Albans witness testified that large producer-handlers impact Federal order pools and a producer-handler located outside the Northeast marking area marketed milk into that area during every month of 2008 in direct competition with fully regulated plants supplied by local producers. The witness asserted that while St. Albans currently faces no competition from producer-handlers located in the Northeast marketing area, the location of the producer-handler is irrelevant since milk shipped from outside the order competes with local production. As such, the witness stated that the rapid growth in volume of producer-handler milk sales represents a potential market disruption.

The following handler members and other supporters of IDFA including the Northeast Dairy Foods Association (NDFA), Worcester Creameries (Worcester), Elmhurst Dairy (Elmhurst), Mountainside Farms (Mountainside), Steuben Foods (Steuben), Harrisburg Dairies (Harrisburg), the Pennsylvania Association of Milk Dealers (PAMD), Anderson Erickson Dairy (AE), Price's Creameries (Price's), and Bareman Dairy (Baremen) testified in support of either the elimination of the producer-handler provisions or the increase of the exempt plant limit on Class I route disposition, or both.

A witness appeared on behalf of IDFA in support of Proposals 1 and 2. According to the witness, IDFA is a trade association representing manufacturers, marketers, distributors and suppliers of fluid milk and related products including ice cream, frozen dairy desserts and cheese. The witness noted that most of the milk purchased and processed by IDFA members is regulated under the Federal order system.

The IDFA witness testified that the elimination of the producer-handler provisions is necessary for a number of reasons, all of which give rise to disorderly marketing. According to the witness, exemption from pooling and pricing allows producer-handlers to, in effect, pay the uniform price rather than the Class I price for own-farm milk. As

a result, producer-handlers have a milk acquisition cost advantage over fully regulated plants, solely on the basis of a regulatory exemption, the witness stated. The witness asserted that disorderly marketing conditions arise when some but not all handlers are subject to payment of the Class I minimum price. According to the witness, handlers not subject to full regulation can use their artificial cost advantage to offer customers a lower price than can be offered by a fully regulated handler.

The IDFA witness also asserted that the need for the elimination of the producer-handler exemption stems from significant structural changes which have occurred at all levels of the dairy industry. The witness explained that in 1998 only 235 farms reportedly had more than 2,000 cows and by 2008 that number had increased to 730 and accounted for 30.5 percent of all U.S. milk production. Providing additional perspective, the witness noted that farms with more than 500 milk cows accounted for 58.5 percent of U.S. milk production in 2008. Cows in the top 5 milk producing states now produce on average, 23,000 pounds of milk per year, the witness stated. The witness illustrated that a 500-cow farm in these states could have monthly production of, on average, nearly 1 million pounds. Additionally, the witness explained that a 2,000-cow herd with the same average would be expected to produce nearly 46 million pounds annually, or 4 million pounds monthly. The witness was of the opinion that large farms, with milk production levels never contemplated when producer-handlers first became exempt from pooling and pricing, are present in the marketplace today.

With regard to Proposal 2, the IDFA witness asserted that IDFA and NMPF jointly support an increase of the limit on Class I disposition for exempt plants. The witness further explained that an increase in the exempt plant limit is intended to preserve regulatory exemption for those plants too small to cause material market disruption, including those small plants previously exempted as producer-handlers. The current 150,000 pounds per month threshold was adopted in all Federal orders as part of Federal order reform as it was the highest volume threshold in existence at the time, the witness noted. Furthermore, the witness asserted that since 1990, the time period for which data was available when the exempt plant provision was adopted, the average volume of fluid milk products produced by U.S. fluid milk bottling plants operated by commercial processors has roughly doubled, from 93.9 million pounds annually in 1990 to 189.8 million pounds in 2007. The witness noted that while the data might suggest a doubling of the threshold, the overall upward trend clearly shows that average fluid milk bottling plant volumes continue to increase over time, which warrants the adoption of a limit that allows for future growth while remaining tied to the structural trends of the industry.

Proposal 2, according to the IDFA witness, also requires that an exempt plant sell its fluid milk products using unique labels, lest this exemption be abused through the establishment of numerous ''small'' plants effectively linked together to market their milk jointly and to garner the advantages of a large plant without being subject to full regulation. The witness noted that this particular feature is not intended to prevent an exempt plant from marketing packaged fluid milk products under more than one label. The witness provided the example of an exempt plant with its own label and other labels distributed to a local grocery store and via home delivery to illustrate this assertion. Ultimately, the witness stated that an exempt plant should not be able to distribute fluid milk products under the same name used by any other handler.

A witness appeared on behalf of NDFA in support of Proposal 22 seeking elimination of the producer-handler provisions. NDFA is a trade association based in New York, representing dairy processors, manufacturers and distributors The NDFA witness provided testimony similar to others regarding the outdated nature of the producer-handler exemption. The NDFA witness added that an exemption for both producer-handlers and exempt plants is inappropriate because producer-handlers and exempt plants are in direct competition with fully regulated handlers. The witness cited the procurement of raw milk at lower prices, ease of balancing and the ability to make pricing adjustments more quickly as advantages that accrue to exempt handlers. Furthermore, the NDFA witness asserted that exempt handlers retain the difference between the Class I price and uniform price which reduces the blend price to producers. However, the NDFA witness was not opposed to the current exempt plant provision.

A witness appeared on behalf of Worcester, Elmhurst, Mountainside and Steuben (Worcester et al.). With the milk of approximately 200 producers and additional purchases of cooperative milk, Worcester supplies Elmhurst, Mountainside and Steuben, all of which are fluid milk plants. The witness echoed the testimony of the NDFA witness in support of the elimination of producer-handler and exempt plant provisions. The Worcester et al. witness testified in exclusive support of Proposal 1 in the event that the exempt plant provision was not eliminated.

By example, the Worcester et al. witness asserted that an existing New York producer with 4 million pounds of monthly production would have a cost advantage as a producer-handler and would reduce the amount of business that proximate fully regulated handlers could secure. The witness also testified that any increase in exempt plant volume would further contribute to handler inequity.

A witness representing Harrisburg and PAMD testified in support of Proposals 1 and 19. Proposal 19 would adopt the 450,000 pound per month limit on Class I disposition for exempt plants as proposed jointly by NMPF and IDFA. The witness testified that Harrisburg is a member of PAMD. Harrisburg is fully regulated under Order 1 with monthly Class I route distribution of 4 to 6 million pounds.

The Harrisburg witness stated that Harrisburg Dairies is not presently in direct competition with producer-handlers. The witness asserted that there is a threat presented by Western Pennsylvania producer-handlers servicing the same type of retail chains as Harrisburg Dairies. The witness testified that their operation would not survive in its current form if producer-handlers move into eastern Pennsylvania. Based on Harrisburg Dairies' experience as a regulated handler, the witness estimated that a producer-handler of similar size would have an average cost advantage of $100,000 per month over a fully regulated plant because of the pool payment exemption. The witness testified that Harrisburg Dairies was recently asked to become a producer-handler and declined. The witness asserted that it is not reasonable for some processors to enjoy regulatory privileges that other processors do not.

A consultant witness, a witness representing AE and a witness representing Price's, each testified to the characteristics and impacts of producer-handlers. The consultant witness appeared on behalf of Prairie Farms, Dairy Institute of California, NDFA, AE, PAMD, Dean Foods Company (Dean), National Dairy Holdings, LP, Shamrock Foods Company (Shamrock), Shamrock Farms and partner farms.

The consultant witness has had involvement in the dairy industry for more than two decades and is currently

a shareholder in Wilcox Farms (Wilcox), a large fluid milk processor and the witness' former employer. AE is private family business with 525 full-time employees and a processing plant in Order 32. AE offers fluid milk and other dairy products that are distributed in Iowa and portions of six other states. Price's, a division Dean, has 170 employees and serves the El Paso, Texas, area.

The consultant witness and the AE and Price's witnesses did not testify in specific support or opposition to any proposals under consideration. Rather, each of the witnesses provided examples of producer-handler competition with fully regulated handlers. The consultant witness testified that in 1974, a large regional grocery chain asked Wilcox to build a fluid processing plant and qualify as a producer-handler as a means of supplying the customer at a lower cost. During the period that Wilcox was a producer-handler, the grocer was able to balance supply through another source, the consultant witness stated. The consultant witness further testified as to the nature of customer-driven competition, noting that after conversion to fully regulated status in 1987, Wilcox was occasionally asked to lower its price to meet a competitor even when the competitor could serve only a small number of stores.

The Price's witness testified to having recently lost business to a producer-handler in the El Paso area. The Price's witness opined that the producer-handler's processing capacity to be as much as 752,000 gallons per week—enough to supply 80 percent of the demand in the area. In March and April 2009, Price's stopped supplying several stores in the El Paso area when an operation that had gained producer-handler status in January 2009 assumed that portion of a national retailer's business, the witness testified. According to the witness, the national retailer had been purchasing 66,000 gallons per week from Price's before it switched to the producer-handler supplier. The witness was of the opinion that Price's lost business to the producer-handler solely on the basis of price. The witness further stated that after Price's lost the account, a Price's employee observed a $0.34 per gallon reduction in the customer's retail price, translating to a wholesale loss of about $4 per hundredweight (cwt) However, the Price's witness acknowledged that lower milk prices in El Paso were not solely attributable to the producer-handler in the area.

The AE witness testified that AE shares a large customer in the Kansas City area with Heartland Creamery (Heartland), a producer-handler. The witness went on to explain that the shared customer traditionally uses a bid process to secure a supply of milk for two private labels and in 2007, AE successfully bid on the account consisting of the two private labels in addition to the branded product account AE already held. According to the AE witness, the customer's pricing scheme is such that the brand name product is priced about $0.10 above the private label product displaying the store's name while the private label product with the more generic name is priced about $0.20 below the store name product. Based on observations of the dairy cases in a number of locations and additional knowledge as to purchasing practices of the customer, the witness offered that AE continued supplying the customer with the generic label product until it was gradually replaced by Heartland's branded product at a lower price point. The witness testified that AE went from annualized sales of 185,000 to 40,000 gallons of the generic label in one year, and the generic label product is now no longer produced.

It was noted by the AE witness that the replacement of a low-cost generic labeled product with a branded product is somewhat unusual. Given that AE continues to supply the customer with the AE branded product and the private label store name product, the fact that, the AE generic label product was replaced by the Heartland branded product and the AE generic label product was in the most price sensitive category, the witness concluded that Heartland's ability to obtain the customer's business was solely on the basis of price not quality or service. In addition, based on AE employee conversations with the retailer, the witness asserted that the retailer account was lost on the basis of price, and in particular because of Heartland's pricing strategy of supplying the account at a lower price than the AE price.

The AE witness further asserted that sales of the AE-produced private label store name product have decreased approximately 200,000 gallons annually since the Heartland product was introduced. The witness estimated that Order 32 has lost approximately 3.25 million pounds from the pool due to the discontinuation of the AE private label generic name product and the reduction in sales of the AE private label store name product attributable to Heartland's direct competition.

The consultant witness and the AE witness both testified that regulated handlers are able to compete with producer-handlers in terms of service, quality, advertising and packaging, but producer-handlers have a clear advantage in terms of price. The AE witness specifically noted that AE is able to respond to more efficient operations but the presence of regulation which creates inequality is not something that can necessarily be overcome.

The consultant witness went on to testify regarding producer-handler proliferation. For a producer with 10,000 cows it is comparatively easier to add a processing plant than for a processor with the capacity to process the milk of 10,000 cows to add dairy cattle, the consultant witness stated. In support of this assertion, the consultant witness testified that in the late 1990s, Wilcox built a plant with capacity for the milk of 5,000 cows for less than $7 million, and the investment to double that capacity would likely have been less than $3 million. The consultant witness stated that a recent University of Florida study found construction of a processing plant for the milk of a 10,000-cow herd would require about $40 million.

The consultant witness described several recent trends that enhance producer-handler viability: many dairy farms are large enough to exclusively supply a processing plant; producer-handlers are attractive investments; and many milk buyers have multiple suppliers capable of balancing producer-handlers' supply. The witness testified that uncertainty of the future regulation of very large producer-handlers has constrained investment in these businesses, but if USDA does not modify the producer-handler provisions as a result of this proceeding, the number of producer-handlers will grow.

A witness representing Bareman, a fluid processer in Michigan, testified in support of Proposals 1 and 2. According to the witness, Bareman purchases milk from cooperatives and is fully regulated under the Mideast order (Order 33). The witness noted that Bareman competes against a number of large fluid milk processors and Country Dairy, a producer-handler.

The Bareman witness reiterated the testimony of others regarding the advantage created by the producer-handler exemption and its associated effects on pooled producers and fully regulated handlers. The witness added that Bareman, as a fully regulated handler, is assured that other fully regulated handlers pay minimum prices in the same manner that it does.

The Bareman witness testified to having lost some accounts to a producer-handler, often on the basis of

price. The witness provided an example wherein Bareman engaged in price competition with Country Dairy (a producer-handler) for a convenience store account during the spring flush. Bareman, the witness testified, was ultimately unable to meet the low price offered by the producer-handler. The disruption noted in this example, the witness asserted, arises because of producer-handlers' need to balance sales with milk production and their resultant willingness to turn to ''fire sales'' for established customers and any others that might be receptive.

Additionally, representatives of the Federation of Organic Dairy Farmers (FOOD), Cornucopia Institute (Cornucopia), National All Jersey (NAJ), and the State Departments of Agriculture in New Hampshire (NH), New York (NY), Pennsylvania (PA), Vermont (VT), and Wisconsin (WI), testified in support of the elimination of the producer-handler provisions, the increase of the exempt plant limit on Class I route disposition, or both.

A panel of three dairy farmers representing FOOD and a witness on behalf of Cornucopia testified in support of Proposal 2. FOOD is an umbrella organization that represents the Western Organic Dairy Producers Alliance (WODPA), the Midwest Organic Dairy Producers Alliance (MODPA) and the Northeast Organic Dairy Producers Alliance (NODPA). According to the panel, FOOD represents nearly two-thirds of the organic dairy farmers in the country. The Cornucopia witness testified that the Cornucopia Institute is a charitable organization serving the organic industry.

By example, the Cornucopia witness illustrated the ways that Aurora Organic Dairy's (Aurora) exempt status as a producer-handler is disruptive. The Cornucopia witness was of the opinion that Aurora used the regulatory loophole to establish one of the largest market shares in the organic dairy industry. The witness testified that adoption of a limit of 450,000 pounds of Class I sales per month for exempt plants, as suggested by Proposal 2, would be reasonable and sufficiently large to accommodate ''legitimate'' family farmers seeking to engage in processing and marketing dairy products, while minimizing disruption associated with the current producer-handler provisions.

The FOOD panel testified in support of a hard-cap limit of 450,000 pounds of Class I route disposition per month for both producer-handlers and exempt plants. The FOOD panel was of the opinion that a 450,000-pound per month limit on Class I disposition would honor the original intent of the producer-handler exemption. Furthermore, the FOOD panel testified, an exempt plant limit of 450,000 pounds of Class disposition per month would ensure a level playing field while allowing small scale operations to package and sell their product locally.

The FOOD panel also testified that Aurora has been able to use the scale of its operation in combination with its exemption from full regulation to capture a great deal of the organic market in the Northeast. According to the FOOD panel, Aurora's significant presence in the Northeast marketing area has negatively impacted the price local organic producers receive for their milk and threatened the viability of the handlers that purchase local milk supplies.

A witness representing NAJ testified in agreement with Proposal 2. The witness testified that NAJ is a membership organization that represents over 1,100 dairy producers and is an affiliate member of both NMPF and IDFA. The NAJ witness testified that the current Federal order producer-handler and exempt plant provisions are inequitable. The witness was of the opinion that handlers with own-farm milk production can be treated very differently for outside purchases of milk depending on the marketing area where they have disposition. The witness testified that some Class I milk should be exempt from Federal order pooling and pricing, and as such, NAJ supports Proposal 2.

A panel of witnesses on behalf of the New Hampshire Department of Agriculture, Markets and Food; the New York Department of Agriculture and Markets; the Pennsylvania Department of Agriculture; the Vermont Agency of Agriculture, Food and Markets; and the Wisconsin Department of Agriculture, Trade and Consumer Protection (State Departments of Agriculture); and 19 producer-handlers and exempt plants located in Wisconsin adopted Proposal 2 in lieu of Proposal 9.

The State Departments of Agriculture panel supported the unique labeling provision of Proposal 2. The panel was of the opinion that this provision is necessary to prevent the aggregation of exempt milk for mass distribution, but was not in support of the adoption of any other labeling restrictions.

Conversely, a panel of consultant witnesses representing the American Independent Dairy Alliance (AIDA) and representatives of Braum's Ice Cream and Dairy Stores (Braums), Kreider Farms (Kreider), Aurora Organic Dairy (Aurora), GH Dairy—El Paso (GH Dairy), Heartland Creamery (Heartland), Snowville Creamery (Snowville), Northeastern state legislators, Shamrock, Diamond D Dairy (Diamond D), a Southeastern dairy farm, Shatto Farms, Inc. (Shatto), Country Dairy, Mallorie's Dairy (Mallorie's), Hatchland Dairy (Hatchland), Dunajski Dairy (Dunajski), NDFA and Country Morning Farms (Country Morning) testified in opposition to the elimination of the producer-handler provisions, an increase in the exempt plant monthly Class I disposition limit, or both.

The panel of consultants testifying on behalf of the American Independent Dairy Alliance (AIDA) provided testimony as to the lack of foundation for Proposals 1 and 2. The panel testified that producer-handlers do not create disorderly marketing conditions since they supply only 1.46 percent of the national fluid milk market. The significant concentrations of market power enjoyed by cooperatives and processors result in producer-handler market share that is minuscule by comparison, the panel asserted. The panel further asserted that a primary objective of the AMAA is the consistent supply of fluid milk to consumers and given the Class I utilization levels of the orders it would appear there is no disruption present in the marketing areas.

Furthermore, the AIDA consultant panel asserted there is no realistic threat that producer-handlers will ever achieve such a scale of operation to become a source of disorder as defined by the AMAA. The panel was also of the opinion that if producer-handlers had a substantial competitive advantage as alleged, there would be more new producer-handlers. The panel acknowledged that one factor influencing the decision to become a producer-handler is the regulatory risk associated with the elimination or amendment of the provision. In addition, the panel provided its opinion of conditions which could be considered disorderly and those which could not and asserted that producer-handlers are not causing disorder. The panel was of the opinion that the crucial issue is whether treatment is equitable in light of the objectives of the AMAA.

The AIDA consultant panel stated that its analysis revealed a number of relevant considerations. The panel identified these considerations as follows: producer-handlers are frequently engaged in the production of unique and growing niche market products such as organic, kosher, and grass-fed milk, which are inherently much more costly to produce; some producer-handlers continue the tradition of home delivery; producer-

handlers adjust their production patterns to minimize surplus production, which would otherwise be sold at a substantial loss; the managers of producer-handler operations have to divide their attention between both the farming and the processing sides of the operation and as such, do not realize cost advantages associated with specialization; and producer-handlers have substantial capital investments in their production, processing and distribution. The panel asserted that ignorance of these realities would lead conclusions about producer-handlers to be drawn without foundation. The panel also explained that niche market products can take many forms, primarily based on the unique consumer preferences associated with a given product and a product can lose the ''niche'' categorization as it becomes relatively less unique due to a greater availability of products with similar attributes. The panel asserted that even producer-handlers who do not serve a niche market remain constrained by the costs of their operation and that producer-handler status is the only way they can compete in a monopolistic market situation.

The AIDA consultant panel was of the opinion that its survey of AIDA producer-handler members revealed a great level of diversity across the operations. More specifically, the panel noted that AIDA producer-handlers members: are all small businesses, relative to many cooperatives and processors; each have their own market niches that serve particular consumer tastes and preferences reflective of the ever increasing diversity of the consumer market; sometimes provide home delivery services; sometimes operate their own stores; market to smaller wholesale outlets with smaller volumes per account; market products with consumer prices that generally exceed those of conventional products; and provide necessary competition.

Based on analysis performed using USDA data, the AIDA consultant panel concluded that the average producer-handler increase in size lies between that of the producer and processor size increases between 1969 and 2008. Furthermore, the panel noted that USDA plant structure data shows that of the 45 producer-handlers in May 2008, 40 had sales volume of less than 2 million pounds and 5 had volume of over 2 million pounds. In comparison, 46 conventional pool plants had a volume of less than 2 million pounds and 210 had volume of over 2 million pounds—73 of which had volume of over 20 million pounds. The panel asserted that these figures clearly indicate that producer-handler growth is constrained, and the requirement that producer-handlers must maintain sole ownership and control over their operations places a de facto limit on the size of producer-handlers dictated by the realities of integrated operations. However, the panel acknowledged that those producers who recently constructed bottling plants and intend upon seeking producer-handler status were not known at the time the analysis was conducted and as such, were not included. The panel also acknowledged that both producer and processor operations could realize lower costs with scale.

The AIDA consultant panel noted that USDA data indicates that producer-handler numbers have decreased from 421 in 1969 to 37 in March 2009. Additionally, the panel was of the opinion that USDA data does not indicate an increasing trend in producer-handler sales volumes. However, the panel acknowledged that the calculations used to arrive at these conclusions were for total volumes not Class I volumes, although the panel asserted that specific concentration on Class I volumes was not a necessary condition of a complete analysis. The panel also acknowledged that the analysis did not represent a scenario in which figures related to sales volumes for entities that had producer-handler status prior to the rulemaking in the Pacific Northwest and Arizona marketing area, which limited producer-handlers with a volume cap.

Cost-of-production, the AIDA consultant panel asserted, is the only figure relevant in assessing the cost of raw milk faced by the handler portion of producer-handler operations. The panel further asserted that the appropriate transfer price for use in any analysis of producer-handler impacts should be based on costs of production not the difference between the blend price and Class I price. The panel testified that in general, the cost of milk production for all size farms exceeds the uniform price by $5 to $8 per cwt. The panel did not utilize specific producer-handler data in the cost-of-production research presented, and the panel was of the opinion that producer-handler data would not be substantially different from other dairy farm sector data. The panel noted that the prices analyzed were selected arbitrarily and the panel was not aware of the locations from which they were collected. The panel further stated that regardless of herd size, dairy farmers cannot rely on simply marketing their raw milk to ensure long-term economic viability. The producer-handler exemption helps farmers who opt to process their own milk compete with large fluid plants, the panel asserted. However, the panel asserted that producer-handlers do not have a price advantage as a result of their regulatory status. The AIDA consultant panel stated that disorder existed during the period when the AMAA was enacted due to the relatively few number of milk buyers and a large number of producers seeking outlets. The panel further asserted that a lack of marketing alternatives is currently an issue in some areas where producers are reduced to either marketing milk through a single cooperative or marketing as a producer-handler. By example, the panel provided the opinion that two producers in the same market may not equivalently enjoy the benefits of the pool, despite the fact that each producer delivers to the same cheese plant, because one producer markets through a cooperative classified as a buyer, while the other remains independent. The panel was also of the opinion that Federal orders do not provide uniform prices to producers because prices vary based on component values, over-order premiums and hauling charges. However, the panel testified that the analysis of producer prices presented did not take into account the formulas used to calculate paychecks based on the various factors. Ultimately, the panel asserted that if producer equity is a goal of Federal milk marketing orders, producer-handlers do not inhibit realization of such a goal.

According to the AIDA consultant panel, pooling producer-handler milk would add $0.01 to $0.02 per cwt to the average statistical uniform price, an amount the panel described as insignificant. The panel also asserted that uniform and Class I prices could not be used as a basis for determining disorder. The panel arrived at this conclusion based on the opinion that prices determined via regulation are not real; instead prices determined in the marketplace are real and should be the basis for examination and identification of disorderly conditions. Furthermore, the panel testified that the additional burden of paying into the pool and completing associated paperwork would put some producer-handlers out of business, although the panel did not provide a characterization of those that would be expected to go out of business.

The AIDA consultant panel addressed concerns that producer-handlers shift balancing costs. The panel argued that cooperative balancing is not just a service to the market because it is an integral part of cooperatives' marketing strategy. As part of that strategy,

cooperatives gain market power from performing the balancing function as it provides the benefit of milk supply control, which allows for the negotiation of full supply contracts, the panel asserted. It was the opinion of the panel that without balancing, cooperatives could not negotiate either full supply contracts or premiums. Based on its survey of AIDA members and USDA data, the panel concluded that producer-handlers manage production levels to correspond with product sales plus a sufficient surplus capacity and producer-handlers bear the burden of selling their small surpluses on the market at a price that is almost always at a loss.

Witnesses representing Braums, Kreider, Aurora, GH Dairy, Heartland and Snowville testified separately as members of AIDA. The AIDA members all testified in opposition to amendments to the current producer-handler provisions. Braums, a producer-handler, milks 12,000 cows with Class I utilization of about 50 percent and operates retail stores in Oklahoma, Texas, Arkansas, Kansas and Missouri. Kreider is a family operation located in Order 1 and has been a producer-handler since 1972. Aurora, a producer-handler, has 345 employees and is a national supplier of private-label and store-brand organic milk and butter. Aurora milks about 12,000 cows every day at 5 farms in Colorado and Texas, and is treated as a partially-regulated distributing plant under Order 131. GH Dairy, a producer-handler, with a plant located El Paso, Texas, sells milk to distributors and national retailers. Heartland is a producer-handler located in Missouri with distribution in Missouri, Kansas, Iowa, and Illinois. Snowville is an exempt plant located in Pomeroy, Ohio.

The Kreider witness testified that Kreider produces less than 2.5 million pounds of Class I products per month and has Class I utilization between 64 and 77 percent. The witness expanded upon the characteristics of Kreider's operation noting that surplus milk is often marketed to an ice cream plant or to a cheese manufacturer. While Kreider is currently below the level of 3 million pounds of monthly Class I disposition, the implementation of a 3-million pound per month cap on Class I disposition may work for Kreider in the short-run but would not be sustainable or profitable in the long-run, the witness stated. The witness revealed that Kreider temporarily lost producer-handler status at one time, and that the associated pool obligations precluded its profit-making ability. Ultimately, the witness asserted, the processing portion of the enterprise would likely cease operations should Kreider have to make payments into the pool.

The Kreider witness asserted that Kreider fluid products are often priced at a premium to the store brand price. The witness testified that Kreider operates in a niche market within its local region, selling milk to customers at above-average prices based on the perceived value of the product. Kreider markets both non-kosher and kosher milk. According to the witness, Kreider products are higher quality because they are locally and sustainably produced, chilled rapidly, rbST-free and produced on a farm that allows for consumer visits, the witness asserted. All of these characteristics, the witness explained, add to operating costs.

According to the witness, Kreider produces kosher milk for Jewish communities in several East Coast states, and is under rabbinical supervision at the farm and in the plant and the same individual supervises both facilities. The witness was of the belief that while pool plants possess the ability to produce kosher milk, producer-handler operations are better suited to kosher milk production as a result of, in Kreider's case, smaller scale and vertical integration. The witness elaborated on this point, explaining that a pool plant with multiple lines and sources of milk would require kosher supervision of a greater magnitude than is the case for producer-handler operations wherein the plant and the farm are more proximate and under identical control.

The Aurora witness testified that one of the responsibilities of a producer-handler is to balance its own-farm milk supply. The witness indicated that Aurora balances through careful management of its finished goods inventory, powder and butter production with co-packers, bulk sales and farm production. The witness further explained that Aurora uses its longer life finished goods inventory to even out the peaks and valleys of customer orders relative to farm production. The witness noted that powder and butter serve as medium and long-term balancers as their shelf lives are substantially longer than that of fluid milk.

The Aurora witness testified that their cost-of-production is considerably higher relative to conventional producers because Aurora does not produce anything other than certified organic milk. The witness testified that a producer-handler acquires milk at the cost-of-production on the farm, and that the cost-of-production for organic milk always exceeds Federal order class and uniform prices. The witness testified that Aurora has a $30 per cwt cost-of-production, and that this figure includes the capital and operating expenses of the farms, but does not include transportation of milk from the farms to the processing plant or capital and operating costs associated with the processing plant. The witness also noted Aurora is not similarly situated to others in the organic marketplace because of the operation's investment in both organic dairy farming and processing, and the burden associated with the full risk and responsibilities of both.

According to the Aurora witness, retailers select private label suppliers who have the ability to provide the needed product and volume; prioritize the customer's business to meet all expectations and challenges; and deliver product orders reliably. The witness also noted that customers want private label suppliers that demonstrate rigorous quality assurance capabilities, maintain supply chain control and can implement corrective action effectively and quickly. The witness testified that one of the benefits of being vertically integrated is the ability to provide traceability and complete control of organic milk, characteristics that are important to Aurora's clientele. To demonstrate the importance of good customer service, the witness noted two examples in which acquisition and maintenance of customer accounts is not a function of price.

The Aurora witness indicated that in the organic market, the marketwide pool does not facilitate the balancing function due to the fragmented and dispersed nature of organic milk supplies and plants. The witness asserted that if the proposal to eliminate producer-handlers is adopted, Aurora would have to restructure and essentially completely revise its business model.

The Aurora witness was of the opinion that it is not possible to determine the presence or absence of orderly marketing conditions without considering the actual prices being paid to producers and the actual cost of milk incurred by handlers. The witness testified that based on the actual prices and costs, Aurora has not observed any unfair competition or the creation of any disruption in the market as a result of producer-handlers, nor has Aurora observed any producer-handlers with a price advantage that resulted in a competitive advantage.

The Aurora witness was of the opinion that any national policy that is adopted should preserve options and not foreclose them. The witness suggested that some of the proposals

punish vertical integration in any form other than a cooperative, which is anticompetitive and bad for consumers. The witness asserted that some of the proposals pick one business model as the winner, stifle entrepreneurial enterprises, and eliminate independent vertically-integrated operations that meet changing consumer demand.

The GH Dairy witness strongly opposed elimination of the producer-handler provisions and was of the opinion that producer-handlers are more diversified, innovative and responsive than cooperatives. The witness testified that GH Dairy's customers appreciate the source verification they get as a result of GH Dairy having its own dedicated milk supply. Additionally, the witness noted the benefits of total control over processing and milk quality.

The witness testified that GH Dairy's major competitor has 86 or 87 plants, while the witness's portfolio includes only 3. The witness asserted that producer-handlers are good for consumers because they bring competition to the marketplace. The witness further stated that dairy farmers have only two options, become a producer-handler or join a cooperative. The witness was of the opinion that while deregulation of the milk industry is preferable, most producers want regulation. The witness further testified that a producer-handler is not competitive until it distributes 1 million gallons per week (approximately 34 million pounds per month) so 34 million pounds of Class I disposition per month should be the limit for the producer-handler exemption. The witness affirmed that the transition of Sarah Farms, another entity owned by the witness, from producer-handler to fully regulated plant did not put the operation out of business. The witness testified that after becoming a fully regulated plant in April 2006, Sarah Farms underwent restructuring to increase production capacity and lower its costs.

The GH Dairy witness also offered rebuttal to the testimony of the Price's witness. According to the GH Dairy witness, GH Dairy was not a producer-handler at the time it successfully bid on school district business that had previously been held by Price's. Furthermore, the witness noted, the fluid products being supplied to the school districts originated at the Anderson plant in Nevada and were being transported by the witness' firm to the El Paso area. The witness also explained that the several El Paso area stores in which GH Dairy replaced Price's as the supplier belong to a national retailer that uses one of the witness's other fluid processing operations, Sarah Farms (a fully regulated handler) as a supplier in another part of the country.

A panel of witnesses representing Heartland provided details regarding its operation. The panel noted that Heartland is a diversified operation which includes a goat dairy, a cow dairy and a milk plant.

The Heartland panel noted that Heartland recently obtained kosher certification to produce 11 products. Echoing the Kreider witness' testimony, the panel stated that Heartland was sought out by the kosher certification body, in part because of the dairy's proximity to the plant and the associated potential for a single individual to supervise both operations. The panel further elaborated that Heartland's kosher products could be marketed anywhere in the United States through the broker and distribution center that Heartland uses.

The Heartland panel testified that as a producer-handler, Heartland faces competitive constraints that regulated handlers do not; and alternatively, regulated handlers face competitive constraints that Heartland does not. To this point, the panel explained that Heartland is unable to purchase milk while regulated handlers can. More specifically, the panel was of the opinion that Heartland does not have a disruptive impact on the market, as the operation has neither an effect on blend price to the farmers nor an unfair competitive advantage relative to fully regulated processing plants. The panel further asserted that Heartland is at a substantial disadvantage when compared with regulated processors paying Class I prices because Heartland acquires milk at its internal cost-of-production. It was also the opinion of the panel that Heartland has no advantage of size or scale. The panel further noted that in a recent attempt to secure a new customer, Heartland was refused because the customer conveyed it was not worth the effort to switch suppliers based on a $0.02 difference.

The Snowville witness was of the opinion that the operation of a fluid milk plant with only 450,000 pounds of Class I route distribution per month would not be feasible and as such, a 1 million pound per month limit on Class I disposition is more realistic.

The Snowville witness recounted earlier testimony that smaller dairy farmers have a $4 to $5 per cwt disadvantage, and speculated that if these farms are able to survive into the future, it would be through adding value or government subsidies. The witness was of the opinion that if the option to become a producer-handler were to be eliminated, all small dairy farms below 1,000 cows would effectively disappear.

A panel testified on behalf of two dairy farms and Homestead. Homestead is a regulated plant located in the Order 5 marketing area. The panel testified in support of an increase in the exempt plant monthly Class I disposition limit. Homestead, according to the panel, is a family run operation that primarily packages milk in glass bottles and distributes, in part, via home delivery. The panel noted that Homestead also has limited arrangements with Kroger.

The Homestead panel suggested that 450,000 pounds of Class I disposition as the standard for the exempt plant provision is not high enough, and instead suggested a limit of 1 million pounds of Class I disposition per month. The panel acknowledged that the cumulative effect of numerous 1000-cow operations would be disruptive, but that numerous 100-cow operations would not be due to the financial constraints associated with such smaller operations.

A witness appearing on behalf of several Northeastern legislators testified in opposition to the elimination of the producer-handler provisions. The witness testified that the national impact of producer-handler dairy operations is very small and producer-handlers bear the true costs of production and delivery in the production of products that meet the demands of their consumers. In fact, the witness noted, state legislators have significant concerns about consolidation and concentration among the largest cooperatives and handlers and the associated impacts on the marketplace. Finally, the witness asserted that the problems in the dairy industry are not the result of a small number of producer-handlers, regardless of the sizes of the operations. The witness asserted that legislators in the Northeast think that a lack of competition in the dairy processing sector is damaging to both consumers and dairy producers in the Northeast.

A witness on behalf of Shamrock, an Arizona milk processor, testified in support of the limits on route distribution currently in place for producer-handlers under Order 131. According to the witness, Shamrock is unique in that it owns a dairy farm, Shamrock Farms, aside from its milk processing business.

The Shamrock witness testified that there are four primary fluid milk processors in Arizona. According to the witness, Shamrock's primary competitor is a former producer-handler out of

Yuma, Arizona. The witness testified that this former producer-handler is Shamrock's primary competitor because two of the other processors are primarily focused on own-store sales, leaving the balance of the retail supermarket channel, the mass merchandiser channel, convenience stores and foodservice operations to Shamrock and Sarah Farms.

The Shamrock witness stated that they are not particularly averse to the producer-handler exemption. However, the witness was of the opinion that the exemption is incompatible with having a market order system that all other players are required to operate under. The witness was also of the opinion that producer-handlers have a competitive advantage over regulated handlers because they do not pay the Class I price. However, the witness testified that the elimination of the entire producer-handler provisions is not particularly necessary.

A witness appeared on behalf of Diamond D Dairy, a dairy farm with a fluid milk processing plant in Colorado. The witness urged USDA to leave the current producer-handler regulations unchanged. The witness testified that Diamond D services 1,200 home delivery customers and 175 wholesale accounts in Colorado.

The Diamond D witness testified that approximately 50 percent of the Diamond D operation's milk is processed by its on-farm plant and the balance is sold to DFA. The witness indicated that Diamond D is currently a producer and fully regulated distributing plant intent upon, should business continue to grow, conversion to producer-handler status. According to the witness, Diamond D is both a producer member and a processor customer of DFA. The witness testified to paying DFA all of the normal fees and charges associated with milk marketing. The witness stated that those charges include balancing, milk hauling, forward haul, administrative and milk promotion fees, handling and service charges including over-order premiums. The witness testified that DFA charges approximately $5 per cwt for certain services, which is an out-of-pocket cost. The witness also indicated that as a processor customer, Diamond D must purchase own-farm milk back from DFA for bottling. The witness stated that Diamond D's cost of production is around $17 per cwt.

The Diamond D witness testified that rising costs left few options for survival. The witness further explained that they either had to become larger and presumably more efficient or increase revenues from the current operation. The witness stated that the first option was unrealistic for a number of reasons including land constraints, and taking on responsibility of bottling and marketing was the only way to grow the bottom line. The witness testified that the operation's survival now is conditioned upon the option to become a producer-handler. Additionally, the witness was of the opinion that there exists no need to change producer-handler regulations under Order 32.

A dairy farmer witness, a member of DFA, testified in support of the current producer-handler provisions. The witness testified to operating a dairy farm in Southeast Florida and milking over 1,400 cows. The witness' operation opened a bottling plant in March 2009.

The operation does not currently have producer-handler status and is not causing any market disruption, the Southeast Florida dairy farmer witness stated. The witness was of the opinion that producer-handlers can better meet the demands of niche markets than fully regulated handlers. The witness testified that one of the reasons to become a producer-handler is to avoid payment into the marketwide pool. The witness was of the opinion that everyone should have the opportunity to be able to produce and bottle milk within the same operation. The witness testified to investments made in pursuit of qualification for producer-handler status.

A witness representing Shatto, a producer-handler located in Missouri, testified in opposition to any changes to the producer-handler provisions. The witness stated that Shatto milks 300 cows and distributes fluid products in the Kansas City area. The witness noted that Shatto constructed an on-farm bottling facility in 2003, and became a producer-handler as a means of adding value and selling locally. The witness testified that Shatto's small family operation does not compete with any other organization serving the area, and that its pricing is not comparable to others in the market. According to the witness, Shatto's pricing is higher across the board because of the premium, niche products it markets.

The Shatto witness was of the opinion that disorderly market conditions do not exist, and that Shatto's small operation, in particular, does not create disruption. The witness further asserted that Shatto does not obtain any price advantage over any other cooperative or similar sized producer-handler, and would not do so even with Class I disposition of one million pounds per month. Furthermore, the witness noted, Shatto does not have problems balancing supply with demand.

The Shatto witness testified that Shatto faces additional costs resulting in higher production costs than those faced by other operations. Further, the witness stated the level of these costs remove Shatto from competition on the basis of ''milk cost-of-production by size'' as referenced in Proposal 1. Thus, the ability to suggest that a limit should be based upon some average economies of scale has been eliminated, the witness asserted. Additionally, the witness asserted that the economies of scale rationale employed by NMPF is misleading and unjust in light of the actual costs related to production, since a farm cannot significantly reduce production costs without transitioning away from best management practices. The witness testified that Shatto's per cwt on-farm cost, with nearly 300 cows, far exceeds the $18 noted in Proposal 1, and is likely closer to $25 or $30 per cwt. As such, the witness explained that Shatto is at a significant cost disadvantage compared to not only operations of a similar size, but also cooperatives of all sizes.

The Shatto witness was of the opinion that the proposal to eliminate the producer-handler provision is unjust and inconsistent with the original intent of exempting producer-handlers serving small niche markets that would otherwise be left alone by large entities. The witness also asserted that the proposal will eliminate many small operations like Shatto, and reduce one component USDA claims is necessary for perfect competition.

The witness testified that Shatto would be unable to absorb the cost of regulation associated with NMPF's proposals and Shatto would be required to pay into the pool for use of own-farm milk. The witness testified that overall, Proposal 1 penalizes operations for taking steps to save the small family farm with an on-the-farm bottling facility. The witness testified that small family farms would be unable to expand relative to increased customer demand and meet rational business goals, and a large number of producer-handlers, specifically those with fewer than 600 cows, would go out of business if the NMPF proposals are adopted. The witness was of the opinion that this would shift more sales to large, multistate operations and cooperatives.

A witness representing Country Dairy, a producer-handler, testified in opposition to any changes to the producer-handler provisions. Country Dairy, located in Michigan, has monthly production of 2.4 to 2.6 million pounds and markets through Cedar Crest Dairy.

In the 1990s, Country Dairy's milk was sold at a $0.15 to $0.25 premium

because it was rbST-free and an account was secured based on its rbST-free milk supply, the Country Dairy witness stated. The witness was also of the opinion that Country Dairy's products are sold at retail for a premium because consumers perceive the products to be of a higher quality. The witness revealed that 93 to 98 percent of Country Dairy's production is Class I, and that Country Dairy has had an exclusive distribution agreement with Cedar Crest Dairy, a dealer, since 2001. According to the witness, most of Country Dairy's milk is sold under the Country Dairy label although some is store branded. The witness acknowledged that some of the store branded milk is also supplied by another processor within the same market, through Cedar Crest.

The Country Dairy witness testified that Country Dairy bears all risks of milk production and processing. The witness explained that Country Dairy's prices tend to follow Class I prices, but at times of high production, prices are reduced to sell milk and further establish retail relationships. The witness noted that in the past, when Country Dairy was responsible for product distribution, this high production discount ranged from $0.10 up to $0.20 per gallon. The witness testified that Country Dairy competes with regulated processors to supply the same kinds of retailers. Michigan retailers, even those supplied by fully regulated handlers, advertise and sell milk at very low prices, the witness asserted. The witness was of the opinion that this practice may reflect retailers' willingness to sell at a loss. Ultimately, the witness asserted that producer-handlers are not a disruptive factor and should not be subject to limitations on monthly Class I disposition.

A panel of witnesses testified on behalf of Mallorie's, a producer-handler located in Oregon. The panel testified that Proposals 1 and 2 should be rejected, and if some rules are necessary to regulate large producer-handlers, the existing rules in Order 124 should be used as a model for other milk orders.

The Mallorie's panel stated that the decision to regulate producer-handlers with Class I disposition in excess of 3 million pounds per month in the Pacific Northwest required Mallorie's to significantly restructure its operation and lay off a number of employees. The panel further asserted that the complete elimination of the producer-handler provisions would likely disadvantage small stores dependent on producer-handlers to supply their limited needs, which are not attractive to larger, fully regulated handlers. The panel asserted that Mallorie's operation, with Class I disposition below 3 million pounds per month, is too small to solicit larger accounts. The panel further testified that Mallorie's faces costs much higher than those faced by larger fluid milk processors, and as a producer-handler, nets $2.50 to $3.50 below the Class IV price for surplus milk.

A witness testified on behalf of Brunton Dairy Farm (Brunton), a producer-handler located in Pennsylvania, milking 106 cows. According to the witness, Brunton consists primarily of a glass bottle home delivery component and an on-farm retail store. The witness testified that producer-handlers do not have any price advantage over fully regulated handlers, and that any advantage producer-handlers have over fully regulated handlers is on the basis of product quality. The witness testified to producing products priced above other brands of milk, and to replacing other brands in the marketplace because consumers desire better milk not cheaper milk. The witness was of the opinion that amendment to the producer-handler provisions could change the way in which Brunton conducts business, resulting in a change in the quality of product produced. As such, the witness testified that the current regulations should not be changed. The witness was also of the opinion that increased regulation for producer-handlers, or the complete elimination of the producer-handler provisions, would increase the costs of certain niche products such as those produced by Brunton.

Witnesses representing Hatchland, Mountain Dairy and Dunajski testified in support of the current producer-handler provisions. Hatchland, a producer-handler located in New Hampshire; Mountain Dairy, a producer-handler located in Connecticut; and Dunajski, a producer-handler located in Massachusetts all market milk in the Order 1 marketing area. The Hatchland witness and the Dunajski witness testified in specific opposition to Proposals 1 and 2. The NDFA witness testified in opposition to Proposal 2. The NDFA witness testified that the pooling and pricing exemption for plants with less than 150,000 pounds of Class I route disposition should be maintained.

A witness testified on behalf of Country Morning, a producer-handler located in Othello, Washington. The witness testified in support of the current producer-handler provisions. The witness acknowledged that Country Morning is subject to the 3-million pound cap on producer-handlers under Order 124. The witness testified that Country Morning is the only processing plant in Washington State that markets milk directly from the farm to the consumer without blending milk from other farms. The witness testified that Country Morning bottles milk under a private label owned by a distributor, and acknowledged that the same label may be used for milk from other plants. The witness indicated Country Morning does not actively seek sales under a particular label or sell surplus through co-labeling.

The Country Morning witness testified that if it lost producer-handler status, Country Morning would owe between $50,000 and $60,000 to the pool each month, and neither the farm nor the plant would survive. The witness further testified that the producer-handler issue was debated and settled in the Pacific Northwest decision three years ago and does not need to be revisited.

Elimination of the producer-handler provisions and adoption of grandfathering.

Proposals 17 and 26 were offered by NMPF and Mallorie's, respectively, as applicable should the producer-handler provisions be eliminated. These proposals seek to ''grandfather'' the exemption from pooling and pricing for operations that currently have producer-handler status, provided they are compliant with certain limitations. NMPF was joined by MD&VA, UDA, NDA-Darigold, the DFA dairy farmer panel and a DFA representative in support of Proposal 26. Proposal 17 was supported by NAJ, with modifications.

Proposal 20, proposed on behalf of Continental Dairy Products, Inc. and Select Milk Producers, Inc., was withdrawn on the basis that it was closely related to Proposal 17.

Those in opposition to either Proposal 17 or Proposal 26, or both, included Aurora, Snowville, Kreider, Mountain Dairy, the FOOD panel, Dunajski, the State Departments of Agriculture, Hatchland, Diamond D, the Southeastern Florida dairy farmer, MMPA, Bareman and Cornucopia.

NMPF testified that taken together, Proposals 1, 2, and 26 would only regulate 3 to 5 of the largest producer-handlers in the country, all of whom have estimated annual sales of at least $10 million and packaged fluid milk product sales in excess of 15 million pounds per month. The NMPF witness stated that it is necessary to both regulate all producer-handlers distributing more than 3 million pounds of packaged fluid milk products per month, and limit the proliferation of producer-handlers marketing between 450,000 and 3 million pounds per

month. The witness testified that if adopted, Proposal 26 would reduce the regulatory impact of Proposal 1 on existing producer-handlers that fall within the range of 450,000 to 3 million pounds of monthly Class I disposition.

Several witnesses representing cooperatives testified in support of Proposal 26. The MD&VA witness testified in support of Proposal 26 as a part of the package of proposals offered by NMPF. The UDA witness explained that UDA supports the creation of a new category of exempt plant to include plants with producer-handler status in 2008, providing those plants have 3 million pounds or less of Class I sales of uniquely branded products. The St. Albans witness supported the right of small, existing producer-handlers to continue operation. The NDA-Darigold witness testified in support of ''grandfathering'' provided that it only applies to current producer-handler operations under 3 million pounds of monthly Class I disposition, and the producer-handler exemption is phased out. The NDA-Darigold witness also asserted that if a provision allowing entities with producer-handler status as of the date of enactment of the new regulation was adopted then a significant number of entities may engage in a quick shift to obtain producer-handler status prior to the regulatory change.

The DFA dairy farmer panel and the DFA witness testified in support of Proposal 26. The panel further stated that allowing an existing producer-handler to retain their status up to the 3-million pound limit on monthly Class I disposition would be fair and have little impact on the market provided that if the business exceeds 3 million pounds of Class I disposition per month it will be treated as a fully regulated handler.

Proposal 17 received supporting testimony by the Mallorie's panel. The panel testified that if Proposals 1 and 2 are adopted, existing producer-handlers should be able to retain their exemption through grandfathering, as suggested in Proposal 17. The panel testified that during 2008, Mallorie's milk production averaged 3.1 million pounds per month, with average Class I utilization of 63 percent; average Class II use of 15 percent; and Class IV utilization ranging from 9 to 29 percent, with an average of 22 percent for the year.

The Mallorie's panel testified that the producer-handler provisions were reviewed extensively in Orders 124 and 131, and limits on Class I disposition went into effect in 2006. The panel testified that producer-handlers in these orders have adjusted to the new rules and that there is no reason to readdress the subject. The panel was of the opinion that a growing number of consumers are concerned about where their milk comes from and how it is produced. The panel asserted that larger processors cannot meet these concerns, but operations like Mallorie's, as a producer-handler, can.

The Mallorie's panel further testified that if its operation were to become fully regulated the effect would be catastrophic. The panel testified that when the Federal Order 124 producer-handler exemption was set at a maximum of 3 million pounds, Mallorie's responded with a herd size reduction, and discontinuation of both a heifer raising facility and a leased 300-cow dairy. The panel stated that about 25 employees lost their jobs and purchases of feed, other supplies and services were reduced by nearly one-third or over $3 million a year. The panel also testified that if Mallorie's were to go out of business, the local and Oregon State economies would lose over $6 million per year.

The Mallorie's panel submitted a modification to Proposal 17, explaining that if it is adopted, then a limit of 6 million pounds of monthly Class I route disposition should become the point at which a grandfathered producer-handler loses the exemption from pooling and pricing.

The NAJ witness testified that NAJ supports Proposal 17 with some suggested modifications. According to the witness, NAJ suggests the replacement of language that calculates a volume of exempt own-farm milk dependent on historical sales limited to 3 million pounds per month, with a simple limit on the exemption at 3 million pounds per month of own-farm production.

The NAJ witness testified in opposition to the portion of Proposal 17 that outlines the calculation of the amount of own-farm milk production to be considered exempt, and all of Proposals 20 and 26, because these proposals advocate using a handler's historical processing and sales of own-farm milk to establish an exemption from future pool obligations. These proposals, the witness noted, would penalize handlers beyond a given point in time. This would also be the case, added the witness, for new processors without previous sales figures to establish a base, despite planning for bottling operations that occurred under existing provisions. The witness was also of the opinion that it is inequitable to treat existing producer-handlers differently from producers with the desire to become future producer-handlers.

As members of AIDA, the Aurora and Snowville witnesses testified in specific opposition to Proposal 26, and the Kreider witness testified in opposition to all proposed grandfathering of the producer-handler exemption. The Hatchland witness also testified in specific opposition to Proposal 26. The FOOD panel testified in opposition to any type of ''grandfathering'' provisions for either producer-handlers or exempt plants. The State Departments of Agriculture panel also testified in opposition to any grandfathering provisions. The MMPA and the Bareman witnesses testified in opposition to any proposals that would allow for the grandfathering of producer-handlers should the exemption be eliminated.

The Mountain Dairy and Dunajski witnesses testified in opposition to the adoption of grandfather clauses on the basis that these types of proposals would limit exempt status to include only those operations currently classified as producer-handlers. The Diamond D witness and the Southeast dairy farmer witness testified in opposition to grandfathering clauses. The Diamond D witness asserted that grandfathering would exclude Diamond D from becoming a producer-handler in the future. The Southeast dairy farmer witness testified that such clauses would prevent new producer-handlers from entering the market. Similarly, the Homestead panel testified in opposition to Proposal 26 and was of the opinion that future generations should have the ability to become producer-handlers.

The Cornucopia witness testified in opposition to ''grandfathering'' existing producer-handlers unless qualification for grandfathering included a 3-million pound per month limit on route disposition and packaged fluid sales.

Adoption of producer-handler provisions to include a limit on monthly Class I disposition.

Many hearing participants were in support of maintaining the producer-handler provision but limiting the Class I disposition a producer-handler could have to remain exempt. There were 10 proposals that would meet this intent, published in the hearing notice as Proposals 3, 4, 7, 8, 9, 11, 12, 13, 14 and 21. The proposed changes regarding Class I sales limits for producer-handlers were recommended as either ''hard-caps'' or ''soft-caps.'' Hard-caps would limit the Class I route disposition of producer-handlers, and if exceeded, would fully regulate the producer-handler on their entire volume of Class I sales. Soft-caps would only regulate

the producer-handler on the volume of Class I sales over a certain limit. Hatchland, Lochmead Dairy (Lochmead), FOOD, Monument Farms (Monument), Mountain Dairy, Dunajski, Shatto, the State Departments of Agriculture, Homestead, Country Morning and NDFA all testified in support of amending the current producer-handler provisions to include a Class I sales volume limitation.

Opposition to either general limitations of, or the specific application of soft-cap limitations to, the producer-handler provisions was expressed on behalf of IDFA, Diamond D, the Dairy Institute of California (DIOC), HP Hood, NMPF, DFA and NDA-Darigold.

The Hatchland witness testified as the proponent of Proposal 3, which would regulate producer-handlers in the Northeast order with more than 3 million pounds of monthly Class I route disposition. Hatchland, according to the witness, produces nearly 800,000 pounds of milk per month. As such, the witness testified, a 3-million pound limit on monthly route disposition by producer-handlers would allow Hatchland to grow in the future.

The witness testified that Hatchland is a unique dairy operation with an on-farm store and delivery business providing milk in glass bottles to homes throughout the Northeast. The witness emphasized that Hatchland occasionally buys from, or sells to, a cooperative, but ultimately must balance own-farm production. The witness was of the opinion that given the extra costs incurred by Hatchland's unique operation, the exemption from the pooling and pricing provisions does not result in a competitive advantage over regulated handlers.

A witness representing Lochmead, a producer-handler, testified in support of Proposal 4. Lochmead, based in Oregon, has average monthly sales of nearly 1 million pounds and operates 42 Dari-Mart retail stores.

The Lochmead witness testified that both producers and producer-handlers have increased in size since the producer-handler provisions were first established. According to the witness, this increase in size necessitates a limit on monthly route disposition to remain exempt from pooling and pricing provisions. The witness testified that Lochmead would be unable to compete with the larger, more efficient bottlers and would go out of business, were it to become fully regulated.

The FOOD panel testified in support of establishing a 450,000-pound hard-cap on monthly Class I route disposition for producer-handlers. The panel testified that this proposed change honors the original intent and purpose of the exemption.

The FOOD panel testified that WODPA, MODPA and NODPA members face unfair competition from a large producer-handler that sells organic milk nationally. The FOOD panel testified that this producer-handler sells milk through national supermarket chains, thereby competing with locally produced organic milk at an economic advantage based on the pooling and pricing exemption. The FOOD panel was of the opinion that the regulatory exemption for large organic producer-handlers lowers the prices received by organic dairy farmers whose milk is pooled and priced under the terms of Federal milk orders. The FOOD panel testified in opposition to any type of soft-cap limitations for either producer-handlers or exempt plants.

A witness appeared on behalf of Monument, a Vermont-based producer-handler, in support of establishing a 3-million pound per month exemption on Class I route distribution for producer-handlers. The witness also testified in support of Proposal 13 submitted by the New England Producer-Handler Association, Inc.

The witness testified that Monument produces approximately 1 million pounds of milk per month. The witness stated that Monument does not have any advantage over fully regulated handlers due to costs of production that typically exceed the Class I price. The witness added that Monument must continually balance demand with available supply, pay a premium to purchase additional milk if necessary, and receive the lowest class price or less to sell excess milk.

As a proponent of Proposal 13, the witness for Mountain Dairy expressed support for a 3-million pound limit on the monthly volume of milk a producer-handler may distribute while retaining a regulatory exemption. The witness testified that Mountain Dairy delivers milk to individual homes and also supplies retail customers. The witness testified that Mountain Dairy milks about 500 cows. The witness was of the opinion that the exemption of producer-handlers from the pooling and pricing provisions of Federal milk orders is not contributing to disorderly marketing conditions in the Order 1 marketing area.

Proposal 7 received supporting testimony by the Dunajski witness. The witness testified that Dunajski Dairy is located and markets nearly 350,000 pounds of Class I products per month in the Greater Boston area. The witness was of the opinion that Dunajski Dairy does not compete with large bottlers on the basis of price, and is not disruptive in Order 1.

The Dunajski witness was of the opinion that the current producer-handler exemption should not be changed. However, the witness was also of the opinion that three million pounds of Class I sales per month would be an acceptable cap on the producer-handler exemption providing that no labeling restrictions accompany the cap.

The Shatto witness presented testimony as the proponent of Proposals 11 and 12. The witness stated that Shatto's proposals address the reduction in competition, the negative impact on small businesses, and the overall regulation of the dairy industry as alternatives to Proposal 1. The witness proposed the producer-handler exemption be kept in place with a limit of 1 million pounds of Class I sales per month because, according to the witness, producer-handlers under this limit are not disruptive to the market, and would be unable to survive the financial impact if the producer-handler exemption were to be eliminated entirely. The witness asserted that the effects of Proposals 11 and 12 on small business are more appropriate than Proposal 1.

The Homestead panel of witnesses testified in support of a 3-million pound per month limit on the Class I sales of producer-handlers. The Homestead panel testified that Homestead Creamery and the two associated farms supplying its milk are collectively recognized as a producer-handler by the state of Virginia but not by the Federal order system. Homestead Creamery, according to the panel, is currently a regulated handler. The panel was of the opinion that the producer-handler definition should change to accommodate Homestead, a processor that has farms operated in common rather than owned in common.

The Country Morning witness testified that a limit of 3 million pounds on monthly Class I sales volume for retention of producer-handler status would be acceptable. Similarly, the Shamrock witness did not object to establishment of an upper limit on the route disposition of producer-handlers.

Proposal 8 was testified to by the panel representing the State Departments of Agriculture. The panel testified that farmers in NH, NY, PA, VT, and WI, are moving toward vertical integration, particularly with regard to cheese manufacturing. The panel testified that the producer-handler provision is important in those states because consumers have shown significant interest in the locally-

produced, niche products producer-handlers provide.

The State Departments of Agriculture panel testified that total producer-handler volume in NH, NY, PA, VT, and WI is small relative to total milk production, and that producer-handlers do not create disorderly marketing conditions. The panel asserted that one producer-handler with production greater than three million pounds of route disposition per month could be disruptive. The panel provided specific examples to justify their position that producer-handlers need room to grow. The panel stated that a 2-million pound per month figure is appropriate as it appears to be the level at which economies of scale are realized. The panel further stated that three million pounds per month would be the absolute upward bound as a cap on the producer-handler exemption.

The State Departments of Agriculture panel also testified that marketwide pooling is crucial to dairy farms in the five states represented, and an unlimited producer-handler exemption will ultimately destroy Federal order pooling as it erodes minimum prices and sharing of Class I revenues. The panel advocated a 2-million pound per month limit on producer-handler route disposition.

The NDFA witness suggested that if the producer-handler provisions were not eliminated and a limit was established on the Class I sales volume of producer-handlers, Order 1 should have a lower limit than other Federal orders. The witness supported this assertion by noting that in Order 1 there are significant differences in geographic size and population, and a relatively high number of producer-handlers and exempt plants. Based on a characterization of general statistics, the witness asserted that from 2002 to 2008, total fluid milk sales for producer-handlers across 8 of the 10 Federal orders has increased by over 60 percent and fluid milk sales from exempt plants increased by over 20 percent, while at the same time, total fluid milk sales from fully regulated plants decreased nearly 4 percent. Similarly, for Order 1, total fluid milk sales from producer-handlers from 2000 to 2008 increased nearly 106 percent, and total fluid milk sales from exempt plants increased nearly 44 percent. The witness also testified that dairy farms managed by governments and colleges should be excluded from any hard-cap on the volume of Class I route disposition to maintain an exemption from the pooling and pricing provisions of Federal orders.

The IDFA witness argued that the proposals seeking to continue the producer-handler exemption from pooling and pricing provisions with some volume limit could, in effect, continue the problem of disorderly marketing created by this exemption.

The Diamond D witness testified in opposition to limitations to the producer-handler exemption on the basis that a 3-million pound cap on route disposition may affect Diamond D in the future if the operation grows.

A witness representing the Dairy Institute of California (DIOC) appeared at the request of NMPF for the purpose of describing the producer-handler exemption under California's state milk pooling system. According to the witness, DIOC is a California based trade association representing fluid milk handlers and dairy product processors. The witness opined that USDA may find California's experience with producer-handlers relevant in formulating Federal order policy.

The DIOC witness stated that there are two regulatory schemes for producer-handlers in California. According to the witness, the first option, the ''exempt producer-handler,'' allows for the pool exemption of own-farm production provided that both milk production and sales average less than 500 gallons per day (129,000 pounds) and 95 percent of both production and sales are disposed to retail/wholesale outlets. The second option, the ''option exempt producer-handler,'' effectively operates under a soft-cap, allowing for deduction of exempt milk volume from any Class I pool obligation in a similar manner as suggested by Proposal 17.

The DIOC witness provided opinion and evidence as to producer-handlers' raw milk cost advantage compared to fully regulated handlers. The witness, using data provided by the California Department of Food and Agriculture (CDFA), calculated the advantage for California milk testing 3.5 percent butterfat and 8.7 percent nonfat solids by subtracting the quota price per cwt from the Class I price. The witness stated that the raw product cost advantage for producer-handlers was calculated by dividing the advantage per cwt by the number of whole milk gallons in a cwt of milk. The witness noted that this cost advantage varies greatly depending on the relationship between the Class I price and the pool quota price. For the period of January 2000 to March 2009, stated the witness, the raw milk cost advantage for producer-handlers averaged $0.113 per gallon. The witness added that for the most recent 12-month period, the cost advantage averaged $0.177 per gallon. Overall, the witness was of the opinion that producer-handlers have a lower raw milk cost than fully regulated handlers, leading to a producer-handler competitive advantage.

The DIOC witness testified that producer-handlers have increased their share of Class I sales at the expense of fully regulated competitors. Relying on CDFA data, the witness compared the ''option exempt producer-handler'' share of the California Class I market with the share attributed to regulated handlers from July 1995 to August 2008. The witness testified that the producer-handler share of the Class I market increased from 14.8 to 23.4 percent.

In summary, the DIOC witness testified that the soft-cap type producer-handler exemption in California has significantly advantaged producer-handlers and disadvantaged fully regulated handlers. The witness was of the opinion that the provision has created a dilemma for policy makers who struggle to reconcile the goal of providing equal prices to competing handlers.

A witness appeared on behalf of HP Hood to provide a description of soft-cap producer-handler provisions, similar to those advanced in Proposal 17, and the resultant impact on the competitive landscape in the northern California milk market. HP Hood is a Massachusetts-based handler that owns and operates 22 milk processing and manufacturing facilities.

The witness testified that HP Hood has repeatedly lost business to producer-handlers who can sell milk at a lower price. The witness testified that the exemption for producer-handlers under the California milk pooling plan has decreased the revenues of producers whose milk is pooled and allowed producer-handlers to increase their share of the California Class I market. The witness noted that the intent of government-controlled dairy pricing systems should be to provide market stability for both producers and processors and avoid the creation of opportunities for one party to benefit at the expense of another.

The NMPF witness echoed testimony provided by the DIOC and HP Hood witnesses, noting that soft-caps have been problematic in California. The witness was of the opinion that soft-caps, applied in the Federal order system, would have a negative effect on uniform pricing.

The DFA witness and the NDA-Darigold witness testified in opposition to all proposals seeking establishment of soft-caps regulating only a portion of a producer-handler's sales. The DFA witness stated that minimum order

prices would be unclear to buyers, causing them to wonder if competitors had access to lower priced milk due to the soft-cap. The DFA witness also asserted that a soft-cap would require a greater level of administration. The NDA-Darigold witness stated that the adoption of soft-cap provisions would further increase the advantages associated with producer-handler status.

Exemption of vertically integrated operations with retail and home delivery distribution.

Proposal 24 would exempt from regulation milk sold by producer-handlers through ''handler-controlled retail channels'' including home delivery and handler-controlled retail outlets, regardless of sales volume.

The AIDA consultant panel testified that Proposal 24 is intended for adoption only if USDA amends the producer-handler provisions. The rationale for this proposal, the panel explained, is that sales through home delivery and handler-controlled retail outlets are entirely controlled by the handler and do not have an impact on the pool.

The Braums witness testified in support of Proposal 24. The Braums witness testified that Braums' business model is unique, as the company sells own-farm milk and related dairy products in company-owned retail stores that do not carry any other fluid milk brand. The witness further testified that Braums serves a niche market that other fluid milk retailers do not. According to the witness, as a producer-handler, Braums must self-balance and cannot use outside suppliers. The witness further asserted that Braums' supply is limited to only what its farm is able to produce.

The witness testified that Braums' products are not available anywhere other than Braum's retail stores, and the operation has never been approached to begin supplying milk to other retailers. The witness noted that no other operation produces or sells Braums' branded milk products, and since Braums sells its product all the way through to the retail level, the operation incurs all the same costs and risks of other producer-handlers along with the additional costs and risks associated with its exclusive distribution and retail business. The witness also stated that Braums does not enjoy a price advantage because the operation has had to make substantial investments in the milk production side of the business.

The Braums witness was of the opinion that they are not a disruption in the market, and that depooling has had a far greater impact on blend prices in Order 32 than the exemption of producer-handlers from pooling and pricing provisions. The witness added that if Braums were to become fully regulated, the blend price in Order 32 could actually decrease based on Braums' utilization.

The Kreider witness testified in opposition to Proposal 24. The witness did not support an exemption from pool obligation for volumes of milk sold at retail by producer-handlers. Kreider, the witness testified, does not currently sell to retail customers, direct to consumers through home delivery, or via farm store.

The IDFA witness noted that the adoption of Proposal 24 would create new incentives for existing regulated handlers to invest in dairy farms and retail stores for the sole purpose of gaining an exemption from pooling and pricing regulations. The Shamrock witness agreed with the IDFA witness, stating that the adoption of a retail and home delivery exemption may result in the creation of a loophole that would possibly need to be revisited in the future.

The NMPF witness stated that an exemption granted for handler sales conducted exclusively through handler-controlled outlets, as advocated by Proposal 24, is inequitable and would allow those handlers to balance their supply through the rest of the market. The DFA witness echoed the NMPF witness' position, adding that an Order 32 producer-handler selling milk entirely through its own retail outlets currently aggressively competes for retail sales, which has lead to disorderly marketing.

Exemption of own-farm milk.

Proposal 23, proposed by AIDA, would remove the producer-handler provision from all milk orders and exempt from regulation milk procured from a farm owned by a handler. Additionally, this proposal would treat handlers with own-farm production as partially regulated distributing plants.

The AIDA consultant panel testified that under Proposal 23, handlers with own-farm milk would be allowed to down-allocate the volumes of own-farm milk to their lowest value of use in their producer-settlement fund obligation calculation. Additionally, the panel stated that adoption of this proposal would allow handlers with own-farm production to purchase milk from pool sources, providing that all purchased milk would be up-allocated to the handler's highest value use. The panel also offered that handlers with own-farm production could elect partially-regulated distributing plant status for own-farm milk volume as an alternative to full exemption of own-farm milk. The panel concluded that adoption of this proposal would allow producer-handlers to remain in business and compete in an orderly manner.

The Braums, Kreider, Aurora, GH Dairy, Heartland and Snowville witnesses testified in conditional support of Proposal 23. The witnesses supported its adoption should the current producer-handler provisions be eliminated or restricted.

The NAJ witness testified in support of Proposal 23, with the modification that own-farm milk production should be exempt up to 3 million pounds per month, and any additional own-farm or purchased volume should be subject to pooling and pricing. The witness testified that expansion of the existing partially-regulated distributing plant provisions to include an exemption of the first 3 million pounds of own-farm milk would be equitable for producer-handlers with less than 3 million pounds of own-farm milk, those with more than 3 million pounds of own-farm milk, and those with a combination of own-farm and purchased milk.

The NMPF, IDFA and DFA witnesses testified in opposition to Proposal 23. The NMPF witness stated that the exemption of own-farm milk would disproportionately benefit large producer-handlers, while the IDFA witness noted that the adoption of Proposal 23 would create new incentives for existing regulated handlers to invest in dairy farms.

Establishment of individual handler pools.

Proposal 25, as proposed by the members of AIDA, would establish individual handler pooling provisions in all Federal milk orders. The AIDA consultant panel was of the opinion that adoption of individual handler pools would encourage milk in higher class uses to move where needed and assure that Class I revenues accrue to producers serving the Class I market. Additionally, the panel asserted that there would be little incentive for the supply area to expand beyond what is sufficient to serve the needs of the market, thus saving transportation costs. The panel concluded that Proposal 25 would treat producer-handlers the same as any other handler because producer-handlers would function as a regulated handler under the order, and would be able to buy milk from other producers at the blend price. Finally, adoption of Proposal 25 would allow producer-handlers to compete in an orderly manner, and allow producers and cooperatives to benefit from producer-handlers' sales in excess of own-farm

production, the panel asserted. The panel acknowledged reliance on the Nourse Commission Report (Nourse Report) in the preparation of its testimony, and encouraged USDA to reference it in making a determination. The panel represented that its heavy reliance on the Nourse Report in lieu of past decisions of the Secretary stemmed from its useful guidance on disorderly conditions.

The Braums, Kreider, Aurora, GH Dairy, Heartland and Snowville witnesses testified in conditional support of Proposal 25. The witnesses advocated its adoption in the event that the current producer-handler exemption be eliminated or restricted.

The Aurora witness acknowledged that if Proposal 25 were adopted, Aurora could continue to operate as a vertically-integrated business, although some modification might be necessary. The witness testified in support of individual handler pools on the basis that organic producers and processors obtain very limited benefits from the marketwide pooling system. The witness was also of the opinion that this is also true of other differentiated milk markets such as grass-fed and kosher. Individual handler pools would result in differentiated producers and processors gaining equity with respect to pooling, the witness asserted.

A witness representing Oberweis Dairy (Oberweis) testified in specific support of Proposal 25. Oberweis operates a distributing plant in Order 30 with 3 to 5 million pounds of monthly Class I disposition and home delivery.

The Oberweis witness testified that individual handler pools would benefit Oberweis and its producer suppliers. The witness testified that Oberweis competes with producer-handlers in the Virginia and Detroit markets. The witness stated that it is perfectly acceptable for regulated plants to compete with producer-handlers. The witness also testified that the government should not set minimum milk prices because prices are better determined in the marketplace.

The St. Albans witness testified in opposition to individual handler pools. The witness was of the opinion that individual handler pools would only benefit producers in close proximity to fluid plants. The witness stated that marketwide pooling is crucial to the economic survival of St. Alban's members because St. Albans is based in a rural area where most of the milk goes into manufactured products not fluid milk products.

The NDA-Darigold witness, the NAJ witness and State Departments of Agriculture panel testified in opposition to all individual handler pool proposals. The NDA-Darigold witness was of the opinion that individual handler pools would damage the marketwide pooling system—a system NDA and Darigold have found to be essential for producer support of Federal orders. The NAJ witness asserted that the establishment of individual handler pools would lead to disorderly marketing conditions because returns generated by sales of higher priced Class I milk would only be shared among those producers with access to a Class I processing plant.

The NMPF, DFA, IDFA, Mid-West-Lakeshore and UDA witnesses also testified in opposition to individual handler pooling. The DFA witness testified that individual handler pools should not be adopted because handlers operating fluid plants would gain market power and increase competition for access to the Class I market. Furthermore, the DFA witness was of the opinion that individual handler pooling is not compatible with the AMAA's basic tenet of minimum order prices for both producers and handlers. The IDFA witness echoed the DFA witness, noting that rather than being innovative, Proposal 25 instead proposes going back many years despite the findings of a number of hearings over the years which found individual handler pools contribute to disorderly marketing. The NMPF witness testified that individual handler pools threaten the Federal order system because producers supplying milk that balances the market would not benefit from Class I revenues.

Post-Hearing Briefs

Post-hearing briefs filed on behalf of proponents and opponents for the elimination of or amendment to the producer-handler definitions in all Federal milk marketing orders reiterated testimony and provided legal arguments as to why producer-handlers should or should not be fully regulated under the orders. Proponents and opponents alike stressed testimony and evidence purported to strengthen their specific positions. Presented below is a summary of the briefs as they related to the economic and marketing conditions in all marketing areas.

A brief filed on behalf of the New England Producer-Handlers Association, Inc., Willard J. Stearns & Sons dba Mountain Dairy, Monument Farms, Inc. and Homestead Creamery (New England Producer-Handlers Association, Inc. *et al.*) reiterated positions given at the hearing: producer-handlers in Order 1 do not give rise to disruption resulting from a significant impact on the blend price paid to producers; there exists no evidence to support the conclusion that producers with a large number of cows intend to construct bottling facilities and seek producer-handler status; consumer interest is a factor to be weighed during the determination of the regulatory treatment of producer-handlers; the producer-handler definition should be broadened to include entities operating in common; the exempt plant limit of 150,000 is inadequate and should be increased to 1 million pounds per month; and the exempt plant limit should be increased to 3 million pounds of monthly Class I route disposition in the event that the producer-handler provisions are eliminated.

In their brief, New England Producer-Handlers Association et al. requested that findings regarding the regulatory treatment of producer-handlers be separate for each of the Federal milk marketing orders. New England Producer-Handlers Association *et al.* argued that record evidence indicates that each order's findings should be based upon existing conditions within that order's marketing area. Specifically, it was argued that the circumstances that existed prior to amendment of the producer-handler provisions of Order 131, and the circumstances that currently exist in the Order 126 marketing area, do not exist in either the Order 1 or 5 marketing areas. Accordingly, the position taken in the New England Producer-Handler Association *et al.* brief was that proposals to eliminate the producer-handler provisions of Orders 1 and 5 are not relevant to the prevailing conditions in either of the two marketing areas.

A brief filed on behalf of Land O'Lakes, Inc (LOL) agreed with testimony given in support of Proposals 1 and 2. LOL is a Capper-Volstead cooperative with more than 4,000 dairy farmer members marketing in and pooling milk on 5 Federal orders. The LOL brief also detailed support for the grandfathering of existing producer-handler operations at a level to be determined by the Secretary and opposition to Proposals 23, 24 and 25.

In their brief, LOL noted that record evidence regarding the entrance of GH Dairy into the El Paso market supports the conclusion that a producer can transition their farm into a producer-handler operation with relative ease in a short period of time. LOL identified testimony that the conversion of a dairy farm into a producer-handler operation is more favorable, given the economics of market entry, than the conversion of a dairy processing plant into a producer-handler operation.

The LOL brief also detailed market disorder associated with the current producer-handler provisions. LOL stressed that the impact of producer-handler operations varies by size of order and the number of producer-handlers selling into a given marketing area. LOL further noted that record evidence indicates an impact on the blend price of as much as $0.12 per cwt for Order 32. LOL identified testimony that shows disorderly marketing exists as a result of pricing inequity between producer-handlers and fully regulated handlers. Previously, according to LOL, pricing discrepancies were not as significant when producer-handler operations were smaller, and larger regulated handlers could compete through increased plant efficiency but as producer-handler operations have grown, regulated handlers' advantage based on scale efficiency has eroded.

A brief filed on behalf of a Florida dairy producer reiterated testimony given on the record in support of maintaining producer-handler provisions in Federal orders and detailed the producer's opposition to Proposals 1 and 26.

A brief filed on behalf of Midwest and Lakeshore reiterated Midwest and Lakeshore's support for Proposals 1 and 2 and opposition to all other proposals presented at the hearing. In their brief Midwest-Lakeshore noted by illustration that raw milk production cost differences are not relevant to an operation's status as a producer-handler. Midwest-Lakeshore concluded that a distinct exemption for producers who elect to bottle their own milk is not necessary, instead an exemption for all handlers with 500,000 or fewer pounds of monthly Class I disposition is sufficient to accommodate vertically integrated entities and others whose presence does not give rise to disorderly marketing conditions.

A brief filed on behalf of NAJ reiterated and clarified positions taken by NAJ at the hearing. NAJ claimed in its brief that NAJ's modification to Proposal 17 would result in the addition of at least 17 million pounds of milk to Federal order pools each month. In brief, NAJ reasserted that the exemption of producer-handler's first three million pounds of own-farm milk disposed of as Class I during the month is equitable for producer-handlers who use less or more than three million pounds of own-farm, or use a combination of own-farm and purchased milk.

A brief filed on behalf of Select and Continental articulated support for the goals of Proposals 1, 2 and 26, albeit with certain noted exceptions to Proposal 26. In their brief, Select and Continental highlighted evidence presented by proponents and opponents and offered current and historical overviews regarding the regulatory treatment of producer-handlers. Select and Continental supported their position that producer-handlers should not gain economic advantage as a result of their exemption from pooling and pricing. Select and Continental asserted that amendments to the regulations governing producer-handlers should be based upon economic fundamentals.

The Select and Continental brief included details regarding the important role played by producer-handlers in the marketplace through their service of a full range of consumer demands and provision of competition to markets that would otherwise be characterized by imbalances in market power. The brief detailed a number of arguments supportive of the use of transfer prices faced by producer-handlers as the basis for determining competitiveness with fully regulated handlers. Select and Continental asserted that any limit on the monthly Class I sales volume of producer-handlers should be determined according to the level of advantage enjoyed by producer-handlers. The level of this advantage, according to Select and Continental, can be identified by comparing producer-handler transfer prices and the Class I price. Select and Continental further argued that while the determination of an appropriate limit on the producer-handler provisions is necessary because economic advantages accrue with increased size, a finite limit number cannot be determined on basis of the hearing record. However, Select and Continental asserted that an appropriate limit would allow producer-handlers with less than 3 million pounds of monthly Class I route disposition to continue operations with exemption from pooling and pricing. Select and Continental also asserted that the adoption of a limit on the basis of total producer-handler sales rather than merely in-area sales is justifiable and warranted.

In their brief, Select and Continental also opposed the adoption of an exempt plant threshold in excess of 450,000 pounds of monthly Class I route disposition. The rationale for the exemption of ''exempt plants'' is distinct from the rationale for the exemption of producer-handlers and as such, a single definition intended to encompass the two types of entities would be inappropriate, Select and Continental argued. In this regard, the Select and Continental also pointed out that the exempt plant threshold limit is not based on farm size or production but on the level of Class I distribution. The rationale underlying the exemption of plants with 450,000 or fewer pounds of monthly Class I disposition relates, at least in part, to administrative convenience, asserted Select and Continental.

The Select and Continental brief detailed arguments in opposition to using retail price data in the determination of disorderly marketing conditions and the amendment of the producer-handler provisions to include labeling restrictions. Select and Continental argued that the analysis of retail price data does not provide a clear illustration of disorder due to handler inequity because such analysis is unable to disaggregate handler pricing to consumers from other factors involved in setting retail prices. As to proposed unique labeling restrictions, the Select and Continental asserted that since any relative advantage between producer-handlers and regulated handlers should be determined on the basis of the regulatory treatment of producer-handlers, there is no need for adoption of labeling restrictions.

Furthermore, Select and Continental argued in their brief that when average dairy farm size data is compared with producer-handler numbers, opposite trends are revealed and as such, there is insufficient basis for concern that the growth in the number of large farms suggests the potential for the growth in the number of producer-handlers. The brief also indicated that the presence of organic producers and organic producer-handlers in the market should not result in different regulatory treatment by marketing orders as production methods are not relevant.

The Select and Continental brief detailed agreement with the adoption of provisions that would provide for a ''grandfathering'' clause to be applied to current producer-handlers. Continental and Select asserted that such a clause should allow entities classified as producer-handlers prior to July 1, 2009, with monthly Class I route disposition of no more than 3 million pounds to retain their exemption from pooling and pricing. According to Select and Continental, whatever method is selected for limiting producer-handler disposition of Class I sales, it is more important that current producer-handlers operations within the proposed limit not be fully regulated.

A brief was filed on behalf of Upstate Niagara Cooperative, Inc. (Upstate Niagara). Upstate Niagara is a Capper-Volstead cooperative that owns fluid processing and manufacturing plants regulated under several Federal orders, including Orders 1 and 33. Their brief

detailed support of the positions taken by NMPF and IDFA.

A brief filed on behalf of the State Departments of Agriculture of New York, Pennsylvania, New Hampshire, Vermont and Wisconsin (State Departments of Agriculture) stressed support for a 3-million pound limit on monthly Class I route disposition for producer-handlers. The State Departments of Agriculture also detailed opposition to an unlimited pooling and pricing exemption for Class I sales through producer-handler-controlled retail channels, and the adoption of a producer-handler grandfather clause.

According to the State Departments of Agriculture brief, a limit on producer-handler Class I sales volume is necessary as it would allow producers processing own-farm milk to continue to meet growing demand for locally produced, single-source milk while also preventing the erosion of the value of marketwide pools. In their brief, the State Departments of Agriculture stressed that any limitation on producer-handler Class I sales volume should apply to total sales. The State Departments of Agriculture also indicated that producer-handlers with three million or fewer pounds of monthly Class I route sales should be allowed to make temporary purchases of limited amounts of supplemental milk from other sources without loss of producer-handler status.

A brief filed was on behalf of DIOC. In their brief, DIOC provided analysis of specific proposals and testimony presented during the hearing. More specifically, the DIOC discussed the impact of California's producer-handler provisions that allow for soft-cap limits on Class I sales volume. The brief also stressed the relevance of California's producer-handler experiences to the current proceeding, the concept of transfer pricing as related to producer-handlers' cost advantage and the concept of economic rents.

In their brief, DIOC reiterated its testimony given on the substantial negative effects of producer-handlers in the California milk marketing system. Producer-handlers, according to DIOC, realize greater economic returns than similarly situated farms and plants that are not fully integrated. DIOC went on to assert that advantage arises because of producer-handler exemption from pooling and pricing. That exemption, DIOC stressed, allows the integrated producer-handler firm to either earn a greater return at the farm level by paying itself the Class I price, or earn a greater return at the plant level by paying the farm side of the operation less than the Class I value for milk supplied. DIOC concluded that the advantage enjoyed by producer-handlers is not a direct result of realized scale economies but rather is the result of revenue that is not shared with the pool.

A brief filed on behalf of Mallorie's Dairy, Nature's Dairy and Country Morning Farms (Mallorie's Dairy et al.) reiterated arguments against the adoption of Proposal 1 and for the adoption of Proposal 17 should Proposal 1 be adopted. The majority of these arguments rest upon the opinion that proponents lack evidence supporting adoption of their proposals. Mallorie's Dairy et al. also proposed that should the Secretary determine that changes to the producer-handler definitions are necessary, then the current size limitation on producer-handlers in Orders 124 and 131 should be adopted in other markets as dictated by record evidence of the need for change in those orders.

In their brief, Mallorie's Dairy *et al.* stressed that calculation of producer-handler advantage as the difference between the Class I price and the blend price is in error. Rather, Mallorie's Dairy *et al.* asserted that producer-handlers, like fully regulated handlers, use own-farm milk in other classes and as such, their pool obligation would likely be something less than the Class I price minus the blend price applied to total production. Mallorie's *et al.* further stated that proponents' use of erroneous calculations resulted in an overstatement of producer-handlers' purported competitive advantage.

The Mallorie's Dairy *et al.* brief also articulated additional factors determinant in producer-handlers competitive position relative to fully regulated handlers. According to the brief, smaller producer-handlers' processing, balancing and distribution costs exceed those of larger pool distributing plants and as a result, smaller producer-handlers are unable to compete with fully regulated plants, or to cause disruption in the fluid market on the basis of price.

A brief filed on behalf of IDFA reiterated its support for Proposals 1 and 2 exclusively, and highlighted testimony supportive of its position. IDFA also purported a lack of evidence supporting other proposals and detailed its opposition to the adoption of any proposals other than Proposals 1 and 2. IDFA asserted that the adoption of Proposal 1 is warranted based on the testimony of dairy farmers, cooperative representatives, and regulated fluid milk processors that provided numerous examples of producer-handlers' presence giving rise to disorderly marketing in several Federal milk marketing orders.

In its brief, IDFA stressed that significant structural changes within the dairy industry have nullified any historical justification of the producer-handler exemption from pooling and pricing provisions. Movements toward concentration and consolidation in the dairy farm sector combined with unbounded producer-handler provisions in many Federal orders, has caused producer-handlers to have a significant negative impact on orderly marketing conditions and the potential for an even greater negative impact is present, according to IDFA.

IDFA also asserted in its brief that the adoption of Proposal 2 is warranted. IDFA revealed that an increase of the exempt plant qualification threshold from 150,000 pounds to 450,000 pounds of monthly Class route disposition will allow small handlers, including previously exempt small producer-handlers, to enjoy an exemption from pooling and pricing provisions because they are too small to cause material market disruption. IDFA further asserted that Proposal 2 should be adopted in its entirety. According to the IDFA brief, the unique labeling restriction feature in Proposal 2 is necessary to avoid linking together the sales of numerous small exempt plant handlers in an effort to gain the volume advantages of larger, fully regulated handlers.

A brief filed on behalf of AE, Dean, National Dairy Holdings, NDFA, PAMD, Parker Farms, Shamrock and Shamrock Farms (AE *et al.*) articulated collective support for Proposal 1. In their brief, AE *et al.* also noted that all parties represented in brief except NDFA support Proposal 2. The brief detailed opposition to an increased exempt plant Class I distribution limit should USDA decline adoption of any proposals under consideration in this proceeding or if USDA adopts any proposal other than Proposal 1. AE *et al.* also detailed specific opposition to any proposals that include soft-cap provisions. Finally, AE *et al.* acknowledged that certain parties represented in their brief could accept an amendment of the orders that would establish a 3-million pound hard-cap limit on monthly Class route sales for producer-handlers. Adoption of this limit, according to AE *et al.,* would restore orderly conditions in most circumstances.

In their brief, AE *et al.* asserted that record evidence reflects the threat of producer-handler proliferation. In particular, AE *et al.* argued that recent growth in producer-handler volumes, retailing customers search for producer-

handler suppliers and the presence of producers actively structuring their operations with the express intent of becoming a producer-handler, is precisely the sort of evidence indicative of a potential threat to the maintenance of orderly marketing conditions. AE *et al.* also argued on behalf of NDFA that the exempt plant qualification threshold in Order 1 should not be increased due to the potential aggregate impact of such an amendment. According to the brief, record evidence shows a substantially larger number of exempt plants in Order 1 than in any other order.

The AE *et al.* brief detailed a number of reasons to support its position that Federal orders should include unique label requirements in the event that the exempt plant qualification threshold is increased or the producer-handler provisions are not entirely eliminated. Requirements for the unique labeling of packaged fluid milk products, according to the brief, will prevent the Class I sales volumes of exempt handlers, used in aggregate, from being balanced against the Class I sales volumes of fully regulated handlers. AE *et al.* provided several illustrations in support of this assertion and noted that unique labeling requirements would not prevent an exempt handler from bottling under several labels or bottling under a label other than one bearing its own name. Rather, the brief related that the only circumstance which would be prevented by unique labeling requirements is when any exempt handler or producer-handler bottles milk under the same label used by other handlers.

The AE *et al.* brief cited several examples from the record that they assert establish the presence of producer-handler driven disorderly marketing conditions in individual orders as well as across all orders. AE *et al.* further asserted that producer-handlers do not actually face balancing costs high enough to eliminate the price discrepancy between their operation and fully regulated handlers. The testimony of regulated handlers and producer-handlers alike, according to the AE *et al.,* addressed this very issue. AE *et al.* furthered this assertion, noting examples where producer-handlers were balanced by fully regulated suppliers, or supplied fluid milk products at retail under a label used by another [fully regulated] handler. Producer-handlers have a market impact across multiple marketing areas because some producer-handlers have distribution that is national, noted AE *et al.* The effect of producer-handler's multi-order distribution, according to AE *et al.,* is amplified by retailers' common practice of requiring fully regulated handlers to match producer-handler low-cost competing offers in an entire region.

In their brief, AE *et al.* also asserted that record evidence supports the conclusion that producer-handlers' market share has increased even as the number of producer-handlers in operation has decreased. AE *et al.* stressed that this trend leads to concluding that producer-handlers, as individual entities, have grown in size and that they present a greater potential for further growth and disorderly marketing. In this regard, the brief cited testimony provided by two dairy farmers who recently constructed processing plants with the intent of seeking producer-handler status. The potential for growth in producer-handler market share combined with retailers' knowledge of the pricing advantage enjoyed by producer-handlers is indicative of existing and future disorder, according to AE *et al.* Furthermore, AE *et al.* asserted, if producer-handlers' cost of surplus disposal exceeded the advantage of their exemption from full regulation, then it would be irrational for those operations to continue. AE *et al.* concluded that if no action is taken to limit or eliminate the producer-handler definitions in all orders, then fully regulated handlers will be put at further disadvantage and the benefits of marketwide pooling will be threatened.

A brief submitted on behalf of NMPF summarized its position and highlighted record evidence in support of adopting Proposals 1, 2 and 26. In its brief, NMPF stated that the adoption of Proposals 1, 2 and 26 would: allow plants meeting a small business definition to continue operations with an exemption from the pooling and pricing provisions of the Orders; prevent the aggregation of exempt plant Class I sales to circumvent regulation; improve revenues paid to producers via increased blend prices; and allow handlers to face uniform classified prices. According to NMPF, any provisions regarding exempt handlers adopted as a result of this proceeding should apply to total sales and not only to sales in a particular marketing area, and should include unique labeling restrictions to prevent integration of many small exempt handlers in search of a cost advantage based upon exempt milk supplies. NMPF further asserted that the amendments presented in Proposals 1, 2 and 26 are warranted given current and potential disorder, and taken collectively would restore orderly conditions within the system. NMPF reiterated its opposition to Proposals 3, 4, 5, 7, 8, 11, 13, 15, 17, 18, 20, 21, 23, 24, 25, 27 and 28.

In its brief, NMPF asserted that both farm sizes and handler operations are growing and the increasing availability of new technologies has drawn the industry to seek scale efficiencies. This new climate presents greater potential for producer-handler proliferation since many dairy farms are now large enough to enjoy economies of scale in milk production and processing and the cost advantage associated with the producer-handler exemption, NMPF emphasized. Some producer-handlers, according to NMPF, have already reached the size and scale necessary to compete directly with fully regulated handlers and that some current producer-handlers have grown to distribute nationally and internationally. Additionally, NMPF stressed in its brief that producer-handlers in low- and high-Class I utilization marketing areas, exhibit Class I utilization significantly in excess of area averages of fully regulated distributing plants. Record evidence, the brief asserted, indicates that producer-handler sales comprise a significant and growing share of the Class I sales in several markets. Furthermore, when full regulation occurs, producer-handlers can and do survive.

In brief, NMPF pointed out that producer-handlers' costs-of-production are not relevant in assessing their impact on orderly marketing conditions. NMPF further asserted that establishment of a transfer price at which producer-handlers acquire own-farm milk is unnecessary because the correct comparison is between the regulatory costs of producer-handlers and similarly situated plants and the farms that supply them. On this basis, producer-handlers face costs that are no different, except that producer-handlers have obligation to the producer-settlement fund, NMPF concluded.

In its brief, NMPF reiterated that producer-handlers are a cause of disorderly marketing conditions because their exemption from pooling and pricing regulation decreases revenue that is otherwise paid to producers and interferes in setting uniform class prices to handlers. NMPF furthered this position noting that marketwide pooling is necessary for the integrity of the Federal order system and the exemption from pooling and pricing of producer-handlers erodes its effectiveness. The larger individual producer-handler operations become, the more a producer-handler's exempt status undermines producer equity, NMPF indicated. The cost advantage of producer-handlers, according to NMPF, equals the difference between the

average value of milk used and the uniform price. This advantage is significant in an industry where bids are often considered and awarded on differences of less than a penny, NMPF maintained. The magnitude of producer-handlers' impact revealed by record evidence to be as high as $0.12 during certain months in Order 32, NMPF noted in its brief. The brief cited other record testimony revealing that producer-handlers also impact the blend price in Order 1.

The NMPF brief articulated the fiercely competitive nature of the retail-level grocery market. According to NMPF, retailers have sought to gain producer-handlers as suppliers in search of price advantages at retail, and producer-handlers can effectively avoid balancing their production when retailers first rely on all of the milk that a producer-handler can offer by meeting the remainder of their needs through other regulated sources. NMPF also noted the testimony of a producer-handler with national distribution which revealed that producer-handlers balance against alternative suppliers.

NMPF, in its brief, explained how the adoption of any proposals other than Proposals 1, 2 and 26 would be ineffective in addressing the current disorderly marketing conditions caused by producer-handlers. Specifically, NMPF stands in opposition to all other proposals. NMPF noted particular concern that the adoption of individual handler pooling in lieu of marketwide pooling would result in disorderly marketing and be detrimental to the Federal order system. In this regard, NMPF explained that individual handler pooling would reward handlers who can selectively recruit larger producers to supply milk needed for Class I use without acknowledging the balancing services provided by other handlers in the market.

In its brief, NMPF argued that the record supports grandfathering current producer-handlers with no more than three million pounds of monthly Class I route disposition provided grandfathering also includes provisions requiring unique labeling of package fluid milk products and farm and plant ownership exclusive of ownership in other farms or distributing plants. According to NMPF, these conditions collectively ensure the independent nature of producer-handlers as was intended when this category of handler was first created.

NMPF concluded in its brief that adoption of their package of proposals on a national basis is appropriate and is required to correct current disorderly marketing conditions and to preempt future disorder, noting adoption would eliminate the need for numerous and redundant hearings. With a national view, NMPF asserted that the collective adoption of Proposals 1, 2 and 26 would likely result in the full regulation of not more than five current producer-handler entities.

A brief submitted on behalf of AIDA reiterated the testimony of AIDA members and further articulated AIDA members' positions. AIDA asserted that Proposals 1 and 26 and other proposals that would eliminate or restrict producer-handler operations should be denied and the status quo maintained. Should the Secretary find that change to the producer-handler provisions is necessary, AIDA asserted, only Proposals 23, 24 and 25 should be considered for adoption.

In their brief, AIDA asserted that the preemptive regulation of producer-handlers and measures to prevent their proliferation are not warranted. In this regard, AIDA highlighted testimony that producer-handler competition is not currently an issue. AIDA concluded that the decreasing number of producer-handlers should be evidence enough that no threat of proliferation exists. Furthermore, the AIDA also concluded, while the volume of producer-handler milk has increased, the total percentage of Class I sales attributable to producer-handlers is at its lowest level in more than 40 years.

AIDA reiterated their assertion that the record supports concluding that producer-handler raw milk costs are equivalent to farm-level cost-of-production and not the Federal order blend price. In this regard, AIDA referenced USDA statistics that demonstrate farm-level cost-of-production exceeds both the blend price and the Class I price and as such, producer-handlers acquire own-farm milk at costs higher than either of these prices. Accordingly, AIDA asserted that the blend price is not the appropriate transfer price of milk from a producer-handler's farm to its plant. Instead, AIDA asserted, the only economically rational transfer price is the farm cost-of-production incurred by the producer-handler. Among other things, AIDA maintained, without evidence of an unfair cost advantage, no basis can be established to conclude that producer-handlers give rise to disorderly marketing conditions.

Expanding upon the argument that disorderly marketing conditions are not evident, AIDA stressed in its brief that disorderly marketing can only be found when consumers are unable to obtain a sufficient supply of fluid milk at reasonable prices. Applying this definition to the current record, which AIDA asserts does not show any consumer inability in buying milk, AIDA concluded that disorderly marketing is not present. AIDA also referred to testimony of proponent witnesses that acknowledged that producer-handlers are not currently causing disorderly marketing conditions. AIDA went further to suggest that any decisions regarding the regulatory treatment of producer-handlers must be based upon economic conditions and equity rather than equality amongst regulated parties.

In their brief, AIDA indicated that producer-handlers do compete with fully regulated handlers on the basis of price, but also stressed that price alone is not the only determinant factor of competition and producer-handlers are evidence of nothing more than healthy competition. AIDA insisted that competition is not the same as disorderly marketing and asserted that Federal orders are not intended to limit or eliminate competition. AIDA relied on several examples from the record which they purport to show that producer-handlers do not compete solely on the basis of price and also countered testimony intended to show the competitive advantages producer-handlers enjoy by being exempt from pooling and pricing.

AIDA cited in their brief record testimony demonstrating that producer-handlers meet the regulatory test of bearing the burden of balancing their milk supply. Based on the testimony of several producer-handlers, AIDA concluded that producer-handlers are price-takers when selling surplus milk and the price received for surplus milk is lower than the classified prices. In addition to bearing the burden of their surplus, producer-handlers do not enjoy the Federal order minimum prices for surplus milk as do pooled producers, AIDA asserted.

AIDA presented several arguments in their brief to demonstrate the irrelevance of the impact producer-handlers have on blend prices. While AIDA acknowledged an impact, they argued that the impact is not significant relative to the impact of several other marketing conditions tolerated by Federal orders, including the depooling of milk.

AIDA noted in their brief that the producer-handler model is, in many marketing areas, the only alternative for producers outside of marketing through a cooperative. AIDA also asserted that through the producer-handler option, producers are able to provide differentiated products through innovative methods and marketing

channels that are best served by the producer-handler business model. In this regard, AIDA mentioned several prominent regulated handlers serving the current marketplace that began as producer-handlers. Accordingly, AIDA concluded that USDA should leave the producer-handler definition unchanged.

In the event USDA finds the need for changing the producer-handler provision, AIDA asserted in their brief that Proposals 23, 24 and 25 should be adopted because they are less-burdensome alternatives to the other proposals under consideration in this proceeding. According to AIDA, the two parts of Proposal 23 would allow handlers to exempt own-farm milk volumes from pool obligation while also allowing handlers with own-farm milk production to elect partially regulated distributing plant status.

In their brief, AIDA reasserted that Proposal 24 is primarily intended for adoption in the event that USDA determines that the producer-handler provisions need amending to include Class I disposition limits, while also maintaining that the proposal could be adopted even in the event that the producer-handler provisions were completely eliminated. AIDA reiterated that the proposal's intent is to exempt producer-handlers with handler-controlled retail channels because their control of milk is complete from production through to final disposition to the consumer and because there is no impact on the pool. AIDA noted that this provision is intended to be liberally construed so as to include independent contractor relationships within the handler-controlled retail channel.

In their brief, AIDA reiterated their position that individual handler pooling (Proposal 25) is an alternative to marketwide pooling as a means to address the producer-handler issue. According to AIDA, the adoption of individual handler pools would not only allow producer-handlers and regulated handlers to enjoy more equal treatment, it would also better reflect Class I market demands and the producers serving those demands. AIDA asserted that it would also eliminate the need for pooling standards and the hearings required to determine them, as well as eliminate the disorderly impacts of depooling. AIDA concluded that the possibility of unequal producer prices under individual handler pools would not be a great issue.

In their brief, AIDA also detailed support for increasing the exempt plant's limit on Class I distribution independent from consideration of the regulatory treatment of producer-handlers. Citing from the record, AIDA supported a Class I distribution limit of 1 million pounds per month.

Discussion and Findings

General

At issue in this proceeding is the reconsideration of the current exemption of certain handlers from pooling and pricing provisions of Federal milk marketing orders. All milk marketing orders provide for the exemption of handlers known as producer-handlers and plants that have less than 150,000 pounds of monthly Class I route disposition—commonly referred to as exempt plants. While exempt plants are limited to 150,000 pounds or less of monthly Class I disposition, the producer-handler definitions, except in Orders 124 and 131, specify no disposition limitation.

A proposal seeking elimination of the producer-handler definitions asserts that the pooling and pricing exemption of this category of handler has become a source of current or potential disorder in the marketplace and should be eliminated across all orders. A companion proposal to mitigate regulatory impacts associated with elimination of the producer-handler definitions was offered to be adopted simultaneously. This companion proposal seeks to increase the exempt plant limit of monthly Class I disposition from 150,000 to 450,000 pounds. As proposed, it is intended to allow current small scale producer-handlers, those with less than 450,000 pounds of Class I disposition per month, to be exempt from pooling and pricing provisions of the orders.

Numerous additional proposals were offered and considered as alternatives to these two proposals. While all producer-handlers endorse the status quo, the alternative proposals are offered in the event that USDA determines the producer-handler definitions should be amended. Several current producer-handlers and other interested parties offered proposals that would add a monthly Class I route disposition limit to the producer-handler definitions. Other proposals seek to prevent proliferation of new entrants under the producer-handler definition while allowing existing producer-handlers to retain their current status. One proposal seeks to recast the producer-handler definitions to exempt only those entities with the additional risk and burden of exclusive distribution through producer-handler-controlled retail channels. Another proposal seeks to change the method of pooling milk and the classified use-values of milk in the orders. Finally, proposals that seek to exempt handlers' own-farm milk production disposed of as packaged fluid milk products were offered.

The record reveals that there are currently over 100 entities across the Federal milk marketing order system meeting the current exempt plant definition. Many of these entities are operated by dairy farmers who bottle and sell their milk production as fluid milk products. If not for their monthly Class I route dispositions being less than 150,000 pounds, these entities would likely meet the producer-handler definition of their respective orders. Although some exempt plant handlers fit the producer-handler definition, which requires handlers to have integrated production, processing and route disposition at their exclusive enterprise and risk, exempt plant handlers have no such restrictions. In other words, exempt plants may be exclusively supplied with milk purchased from dairy farmers. Irrespective of production, processing and route disposition, an exempt plant incurs no Federal order minimum payment obligation to the dairy farmer(s) from whom milk was purchased.

The AMAA requires the setting of uniform prices to producers regardless of how the milk of any single dairy farmer is used and uniform prices to similarly situated handlers (Section 608c(5)). Handlers who are similarly situated pay at least the class prices established under the orders for milk. Producers are paid at least the minimum uniform (blend) price that is determined through marketwide pooling. A marketwide pool, through the mechanism of a producer-settlement fund, equalizes the classified use-values of milk pooled on an order among handlers and determines a uniform price paid to producers. Marketwide pooling allows for equitable sharing of the cost of supplying and balancing the Class I market. These two key features of milk orders—classified pricing and marketwide pooling—provide the basic foundation for orderly marketing and address the AMAA's primary objective of ensuring orderly marketing.

There are currently four different producer-handler definitions used in Federal milk marketing orders. The three southeastern orders (Orders 5, 6 and 7) have no Class I route disposition limits and do not provide for the purchase of milk beyond the own-farm production of a producer-handler. The producer-handler definitions of 5 other orders also have no limit on Class I route disposition but provide for the limited purchase of milk of 150,000 pounds or less per month beyond own-

farm production. Only Orders 124 and 131 have a limit on Class I route disposition in their marketing areas that, when exceeded, obligates producer-handlers to pooling and pricing provisions of these orders in the same manner as the fully regulated plants. The producer-handler definition of Order 131 differs from that of Order 124 in that it also places certain restrictions on product labeling. Nevertheless, the common criterion of all producer-handler definitions for all orders is the requirement that the entire operation be under the sole risk and enterprise of the producer-handler.

Despite previous rulemaking proceedings which considered full regulation of producer-handlers, it was not until 2006 that some producer-handlers became subject to pooling and pricing provisions under Orders 124 and 131. In that formal rulemaking proceeding, USDA adopted a 3-million pound per month Class I disposition limit in the marketing area that, when exceeded, results in the full regulation of producer-handlers. No changes were made with regard to the exempt plant definitions of the two orders. Shortly after implementation of the amended Orders 124 and 131, enactment of the Milk Regulatory Equity Act of 2005 required implementation of additional regulatory criteria affecting handlers and producer-handlers in *all* Federal milk marketing orders.

In the producer-handler proceeding for Orders 124 and 131, USDA found that the exemption of large scale producer-handlers from pooling and pricing disrupted the orderly marketing of milk. The record of that proceeding demonstrated that large scale producer-handlers enjoyed a price advantage over regulated handlers while simultaneously decreasing blend (uniform) prices to dairy farmers. The record of this proceeding does not support the same conclusion. Of greater significance, the record of this proceeding indicates that all producer-handlers enjoy a competitive pricing advantage over fully regulated handlers because of their exemption from pooling and pricing provisions. This is not surprising as any entity exempted from the regulatory plan will cause prices to be set at a lower level than the prices that would otherwise be uniform to producers and handlers. It is clear from this proceeding that as Class I dispositions of a producer-handler increase, the order's ability to set prices that are uniform to handlers and producers is eroded.

Depending on the volume of Class I disposition, the exemption from obligation to account for milk at minimum classified prices, and the exemption from payment into the producer-settlement fund of the difference between a producer-handler's use-value of milk and the blend price become critical factors that give rise to disorderly marketing conditions. Large producer-handlers become increasingly able to market fluid milk at prices below those that can be offered by fully regulated handlers because the classified prices set by the order are not uniform. The exemption from payment to the producer-settlement fund renders the order unable to set uniform prices to producers.

The record of this proceeding demonstrates that producer-handlers with monthly Class I route disposition of three million pounds or less are not a cause of disorderly marketing conditions that warrant correction by eliminating the producer-handler definition across all Federal milk marketing orders. Accordingly, it is reasonable to conclude that the objectives of the AMAA can continue to be achieved without the complete elimination of the producer-handler definitions across the system of orders. It is also reasonable to conclude that all orders should be amended so that the producer-handler definitions include some limitation on the amount of Class I dispositions that a producer-handler may have before becoming obligated to the system's regulatory plan of pooling and pricing. Doing so is necessary to maintain the integrity of the Federal order system and orderly marketing conditions.

Elimination of the producer-handler definition and increasing the exempt plant monthly limitation of Class I disposition.

Record evidence reveals that the elimination of the producer-handler definitions of the orders is not necessary and an increase in the exempt plant threshold from the current 150,000 to 450,000 pounds on Class I route disposition per month is not warranted. Nevertheless, testimony and evidence provided by proponents, most notably NMPF and IDFA and associated witnesses, identified shortcomings of the current producer-handler definitions.

Producer-handler exclusion from pooling and pricing has historically been based on the premise that the declared policy and objectives of the AMAA, namely orderly marketing, could be achieved without the extension of full regulation to this category of handler. USDA has articulated its authority to obligate producer-handlers to further regulation, including marketwide pooling and minimum pricing provisions, if they singularly or collectively have a negative impact on the market. USDA found the activity of large scale producer-handlers to be a source of significant and measurable disorder in the Arizona and Pacific Northwest marketing areas.[1] Accordingly, those orders were amended to establish a 3-million pound limit on monthly Class I disposition in the marketing area in the producer-handler definitions beyond which pooling and pricing regulation applies to the handler.

Prior rulemakings consistently articulated USDA's authority to subject producer-handlers to full regulation. For example, in a Final Decision for the Puget Sound order, a predecessor to the Pacific Northwest order, USDA found that producer-handlers should continue to be exempt from pooling and pricing provisions of the order with the caveat that producer-handlers could be subject to further regulation if justified by prevailing market conditions.[2] This position was amplified in a subsequent Puget Sound Final Decision wherein USDA found that a hearing should be held to consider the regulation of producer-handlers if the marketing area was susceptible to being affected by producer-handlers or if producer-handler sales could disrupt or operate to the detriment of other producers in the market.[3] Such policy was also articulated in another decision concerning producer-handlers in Texas and the Southwest Plains.[4] That decision concluded that it would be appropriate to obligate producer-handlers to the pooling and pricing provisions of the order if it could be shown that producer-handlers cause market disruption.

The proposals for elimination of the producer-handler definition are primarily based upon issues regarding producer-handler size, specifically the volume of Class I route disposition. The elimination of the producer-handler definition across the system of orders is proposed to be offset by an increase in the exempt plant monthly Class I route disposition limit. This would, as the proponents intend, mitigate the impact of the proposed regulatory change on current producer-handlers characterized as not having a significant impact on orderly marketing conditions.

[1] Official notice is taken of Final Decision, published December 14, 2005 (70 FR 74166).

[2] Official notice is taken of Final Decision, published May 13, 1966 (31 FR 7062–7064).

[3] Official notice is taken of Final Decision, published July 21, 1967 (32 FR 1073–1074).

[4] Official notice is taken of Recommended Decision, published June 28, 1989 (54 FR 27179).

Producer-handlers are persons who operate dairy farms and generally process and sell only their own milk production. A pre-condition to operating a processing plant as a producer-handler is the operation of a dairy farm. Consequently, the size of the dairy farm determines the production level of a producer-handler's farm operation and is also the controlling factor of the volume that is processed by the plant and that is available for distribution. Accordingly, the major consideration in determining whether a producer-handler is a large or small business is its capacity as a dairy farm. Under SBA criteria, a dairy farm is considered large if its gross revenue exceeds $750,000 per year which equates to a production guideline of 500,000 pounds of milk per month. Accordingly, a producer-handler with Class I disposition in excess of three million pounds per month is considered by this decision to be a large business.

At what size a producer-handler begins to have a significant impact on a market's pooled participants should be determined by whether minimum prices are uniform to producers and among handlers. Testimony in this proceeding presented the argument that the presence of effective prices—or actual prices paid and received—that differ from minimum prices set under the orders is indicative of disorder. This decision disagrees. The regulatory plan of the milk order program is not tasked with setting the effective prices. Rather, the regulatory plan of the milk order program provides for setting and enforcing *minimum* prices paid by handlers and received by producers. The effective prices producers receive can and do vary, but prices paid to producers and their cooperatives cannot be lower than the minimum price established under the orders. The fact that cooperatives can re-blend the price they pay for the marketing of their producer member milk is neither an example of disorderly marketing conditions nor germane to evaluation of the conditions appropriate for excluding handlers from the pooling and pricing provisions of the orders.

Because producer-handlers do not share the additional value of their Class I sales with a market's producers, their exemption from the pooling and pricing provisions is conditioned on the premise that the burden of surplus disposal (milk not used for fluid uses) is borne by them alone. The surplus milk of a producer-handler may be sold for any price, but germane to this condition, such surplus milk does not receive the minimum price protection offered by marketwide pooling. When a producer-handler is able to avoid the burden of surplus disposal while also retaining the entire additional value of milk accruing from Class I sales, equity among producers and handlers is jeopardized and disorderly marketing conditions can ensue. When uniform minimum price conditions exist, the basis for orderly marketing is present. In the absence of uniformity of minimum prices among producers and handlers, the basis for orderly marketing is undermined.

The record supports the finding that adoption of a limit on producer-handler Class I dispositions per month can mitigate the disorderly marketing which arises when producer-handlers are able to avoid bearing the burden of surplus disposal. Bearing the burden of surplus disposal is a fundamental demonstration of a producer-handler balancing their milk production with market demand for their Class I products. Disorderly marketing conditions are present when a producer-handler becomes able to directly or indirectly balance their Class I dispositions with the surplus milk of pooled producers. The record indicates examples of indirect balancing of producer-handlers on the regulated market. The record also indicates that as the size of a producer-handler's Class I disposition increases, conditions arise that offer an even greater ability to effectively transfer the balancing burden to the regulated market.

While opponents to the elimination of the producer-handler definitions argue otherwise, this decision agrees with proponent arguments, presented by witnesses testifying in support of NMPF and IDFA positions, that the difference between the Class I price and the blend price is a reasonable estimate of the price advantage enjoyed by producer-handlers even if it is not possible to determine the precise level of the advantage for any individual producer-handler. This price advantage is compounded as a producer-handler's Class I utilization increases. In addition, allowing producer-handlers to have unlimited Class I disposition will result in a measureable impact on the blend price received by pooled producers.

This decision finds no reason to consider the higher costs purportedly associated with the operation of producer-handlers a relevant factor for determining conditions in which handlers should or should not be subject to full regulation. All handlers face different processing costs. These differences may be the result of divergent plant operating efficiencies related to size or to that portion, if any, of milk supplied, which may be produced and supplied from own-farm sources. Whatever the cost differences may be and the reasons for them, all fully regulated handlers must pay the same minimum Class I price, and equalize their use-value of milk (generally, the difference between the Class I price and the blend price) through payment into the order's producer-settlement fund. Similarly, all producers face different milk production costs. Producer cost differences, for example, may be the result of farm size or variation in milk production levels attributable to management ability. Producers, regardless of their individual costs, receive the same blend price.

Establishment of individual handler pools.

The marketwide sharing of the classified use-values of milk among all producers supplying a marketing area is an essential feature of the Federal milk marketing order system. It ensures that producers supplying a given marketing area receive the same uniform price for their milk, regardless of its end use. In combination with classified pricing, marketwide pooling has, among other things, successfully mitigated price competition between producers seeking the higher-valued fluid outlets for their milk. Abandonment of the marketwide pooling system in favor of an individual handler pool system would reverse the stability achieved by its adoption in all Federal milk marketing orders.

The record reveals that justification for the adoption of individual handler pooling is rooted in a collection of extremely selective excerpts of a study authored by dairy industry participants and published in 1962. The study, commonly referred to as the Nourse Report, examined in great detail the Federal milk marketing order system. The few excerpts used to advance the features of individual handler pools pale in comparison to the Nourse Report's cautions as to its use as well as descriptions of the superior qualities associated with marketwide pooling. Over the years, USDA has repeatedly concluded that marketwide pooling promotes orderly marketing conditions more completely and is one of the most important marketing order tools used to ensure uniformity in prices to producers.[5] In markets where much of the milk is handled by operating cooperatives and large surpluses of milk are unevenly distributed among handlers, conditions observable today,

[5] Official notice is taken of: Final Decision, published April 2, 1999 (64 FR 16026); Final Decision, published October 13, 1955 (20 FR 7689); Final Decision, published June 15, 1990 (55 FR 25618).

marketwide pooling best ensures orderly marketing. This is the same opinion of the Nourse Report.

Individual handler pooling did have a role to play in the orderly marketing of milk, but only under very specific conditions. On the eve of milk marketing order reform implementation which instituted, among other things, the current large regional milk marketing orders, individual handler pooling existed for only one very small marketing area that had a single fully regulated handler distributing Class I products. When a marketing area has a single fully regulated handler, the classified prices established under the order and the blend price returned to dairy farmers supplying that handler are uniform. However, when a market contains more than a single regulated handler, the individual handler pooling system cannot provide uniform prices to producers.

As marketing areas grew in geographic size and in the number of handlers competing for Class I sales and manufacturing of other dairy products increased, marketwide pooling became the method ensuring uniform prices to producers. The pooled milk of producers shared in the additional revenue accruing from the higher classified use-value of Class I sales and the burdens of lower classified use-values. Under an individual handler pooling plan, producers supplying handlers with differing utilizations would receive different prices. These differences would be particularly notable between producers delivering to handlers with high manufactured class utilization and those with a majority of Class I uses. Producers supplying a handler with high Class I utilization would receive higher prices than producers whose milk was delivered to manufacturing handlers. Returns distributed to producers in this manner are not uniform nor can they be when a market consists of multiple handlers.

To the extent that individual handler pooling is an alternative to the elimination of the producer-handler definitions, USDA long ago determined it to be inferior to marketwide pooling. While it may be a novel way to address the issues under consideration in this proceeding, it does so by a claim that a producer-handler is paying itself the use-value of its own milk. Its adoption could not be immediately implemented as it would, for example, require an overhaul of an order's pooling standards plus the addition of other criteria to ensure that distributing plants had an adequate supply of milk for fluid uses.

The central issue of this proceeding is the consideration of the conditions that warrant exemption of handlers from full regulation not whether the method of pooling should be changed. Individual handler pooling does not directly address when and under what circumstances handlers can be exempted from pooling and pricing without undermining orderly marketing. Accordingly, the proposal for adopting individual handler pooling (Proposal 25) is not recommended for adoption.

Grandfathering, Soft-caps, and Own-farm Milk Exemptions

Three proposals, Proposals 17, 23, and 26, submitted in response to Proposals 1 and 2 received testimony in support of ''grandfather clauses'' and exemptions for ''own-farm'' milk supplies. In the context of this proceeding, ''grandfather clause'' refers to an exception that would allow current producer-handlers to continue their operations with added restrictions. ''Own-farm'' milk here refers to the amount of milk processed for use by a handler who is also the producer of that milk. These alternative proposals to the elimination or amendment of the producer-handler definition calling for these features are not recommended for adoption.

While requesting the elimination of the producer-handler definition in all orders, NMPF asserts that their Proposal 26 is consistent with this request because it effectively halts the proliferation of new producer-handlers. This decision disagrees and does not recommend NMPF's Proposal 26 for adoption. If the position is taken that the exemption of producer-handlers from pooling and pricing causes disorderly marketing conditions, then it would be reasonable to conclude that the current producer-handler exemption, regardless of any limitations placed on Class I route dispositions, should come to an end. A willingness to accept a 3-million pound per month limit on Class I route dispositions for current producer-handlers begs the conclusion that producer-handlers with Class I dispositions at or below this level are not disorderly or, at the least, represent a tolerable deviation from strict application of pooling and pricing provisions.

Grandfathering clauses, as proposed, would create inequity between persons who are currently producer-handlers and other entities who may in the future seek to supply milk as producer-handlers. Adoption of these types of provisions would essentially create a new category of handler based solely on their regulatory status during a specified time period. Dairy farmers that aspire to produce, process and market milk at their own enterprise and risk would be denied the opportunity to join the new ''grandfathered'' category.

As previously discussed, the broad purpose of the AMAA is to establish and maintain orderly marketing conditions. Its purpose is not to create barriers to entry into a viable business or marketing alternative. New-to-market operations should not be denied the ability to form under the same provisions as current entities that have already met the producer-handler definition. Concern for the proliferation of producer-handlers is overly proscriptive.

In their post-hearing brief, Mallorie's Dairy, proponent of Proposal 17, articulated a willingness to accept the current size limitation of 3 million pounds of Class I route disposition of the PNW and Arizona orders as a reasonable alternative to elimination of the producer-handler provisions. This willingness was conditioned upon a USDA recommendation against the elimination of the producer-handler provisions and for the application of the Class I route disposition limit common to the PNW and Arizona orders across all other orders. As this decision recommends adoption of amendments similar to those acceptable to Mallorie's Dairy, no further consideration is given to Proposal 17, as proposed by Mallorie's Dairy.

Modifications to Proposal 17 as offered by NAJ request consideration for provisions which would create a new category of handler. In their post-hearing brief, NAJ advocated the creation of an exemption for handlers with own-farm milk supplies. With NAJ's modification to Proposal 17, handlers with own-farm milk would be exempting the first three million pounds of own-farm milk disposed of as Class I during the month. NAJ asserts that this would be equitable for handlers with less or more than the three million pounds of own-farm Class I dispositions or a combination of own-farm and purchased milk. This decision does not find NAJ's proposed changes to be equitable as represented by NAJ.

NAJ suggests that handlers with own-farm milk should be partially regulated distributing plants with an exemption from pooling and pricing equal to their own-farm milk volume. While this modification uses terminology common to current regulation it in fact represents a recast meaning of the term ''partially regulated.'' Unlike pool distributing plants, partially regulated handlers are handlers that distribute fluid milk products into a marketing area but do not meet the standards for full regulation under that order. NAJ uses

the term ''partially regulated'' to refer instead to handlers who would only be subject to full regulation for own-farm fluid milk product volume in excess of three million pounds and all purchased milk volume. This would essentially create a unique exemption based upon the origin of the milk supplies received by a given handler.

As proposed, NAJ's modification is grounded in a justification based upon the source of a milk supply. It would not be appropriate to have differentiated regulatory treatment of milk supplies on the basis of origin. The current producer-handler provisions require that operations be performed at their exclusive control and through a dependence on their own milk production without reliance on purchased milk.

AIDA, proponents of Proposal 23, offered two versions of Proposal 23 to be considered as distinct from one another. Both versions would require the creation of handler categories specific to handlers with own-farm milk supplies reflecting certain provisions that currently govern the regulatory treatment of pool distributing plants and partially regulated plants, save one major exception. Under the first variation of Proposal 23, handlers with own-farm milk would be treated as fully regulated plants with the ability to down-allocate all own-farm milk supplies. The second variation would allow handlers processing own-farm milk for Class I use to elect partially regulated status.

The first version of Proposal 23 would cause handlers with own-farm milk to have a price advantage due to their exemption from pooling and pricing while handlers without own-farm milk would be subject to pooling and pricing provisions of the orders. The second version of Proposal 23 seeking treatment of handlers with own-farm milk as partially regulated plants would treat differently those handlers without own-farm milk supplies. Adoption of this proposal would cause differentiated treatment of similar plant operations solely on the basis of supply sourcing. Furthermore, the provisions offered in Proposal 23 are far less restrictive than the current producer-handler provisions, which proponents of Proposal 23 contend should not be changed. Either form of Proposal 23 would cause inequitable treatment of similarly situated handlers due to an exemption favoring handlers having own-farm milk supplies.

While AIDA describes their proposed changes using terminology common to current regulation, the proposals are different than current regulations. The proposals do not consider conditions under which full exemption from pooling and pricing regulation is warranted. Proposal 23 uses needlessly complex methods to address an issue that may be more easily fixed by simply modifying the current producer-handler definition to include a limit on monthly Class I route disposition. Accordingly, this decision does not recommend the adoption of either version of Proposal 23.

The portion of Proposal 23 and the NAJ modification that propose total or partial exemption from pooling and pricing based on own-farm production disposed of as Class I while allowing for purchase of milk from other producers, deviates from the long-held own risk and enterprise conditions associated with the producer-handler definition. If adopted, each of these two proposed changes would create a soft-cap exemption. Soft-caps exempt some Class I disposition while subjecting any additional disposition to pooling and pricing. This would cause inequitable treatment across similarly situated handlers where handlers with own-farm milk could ''smooth'' the price advantage gained on the volumes of exempt fluid milk products across any additional Class I sales. In turn, this would also allow handlers with own-farm milk to undercut prices offered by those handlers without own-farm milk strictly as a consequence of regulation.

This decision notes the testimony regarding the use of similar soft-cap limits for producer-handlers under California's milk marketing regulatory plan. California's milk marketing regulatory system is similar to that of the Federal order system. The soft-cap limits there led to inequity among similarly situated handlers. According to the record, other fully regulated handlers with similar Class I disposition, but without own-farm milk production, were placed at a competitive disadvantage relative to those handlers with own-farm production.

Retention of the Producer-Handler Definition With Limits on Class I Disposition

As discussed above, the exemption of producer-handlers of any size (and exempt plants) from the regulatory plan of milk orders immediately leads to minimum prices under the orders that are not uniform to producers and handlers. However, USDA has a long history in which certain categories of handlers have not been subject to the full regulatory scheme in order to achieve the AMAA's objective of orderly marketing.

While having an absolute impact on milk orders' ability to set uniform prices to similarly situated handlers and return uniform prices to producers, the volume of milk represented by exempt plant route dispositions has had and continues to have a de minimis impact on orderly marketing. As such, USDA has concluded that the full regulatory plan need not be applicable to such small handlers. The exempt plant limit on Class I dispositions represents a measure of participation in the market that while exempt, is tolerable and does not undermine the purpose of the order system and its treatment of larger handlers.

The same de minimus impact on orderly marketing owed to producer-handler Class I route disposition volume has been, in part, the rationale for their exemption from full regulation. Simply stated, producer-handlers have historically conducted small scale operations and have been subject to certain requirements to remain exempt from full regulation. Those requirements have been that the operation: Be under the sole enterprise and risk of the producer-handler; bear the full responsibility and risks associated with the care and management of the dairy animals and other resources necessary for milk production; and engage in and exclusively control the processing and distribution of their Class I products. Under these and other requirements unique to each order, producer-handlers have been determined to have neither an advantage in their capacity as producers or as handlers.

With these conditional requirements for producer-handlers, there was no need to consider further regulatory requirements for this category of handler. Additional amendments to the producer-handler definitions became necessary when producer-handler size was shown to be a cause of disorderly marketing conditions in the Arizona and Pacific Northwest marketing areas, and a cap of three million pounds per month on Class I dispositions in the marketing area was adopted.

The record reveals that the number of producer-handlers and all other categories of handlers is declining. Opponents of change from the status quo conclude that this is justification to leave the producer-handler provisions unchanged. This decision disagrees. In evaluating the impact producer-handlers may have on orderly marketing, the volume of milk marketed by any individual producer-handler is more important than the overall trend in the number of producer-handlers.

The size of individual producer-handlers will impact orderly marketing

conditions in any of the Federal order marketing areas if left without limit. Size of operation will have a direct bearing on competitive equity between producer-handlers and fully regulated handlers. Producer-handler size will increasingly affect an order's ability to set uniform prices to similarly situated handlers and to producers. Producer-handler size will increasingly magnify disorderly marketing conditions and practices where the burden of balancing and surplus disposal is effectively transferred to the regulated market. These examples of the presence and anticipation of disorderly marketing conditions can be largely mitigated by establishing a reasonable limit on a producer-handlers' Class I route dispositions.

Establishing a reasonable limit on total Class I route disposition in all producer-handler definitions for all Federal milk marketing orders unifies the policy objectives of the AMAA to establish and maintain orderly marketing conditions. Establishment of a reasonable limit on Class I disposition does not require changing other order-specific features contained in the producer-handler definitions that have been provided to address local marketing conditions. The addition of a uniform limit on producer-handler total monthly Class I route dispositions in all orders is consistent with the past establishment of the uniform limits, characteristics and features of various milk marketing order provisions applicable to other categories of regulated handlers.

The limit acceptable to or broadly supported by both handler and producer interests is three million pounds of monthly Class I disposition. This decision finds that a 3-million pound per month limit on total Class I route disposition is reasonable. The evidence supports a conclusion that most producer-handlers continue to be small enterprises that have minimal impact in the marketing areas in which they operate. Their participation in the market is not giving rise to disorderly marketing conditions that warrant establishing a more restrictive limit on Class I disposition. Implicit in this finding is that producer-handlers with no more than three million pounds of monthly Class I disposition represent a level of market participation such that the AMAA goal of establishing and maintaining orderly marketing is achieved.

The record supports concluding that a direct relationship exists between producer-handler size and the potential for disorder. More specifically, the record supports the conclusion that adoption of a limit on producer-handlers' *total* monthly Class I route disposition across all orders is necessary to maintain orderly marketing conditions. This represents a needed change to the producer-handler provisions of Orders 124 and 131, which only consider producer-handlers' monthly Class I dispositions within the respective marketing area. Adoption of a limit on the total Class I route disposition of producer-handlers is reasonable and should mitigate the inequitable conditions associated with distribution in other marketing areas or where the handling of milk is not regulated. The producer-handlers with more than three million pounds of total Class I disposition per month that meet the pooling standards of an order will have all of their distribution of Class I products pooled and priced no matter where that milk is sold. The producer-handlers with more than three million pounds of total Class I disposition per month that do not meet the pooling standards of an order will be treated as partially regulated distributing plants for route sales in the marketing areas.

An additional proposal, Proposal 24, seeking an unlimited exemption for producer-handlers marketing own-farm milk disposed of as fluid milk products through retail channels under the same handler's exclusive control is not recommended for adoption. This decision gave consideration to the testimony and evidence, which revealed that producer-handlers distributing fluid milk products exclusively through their own retail channels are self-contained and do not balance against pooled supplies. While this seems to adhere to a long-held producer-handler characteristic, the responsibility and risk for balancing is still relative to producer-handler size, as defined by total monthly Class I disposition, which represents a significant contributing factor to disorderly marketing. At issue is the ultimate displacement of Class I sales that would otherwise be supplied through regulated sources.

This decision does not recommend that the producer-handler definitions be amended to include unique labeling restrictions. The rationale offered in support of establishing labeling restrictions offers interesting scenarios of the consequences that may arise without its inclusion. The scenarios speak to how the restrictions will provide better assurances that producer-handlers cannot balance their Class I dispositions on the fully regulated market and cannot daisy-chain together to effectively circumvent otherwise intended regulation. This decision finds such an addition to either the producer-handler or exempt plant definition to be overly proscriptive. The record lacks evidence, apart from theoretical constructions, demonstrating a reasonable need for its adoption. This recommended decision finds that producer-handlers with *total* Class I route disposition in excess of three million pounds per month enjoy significant competitive sales advantages because they do not pay the Class I price for raw milk.

While the adoption of a 3-million pound per month limit on total Class I disposition will not completely eliminate the impact of producer-handlers across the order system, it should result in a reduction in any current and future market disruption. It is also consistent with many of the positions detailed during this proceeding, and will likely prevent a significant increase in the magnitude of disruption observed in the marketing areas.

Ruling on Motions

A motion submitted on behalf of Nature's Dairy moved for review and reversal of the Administrative Law Judge's decision to exclude the testimony of a witness on behalf of a producer-handler, namely Nature's Dairy. The motion requested that the hearing be reopened for the purpose of cross-examination of the Nature's Dairy witness. New England Producer-Handlers Association *et al.* and AIDA joined Nature's Dairy and submitted motions to that effect. The presiding Administrative Law Judge denied the Nature's Dairy, New England Producer-Handler Association *et al.* and AIDA motions prior to certification of the record. This recommended decision concurs with the ruling of the Presiding Administrative Law Judge; accordingly, the motions submitted on behalf of Nature's Dairy, New England Producer-Handler Association *et al.* and AIDA are denied.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such findings are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

a. The tentative marketing agreements and the orders, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

b. The parity prices of milk as determined pursuant to Section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in all marketing areas, and the minimum prices specified in the tentative marketing agreements and the order, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

c. The tentative marketing agreements and the orders, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, the marketing agreements upon which a hearing has been held.

d. All milk and milk products handled by handlers, as defined in the tentative marketing agreements and the orders as hereby proposed to be amended, are in the current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products.

Recommended Marketing Agreement and Order Amending the Orders

The recommended marketing agreements are not included in this decision because the regulatory provisions thereof would be the same as those contained in the orders, as hereby proposed to be amended. The following order amending the order, as amended, regulating the handling of milk in all milk marketing areas are recommended as the detailed and appropriate means by which the foregoing conclusions may be carried out.

List of Subjects in 7 CFR Parts 1001, 1005, 1006, 1007, 1030, 1032, 1033, 1124, 1126, and 1131

Milk marketing orders.

For reasons set forth in the preamble, 7 CFR parts 1001, 1005, 1006, 1007, 1030, 1032, 1033, 1124, 1126, and 1131 are proposed to be amended as follows:

1. The authority citation for 7 CFR parts 1001, 1005, 1006, 1007, 1030, 1032, 1033, 1124, 1126, and 1131 continues to read as follows:

Authority: 7 U.S.C. 601–674, and 7253.

PART 1001—MILK IN THE NORTHEAST MARKETING AREA

2. Amend § 1001.10 by revising paragraph (a) to read as follows:

§ 1001.10 Producer-handler.

* * * * *

(a) Operates a dairy farm and a distributing plant from which there is route disposition in the marketing area, and from which total route disposition during the month does not exceed 3 million pounds;

* * * * *

PART 1005—MILK IN THE APPALACHIAN MARKETING AREA

3. Amend § 1005.10 by revising paragraph (a) to read as follows:

§ 1005.10 Producer-handler.

* * * * *

(a) Operates a dairy farm and a distributing plant from which there is route disposition in the marketing area, and from which total route disposition during the month does not exceed 3 million pounds;

* * * * *

PART 1006—MILK IN THE FLORIDA MARKETING AREA

4. Amend § 1006.10 by revising paragraph (a) to read as follows:

§ 1006.10 Producer-handler.

* * * * *

(a) Operates a dairy farm and a distributing plant from which there is route disposition in the marketing area, and from which total route disposition during the month does not exceed 3 million pounds;

* * * * *

PART 1007—MILK IN THE SOUTHEAST MARKETING AREA

5. Amend § 1007.10 by revising paragraph (a) to read as follows:

§ 1007.10 Producer-handler.

* * * * *

(a) Operates a dairy farm and a distributing plant from which there is route disposition in the marketing area, and from which total route disposition during the month does not exceed 3 million pounds;

* * * * *

PART 1030—MILK IN THE UPPER MIDWEST MARKETING AREA

6. Amend § 1030.10 by revising paragraph (a) to read as follows:

§ 1030.10 Producer-handler.

* * * * *

(a) Operates a dairy farm and a distributing plant from which there is route disposition in the marketing area, and from which total route disposition during the month does not exceed 3 million pounds;

* * * * *

PART 1032—MILK IN THE CENTRAL MARKETING AREA

7. Amend § 1032.10 by revising paragraph (a) to read as follows:

§ 1032.10 Producer-handler.

* * * * *

(a) Operates a dairy farm and a distributing plant from which there is route disposition in the marketing area, and from which total route disposition during the month does not exceed 3 million pounds;

* * * * *

PART 1033—MILK IN THE MIDEAST MARKETING AREA

8. Amend § 1033.10 by revising paragraph (a) to read as follows:

§ 1033.10 Producer-handler.

* * * * *

(a) Operates a dairy farm and a distributing plant from which there is route disposition in the marketing area, and from which total route disposition during the month does not exceed 3 million pounds;

* * * * *

PART 1124—MILK IN THE PACIFIC NORTHWEST MARKETING AREA

9. Revise § 1124.10 introductory text to read as follows:

§ 1124.10 Producer-handler.

Producer-handler means a person who operates a dairy farm and a distributing plant from which there is route disposition in the marketing area, from which total route disposition during the month does not exceed 3 million pounds, and who the market administrator has designated a producer-handler after determining that all of the requirements of this section have been met.

* * * * *

PART 1126—MILK IN THE SOUTHWEST MARKETING AREA

10. Amend § 1126.10 by revising paragraph (a) to read as follows:

§ 1126.10 Producer-handler.

* * * * *

(a) Operates a dairy farm and a distributing plant from which there is route disposition in the marketing area, and from which total route disposition during the month does not exceed 3 million pounds;

* * * * *

PART 1131—MILK IN THE ARIZONA MARKETING AREA

11. Revise § 1131.10 introductory text to read as follows:

§ 1131.10 Producer-handler.

Producer-handler means a person who operates a dairy farm and a distributing plant from which there is route disposition in the marketing area, from which total route disposition during the month does not exceed 3 million pounds, and who the market administrator has designated a producer-handler after determining that all of the requirements of this section have been met.

* * * * *

Dated: October 15, 2009.

Rayne Pegg,

Administrator, Agricultural Marketing Service.

[FR Doc. E9–25292 Filed 10–16–09; 4:15 pm]

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Federal Register

Wednesday,
October 21, 2009

Part VII

Environmental Protection Agency

Endocrine Disruptor Screening Program (EDSP); Announcing the Availability of the Tier 1 Screening Battery and Related Test Guidelines; Notice

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2008–0521; FRL–8432–6]

Endocrine Disruptor Screening Program (EDSP); Announcing the Availability of the Tier 1 Screening Battery and Related Test Guidelines

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is announcing the availability of the Endocrine Disruptor Screening Program (EDSP) Tier 1 battery of assays and availability of test guidelines (protocols) for conducting the assays included in the battery. The EDSP was established under section 408(p) of the Federal Food, Drug, and Cosmetic Act (FFDCA), which directed EPA ''to develop a screening program. . .to determine whether certain substances may have an effect in humans that is similar to an effect produced by a naturally occurring estrogen, or such other endocrine effect as the Administrator may designate.'' Coordinated by EPA, several *in vitro* and *in vivo* screening assays were developed, standardized, and validated to identify the potential of a chemical substance to interact with the estrogen, androgen or thyroid (E, A, or T) hormonal systems. Test chemicals that were thought to be potentially interactive as well as non-interactive with the E, A, or T hormonal systems were used to evaluate feasibility of the protocols, relevance of endpoints and reliability of results within and among independent contract laboratories. Subsequent independent peer review of individual assays helped to clarify the strengths and limitations of each assay and define their modes of action involving the E, A, or T hormonal systems within the context of the EDSP Tier 1 battery. EPA submitted a proposed battery of assays to the Federal Insecticide, Fungicide, and Rodenticide Act Scientific Advisory Panel (FIFRA SAP) for external peer review in March 2008. Based on the SAP recommendation, which found the proposed battery adequate to begin screening chemicals to detect the potential for interaction with the E, A, or T hormonal systems, EPA is finalizing the Tier 1 battery as proposed.

FOR FURTHER INFORMATION CONTACT: Don Bergfelt, Office of Science Coordination and Policy (7203M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–8472; e-mail address: *bergfelt.don@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. You may be potentially affected by this action if you produce, manufacture, use, consume, work with, or import pesticide chemicals. To determine whether you or your business may be affected by this action, you should carefully examine section 408(p) of FFDCA, 21 U.S.C. 346a(p).

Potentially affected entities may include, but are not limited to:

- Chemical manufacturers, importers and processors (NAICS code 325), e.g., persons who manufacture, import or process chemical substances.
- Pesticide, fertilizer and other agricultural chemical manufacturers (NAICS code 3253), e.g., persons who manufacture, import or process pesticide, fertilizer and agricultural chemicals.
- Scientific research and development services (NAICS code 5417), e.g., persons who conduct testing of chemical substances for endocrine effects.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

1. *The Tier 1 battery announcement*. EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPPT–2008–0521. All documents in the docket are listed in the docket's index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov*, or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

2. *The EDSP test guidelines*. For additional information about the test guidelines and to access the guidelines electronically, go to *http://www.epa.gov/oppts* and select ''Test Methods & Guidelines'' on the left side navigation menu. You may also access the EDSP guidelines in *http://www.regulations.gov* under docket ID number: EPA–HQ–OPPT–2009–0576.

II. Endocrine Disruptor Screening Program (EDSP)

The Food Quality Protection Act (FQPA) of 1996, which amended the Federal Food, Drug, and Cosmetic Act (FFDCA), directs EPA to:

> develop a screening program, using appropriate validated test systems and other scientifically relevant information, to determine whether certain substances may have an effect in humans that is similar to an effect produced by a naturally occurring estrogen, or such other endocrine effect as the Administrator may designate. (21 U.S.C. 346a(p)).

In 1998, after considering public comments, external consultations and peer review, EPA established the EDSP as a two-tiered approach to implement the statutory testing requirements of FFDCA section 408(p) (21 U.S.C. 346a). For additional information about the history of EDSP go to *http://www.epa.gov/endo*.

Under Tier 1 of the EDSP, the screening battery will be used to identify substances that have the potential to interact with the estrogen (E), androgen (A), or thyroid (T) hormonal systems (Tier 1 ''screening''). The determination will be made on a weight-of-evidence basis taking into account data from the Tier 1 assays and other scientifically relevant information available. The fact that a substance may interact with a hormone system, however, does not mean that when the substance is used, it will cause adverse effects in humans or ecological systems.

Chemicals that go through Tier 1 screening and are found to have the potential to interact with E, A, or T hormonal systems will proceed to the next stage of the EDSP where EPA will

determine which, if any, of the Tier 2 tests are necessary based on the available data. Tier 2 testing is designed to identify any adverse endocrine-related effects caused by the substance, and establish a quantitative relationship between the dose and the E, A, or T effect.

EPA intends to use the data collected under the EDSP, along with other information, to determine if a pesticide chemical, or other substances, may pose a risk to human health or the environment due to disruption of the endocrine system.

III. Assay Validation Process

The use of validated assays is required by section 408(p) of the FFDCA. The process of assay validation used by the EDSP is based, in part, on principles developed by the Interagency Coordinating Committee for the Validation of Alternative Methods (ICCVAM). In addition to the ICCVAM approach to assay validation in the United States, EPA considered the European approach by the European Center for the Validation of Alternative Methods (ECVAM), as well as the international approach by the Organization for Economic Co-operation and Development (OECD) since some screening assays (Amphibian Metamorphosis, Estrogen Receptor Transcriptional Activation, Fish Short-term Reproduction, Hershberger, and Uterotrophic assays) involved a collaborative validation effort with OECD. Validation is still an ongoing process for EDSP Tier 2 tests, which are expected to be completed in 2011.

The purpose of assay validation is to establish relevance and reliability. In the context of the EDSP Tier 1 screening battery, relevance is the ability of an assay or endpoints within an assay to detect chemicals with the potential to interact with one or more of the E, A, or T hormonal systems, whereas reliability is the reproducibility of those results within and between or among laboratories. Throughout the validation process of individual assays between 2001 and 2007 and in accord with the FACA, the EDSP sought guidance on protocol development, selection of test chemicals, and interpretation of results from federal advisory committees such as the Endocrine Disruptor Methods Validation Sub-committee (EDMVS), Endocrine Disruptor Methods Validation Advisory Committee (EDMVAC) and the FIFRA SAP. Each committee meeting provided an opportunity for public comment. Materials from these meetings are available on the Agency's website.

In the **Federal Register** of July 13, 2007 (72 FR 13672) (FRL 8238–4), EPA announced the approach it intends to take for conducting peer reviews of the Tier 1 screening assays and Tier 2 testing assays that are being validated, as well as EPA's approach for conducting the peer review of the Tier 1 battery. For the Tier 1 screening assays, EPA followed a five-stage assay validation process as summarized:

1. *Test development*. A Detailed Review Paper (DRP) or an analogous document (e.g., Background Review Document) was first prepared as a comprehensive document to discuss the purpose of a proposed assay, the context in which it would be used, and the scientific basis on which an initial protocol design would be developed.

2. *Pre-validation*. With selected test chemicals, the initial protocols were refined, optimized, standardized and assessed for feasibility, transferability and performance in a number of independent laboratories based, in part, on the degree of intra-laboratory variability associated with relevant endpoints.

3. *Inter-laboratory validation*. With standardized protocols, each assay was assessed primarily for reliability (i.e., inter-laboratory variability) by running the same test chemicals in multiple, independent laboratories. Assay performance criteria and processes for data interpretation were also optimized during this stage.

4. *Peer review*. An independent scientific review of individual screening assays initially proposed for the EDSP Tier 1 battery was conducted by qualified experts using two processes. EPA conducted the peer review for six assays (i.e., the Androgen Receptor Binding, Aromatase, Estrogen Receptor Binding, Pubertal female, Pubertal male, and Steroidogenesis assays) in accord with EPA's Peer Review Handbook. The EDSP peer review process was published in a **Federal Register** notice of July 13, 2007 (72 FR 38577). In general, EPA prepared an Integrated Summary Report (ISR) for each of these six screening assays. Each ISR served as the main document during peer review, providing an overview of development, pre-validation and inter-laboratory testing of individual assays. Coordinated by an EPA contractor, each peer reviewer responded independently to a list of charges prepared by EPA. The peer reviewers' comments were compiled in a peer review record for each assay and submitted to the Agency. The five assays that were validated in collaboration with OECD (i.e., the Amphibian Metamorphosis, Estrogen Receptor Transcriptional Activation, Fish Short-term Reproduction, Hershberger, and Uterotrophic assays) were peer reviewed by qualified experts using the OECD process, which includes the preparation of a peer review summary report for each of these five screening assays. EPA did not conduct a separate individual assay peer review of these assays. Assessment of the EDSP peer review records and OECD peer review summary reports for each screening assay provided an opportunity for EPA to clarify the strengths and limitations of each assay as well as the complementary nature among assays. This information was then used for selecting assays to include in the Tier 1 screening battery for SAP review.

5. *Regulatory acceptance*. Acknowledgment by EPA that the Agency accepts a test method for regulatory use. EPA adopted the EDSP Tier 1 screening battery (Table 1) in accord with recommendations made by the SAP who found the proposed suite of assays adequate to begin screening for E, A, or T effects as detailed in a final report to the Agency which can be found at the SAP website *http://www.epa.gov/scipoly/ sap/meetings/2008/ march/minutes2008-03-25.pdf*. The SAP report is summarized in Unit III.E.

IV. Peer Review of the Proposed EDSP Tier 1 Screening Battery

EPA announced the independent scientific peer review of the proposed EDSP Tier 1 screening battery by the FIFRA SAP in the **Federal Register** notice of January 24, 2008 (73 FR 4216) (FRL–8348–6), which was held March 25–26, 2008. The SAP serves as the primary peer review mechanism of EPA's Office of Prevention, Pesticides and Toxic Substances (OPPTS) and it provides comments, evaluations and recommendations to improve the effectiveness and quality of analyses made by Agency scientists. EPA provided the SAP with a technical review document that served as a basic guide and source of information about the proposed Tier 1 battery. Respective ISRs or summary reports and reviewer responses from individual review of each assay were also provided to the SAP as additional material for reviewing the proposed battery. The SAP was charged with commenting on whether the collection of assays comprising the proposed battery fulfills its intended purpose to identify the potential of a chemical to interact with the E, A, or T hormonal systems. For consideration during the peer review, the SAP received oral and written comments from EPA, the general public and

various stakeholders. The final SAP report to the Agency is summarized in this Unit and a copy can be found at the SAP website *http://www.epa.gov/scipoly/sap/ meetings/2008/ march/ minutes2008-03-25.pdf*.

EPA provided the SAP with two main charges:

1. Please comment on the ability of the proposed Tier 1 screening battery (Table 1 in Unit V.A.) to provide sufficient information to determine whether or not a substance potentially interacts with the E, A, or T hormonal systems based on the modes of action covered within the battery (Table 2 in Unit V.B.).

2. EPA proposed a Tier 1 screening battery that includes assays that are complementary in nature (i.e., the strengths of one assay offset the limitations of another) in their coverage of the E, A, or T hormonal systems, albeit by different taxa, life-stages, endpoints, exposure and use of *in vitro* and *in vivo* methods executed at different levels of biological organization (i.e., cellular and whole organism).

a. Please comment on how well the proposed battery minimizes the potential for ''false negatives'' and ''false positives.''

b. Are there any unnecessary redundancies for Mode of Action (MOA) across the battery?

c. Please comment on whether a different combination of validated assays would be more effective in achieving the purpose of the battery than that proposed by EPA.

In response to the charges, the panel discussed assays individually and as a complete set of assays regarding the ability to detect interactions with the E, A, or T hormonal systems with few false positives and false negatives as possible. The conclusions drawn upon completion of this review as quoted from the SAP report were:

- Chemicals testing positive in the battery of Tier 1 assays would be identified as potential estrogenic, androgenic and thyroid hormone active substances.
- The ability to identify endocrine active substances is enhanced in the Tier 1 battery because the tests provide adequate replication and redundancy.
- It was clear that the inclusion of apical assays of amphibian metamorphosis and fish short-term reproduction were important to detect endocrine active substances that may operate by mechanisms of action yet to be discovered.
- The 15–day adult male rat assay proposed during some public comments would not be an appropriate substitute for the male and female pubertal assays because the pubertal assays provide for differences between the sexes and provide the only approach to testing for organizational effects during development.

Overall, the SAP agreed that the battery of Tier 1 assays in Table 1 in Unit V.A. is appropriate to begin screening for chemical substances that may interact with the E, A, or T hormonal systems. In addition, the SAP recommended that EPA continue to develop, refine and review the Tier 1 screening battery as the state of the science advances and to consider other hormonal systems that may be affected by exposure to environmental chemicals. After EPA considered the SAP final report and public comments, the Agency adopted the EDSP Tier 1 screening battery presented in Table 1 in Unit V.A.

V. The Final EDSP Tier 1 Screening Battery

A. Assays Included in the Tier 1 Screening Battery

The EDSP Tier 1 battery with its suite of *in vitro* and *in vivo* screening assays is indicated in Table 1 of this unit. The following discussion provides an overview of the nature and complementary aspects within and among assays that were selected to include in the battery.

TABLE 1.—SCREENING ASSAYS IN THE EDSP TIER 1 BATTERY

In vitro	*In vivo*
Estrogen receptor (ER) binding – rat uterine cytosol Estrogen receptor α (hERα) transcriptional activation – Human cell line (HeLa-9903) Androgen receptor (AR) binding – rat prostate cytosol Steroidogenesis – Human cell line (H295R) Aromatase – Human recombinant microsomes	Uterotrophic (rat) Hershberger (rat) Pubertal female (rat) Pubertal male (rat) Amphibian metamorphosis (frog) Fish short-term reproduction

B. Basis for Assay Selection for the Tier 1 Screening Battery

The EDSP Tier 1 battery was designed to work as a whole with all of the screening assays. The basis for selecting an assay to include in the battery involved two principal aspects: (1) The capacity of an assay to detect estrogen- and androgen-mediated effects by various modes of action including receptor binding (agonist and antagonist) and transcriptional activation, steroidogenesis, and hypothalamic-pituitary-gonadal (HPG) feedback, and (2) the degree that *in vitro* and *in vivo* assays complemented one another in the battery as summarized in Table 2 of this unit. In addition, rodent and amphibian *in vivo* assays were selected for the proposed battery based on their capacity to detect direct and indirect effects on thyroid function (hypothalamic-pituitary-thyroidal, HPT, feedback). Thus, the robustness of the proposed battery is based on the strengths of each individual assay and their complementary nature within the battery to detect effects on the E, A, or T hormonal systems.

TABLE 2.—COMPLEMENTARY MODES OF ACTION AMONG SCREENING ASSAYS IN THE EDSP TIER 1 BATTERY

Screening Assays	Modes of Action							
	Receptor Binding				Steroidogensis		HPG[3] Axis	HPT[3] Axis
	E[2]	Anti-E	A[2]	Anti-A	E[2]	A[2]		
In vitro								
ER Binding[1]	•	•[4]						
ERα Transcriptional Activation	•							
AR Binding[1]			•	•				

TABLE 2.—COMPLEMENTARY MODES OF ACTION AMONG SCREENING ASSAYS IN THE EDSP TIER 1 BATTERY—Continued

Screening Assays	Modes of Action							
	Receptor Binding				Steroidogensis		HPG[3] Axis	HPT[3] Axis
	E[2]	Anti-E	A[2]	Anti-A	E[2]	A[2]		
Steroidogenesis H295R					•	•		
Aromatase Recombinant					•			
In vivo								
Uterotrophic	•							
Hershberger			•	•				
Pubertal Male			•	•		•	•	•
Pubertal Female	•	•[4]			•		•	•
Amphibian Metamorphosis								•
Fish Short-term Reproduction (male & female)	•	•[4]	•	•	•	•	•	

[1]Estrogen and Androgen Receptor binding
[2]Estrogen and Androgen, respectively
[3]Hypothalamic-pituitary-gonadal or –thyroidal axis
[4]Estrogen receptor antagonists were not tested during the validation process, but the assay is expected to detect anti-estrogens.

1. *Assays for detection of compounds that affect the estrogen signaling pathway*. The earliest concern for endocrine disruptors was related to environmental chemicals that could bind to the estrogen receptor and thereby interfere with the estrogen signaling pathway. Estrogen is important for reproductive function in males and females, including sexual differentiation of the brain and development of secondary female sex characteristics. In addition, estrogen is involved in the structural and functional development of other bodily systems across genders and for maintaining homeostasis.

Five screening assays within the EDSP Tier 1 battery are capable of detecting whether or not a chemical interacts with the estrogen hormonal system and include: (1) Estrogen receptor (ER) binding; (2) ER transcriptional activation (ERTA); (3) uterotrophic; (4) pubertal female; and (5) fish short-term reproduction. Of the five assays, the two *in vitro* assays (ER binding and ERTA) identify the ability of the test chemical to interact with the estrogen receptor, thus providing mechanistic as well as some functional information. The three *in vivo* assays provide evidence for the effects of the chemical following exposure via subcutaneous injection (uterotrophic), oral gavage (pubertal female), and aquatic medium (fish short-term reproduction). The different routes of exposure can provide information relevant to the effects of Absorption, Distribution, Metabolism and Excretion (ADME). Interpreting the results of the suite of estrogen-detecting assays within the battery is accomplished by examining the results of all the assays together using a weight-of-evidence approach. A brief description as well as value of each of the five assays for detection of compounds that can potentially interact with the estrogen signaling pathway is provided.

a. *ER binding assay*. The ER receptor binding assay utilizing rat uterine cytosol (RUC) is a rapid *in vitro* assay that measures the binding affinity of a chemical to the estrogen receptor. Although the ER RUC assay cannot distinguish between chemicals with agonistic, antagonistic and mixed activity or provide functional, transcriptional information, the technical simplicity of this assay is important for screening large numbers of chemicals. Thus, the assay is a valuable asset for identifying chemicals that can compete with endogenous estrogen for ER binding. The practical use of this assay and its relevance to *in vivo* effects is well documented in the scientific literature.

b. *ER transcriptional activation assay*. The ERTA assay is a method to detect the interaction and functional effect of a chemical on the estrogen receptor. The ERTA assay is based on the expression of a reporter gene induced by a chemical following ligand-receptor binding and subsequent transcriptional activation. As part of the Endocrine Disruption Testing and Assessment Task Force activity under the OECD Test Guidelines Program, Chemical Evaluation and Research Institute (CERI) of Japan developed and validated a stably transfected transcriptional activation assay using the hER-HeLa-9903 (HeLa) cell line with the ERα. Although the ERTA assay is still being evaluated to detect ER antagonists, it complements the ER binding assay within the EDSP Tier 1 battery (Table 2 of this unit) and provides a functional component for identifying ERα agonists.

c. *Uterotrophic assay*. The uterotrophic assay is an *in vivo* assay that was designed to detect estrogenic activity of a chemical through uterine hypertrophy/hyperplasia. For the EDSP, it is preferred that the assay be conducted using ovariectomized female rats exposed via subcutaneous administration because of increased specificity and information gained on specific estrogen-related responses in the absence of first-pass liver metabolism. The sole endpoint is a change in uterine weight (i.e., increase) in response to estrogen–induced water imbibition and hypertrophy. Thus, data from the uterotrophic assay can complement the *in vitro* ER and ERTA

assays (Table 2 of this unit) where metabolic activity is either non-detectable (ER binding) or minimal (ERTA assay) and provide differential information in relation to first-pass effects through the liver since the uterotrophic assay uses subcutaneous exposure compared to the pubertal female assay that uses oral exposure.

d. *Pubertal female assay*. The pubertal female assay is an *in vivo* assay with an intact HPG axis that is sensitive to estrogens such that chemicals with estrogenic activity hasten the age of vaginal opening (VO). For example, when a selective estrogen receptor modulator (SERM) with mixed agonistic/antagonistic activity was examined in the pubertal female assay during the validation process, VO occurred earlier in the treated group than in controls. Although estrogens also accelerate the age at first estrus, the interval may or may not correspond to the time of VO. Nonetheless, the estrogen agonistic effect of the SERM test chemical was substantiated within the assay by increased uterine weight. Notably, the change in time to VO is not necessarily a specific ER binding effect; however, evaluation of results from the pubertal female and uterotrophic assays and *in vitro* ER and ERTA assays may allow distinction between an ER mechanism of action or other steroidogenic and HPG mechanisms. Since oral gavage is the route of exposure for the pubertal female assay and subcutaneous exposure is indicated for the uterotrophic assay, these screening assays can contribute differential information on specific estrogen-related responses taking into account ADME, which is crucial to the identification of compounds that need to be metabolized in order to interact with the estrogen pathway.

e. *Fish short-term reproduction assay*. The fish short-term reproduction assay with fathead minnows is designed to detect changes in spawning, reproductive morphology, and specific biochemical endpoints that reflect disturbances along the HPG axis in response to estrogen agonists and antagonists. Collectively, the endpoints allow for inferences with regard to possible endocrine disturbances involving the estrogen hormonal pathway. Vitellogenin is an egg yolk protein in which synthesis and secretion is primarily controlled through estrogen-receptor interaction. There are commercially available immunoassay kits specific to the fathead minnow that have made vitellogenin production readily measurable; hence, it is a well-established endpoint. Induction of vitellogenin in male fish is an extremely sensitive and specific indication of ER agonists since males have very low circulating concentrations of endogenous estrogen. Reproductively active females have moderate circulating concentrations of vitellogenin, which can be decreased by ER antagonists. Estrogens and anti-estrogens can also affect egg production in the fish assay. Changes in fecundity combined with alterations in gonadal histopathology provide a good indication of reproductive health and have been demonstrated to be sensitive to estrogenic and anti-estrogenic exposures.

2. *Assays for detection of compounds that affect the androgen signaling pathway*. Androgens are critical for sexual differentiation and development of secondary sex characteristics in the male, as well as for a wide variety of reproductive and non-reproductive functions in both males and females. Four screening assays within the EDSP Tier 1 battery are capable of detecting whether or not a chemical interacts with the androgen hormonal pathway. Together these assays are expected to detect chemicals with androgenic and anti-androgenic activity and include: (1) AR binding; (2) Hershberger; (3) pubertal male; and (4) fish short-term reproduction assays.

Of the four assays, the one *in vitro* assay (AR binding) provides mechanistic information at the receptor level, while the three *in vivo* assays provide evidence for the effects of a chemical on the reproductive system at the whole organism level. Again, interpreting the results of the suite of androgen-detecting assays within the battery is accomplished by examining the results of all the assays together using a weight-of-evidence approach. A brief description as well as the value of each of the assays for detection of compounds that can potentially interact with the androgen signaling pathway is provided.

a. *AR binding assay*. The androgen receptor binding assay (AR binding), utilizing rat prostate cytosol, is a rapid *in vitro* assay that measures the affinity of a test chemical for the androgen receptor. As with the ER binding assay, the AR binding assay does not assess functional, transcriptional activity. Nevertheless, the assay's technical simplicity along with its rapid turn-around time is conducive for screening large numbers of chemicals. Thus, the assay is a valuable asset for identifying chemicals that have androgenic or anti-androgenic activity that can compete with endogenous androgens for receptor recognition. In addition to detecting androgen agonists and antagonists, the AR binding assay is complementary in supporting an agonistic or antagonistic result in the Hershberger assay (Table 2 of this unit).

b. *Hershberger assay*. The Hershberger assay is a short-term *in vivo* screen that uses castrated peripubertal male rats exposed via oral gavage to assess biological activities consistent with either androgen agonists or antagonists (or 5α-reductase inhibitors) by measuring changes in the weights of five androgen-dependent tissues: (i) Ventral prostate; (ii) seminal vesicle; (iii) levator ani-bulbocavernosus (LABC) muscle complex; (iv) Cowper's glands; and (v) glans penis. An increase in tissue weights is diagnostic of androgenic activity. In contrast, an anti-androgenic chemical will block any increase in tissue weights when co-administered with a potent androgen such as testosterone propionate. The Hershberger assay contributes to the battery by providing information on androgen-related responses that is complimentary with the intact pubertal male and fish short-term reproduction assays as well as AR binding and steroidogenesis assays (Table 2 of this unit).

c. *Pubertal male assay*. The male pubertal assay is an *in vivo* test system with an intact HPG axis that is sensitive for detecting chemicals that act as androgens or anti-androgens or interfere with androgen synthesis. Importantly, as an *in vivo* assay, it can detect chemicals which require metabolism in order to interact with the androgen hormonal system because of its oral route of exposure. The pubertal male assay is reproducible and sensitive for chemicals that alter androgenic hormone action which is necessary for preputial separation (PPS), associated with the onset of puberty, and growth and development of androgen dependent tissues (e.g., testes, prostate, seminal vesicles). The pubertal male assay is complementary with the Hershberger and AR binding assays (Table 2 of this unit).

d. *Fish short-term reproduction*. Secondary sex characteristics of fathead minnows are affected by androgenic and anti-androgenic substances. Specifically, females will develop external male secondary sex characteristics (nuptial tubercles) when exposed to an AR agonist. Not only is this endpoint specific for this mode of action, it is highly sensitive since female fathead minnows typically do not express these characteristics. In contrast, AR antagonists decrease the expression of male secondary sex characteristics in male fathead minnows. Changes in secondary sex

characteristics in fathead minnows are biologically relevant, unique, robust and reproducible. Androgens and anti-androgens also effectively inhibit egg production in the fish assay, with corresponding alterations in gonad histopathology. The fish short-term reproduction assay is complimentary with *in vitro* assays and other *in vivo* assays (Table 2 of this unit).

3. *Assays for detection of compounds that affect steroid synthesis*. Numerous environmental compounds have been shown to interfere with the steroidogenic pathways for estrogens (e.g., estradiol) and androgens (e.g., testosterone) in various *in vitro* and *in vivo* test systems. In this regard, a number of *in vitro* assays for steroidogenesis were considered for the battery with the decision to include the H295R cell line as it offers the potential to identify chemicals that induce or inhibit estradiol and testosterone synthesis. In addition, since many environmental compounds are known to inhibit the conversion of androgen substrates to estrogen, a decision was made to include a human recombinant aromatase assay. A combination of *in vitro* and *in vivo* assays is expected to provide complementary information to be used in a weight of evidence approach for making decisions as to whether or not a compound interferes with the estrogen or androgen hormonal signaling pathways and includes: (1) Steroidogenesis; (2) aromatase; (3) pubertal female; (4) pubertal male; and (5) fish short-term reproduction assays. A brief description as well as the value of each of the five assays for detection of compounds that can potentially affect steroidogenesis is provided.

a. *H295R for steroidogenesis*. H295R is a human adrenocortical carcinoma cell line that possesses all of the key enzymes involved in the steroidogenic pathways. The assay provides a straightforward, inexpensive and specific way to detect chemicals that affect steroid hormone synthesis through enzyme induction or inhibition. The measurement of estradiol and testosterone in culture media are the essential hormonal endpoints in this assay. Chemical exposure may inhibit enzymes in the pathway, leading to decreased production of one or both of the hormonal endpoints or stimulate enzymes, leading to increased production of one or both of the endpoints.

b. *Human recombinant aromatase*. The recombinant aromatase assay using human recombinant microsomes is an inexpensive and rapid *in vitro* method to detect chemicals that inhibit aromatase activity, thus blocking the conversion of androgens to estrogens. The aromatase and H295R steroidogenesis assays are complementary within the Tier 1 battery (Table 2 of this unit) and are the only *in vitro* assays that have been shown to detect the activity of chemicals that weakly inhibit aromatase and estrogen synthesis.

c. *The pubertal female and pubertal male assays*. A chemical that interferes with endogenous steroid hormone production by the ovaries or testes will produce changes in the numerous hormone-dependent endpoints measured by the female and male pubertal assays, respectively. Together, the pubertal female and male assays and H295R steroidogenesis and aromatase assays are complementary within the Tier 1 battery (Table 2 of this unit) and provide diagnostic information to discern impaired estrogen and androgen production.

d. *Fish short-term reproduction*. Interference in the steroid synthetic pathways is detected by several endpoints in the fish assay. Proliferation of testicular interstitial cells (males), decreased circulating concentrations of reproductive steroids (males and females) and vitellogenin (females), and impaired egg production (females) would all signal potential alteration in steroid synthesis.

4. *Assays for detection of chemicals that affect the HPG axis*. Environmental compounds have been found to interfere with endocrine function of the ovaries and testes by altering the hypothalamic regulation of pituitary hormone synthesis and secretion. By this mode of action, it has been shown that many of these same chemicals can interfere with reproductive development and fertility. The EDSTAC recommended and EPA agreed that the effect of environmental chemicals on the hypothalamic-pituitary-gonadal axis (HPG) be evaluated. To address this issue, the Tier 1 battery includes: (1) Pubertal male; (2) pubertal female; and (3) fish short-term reproduction assays.

The EDSP Tier 1 battery is designed to use the combined results of the *in vitro* and *in vivo* assays included in the battery to differentiate between hormone-receptor binding and non-receptor binding at the cellular and whole organism levels that may involve the HPG axis.

Hypothetically, if a test chemical is found to delay PPS and VO in the *in vivo* pubertal male and female assays, respectively, but none of the *in vitro* assays were altered, it would likely be concluded that the delay in male and female puberty is due to impaired hypothalamic-pituitary function. This scenario has been demonstrated in the pubertal male and female assays with compounds that act on the central nervous system and alter gonadotropin-releasing hormone (GnRH) and luteinizing hormone (LH).

The fish short-term reproduction assay with fathead minnows is designed to detect changes in spawning, morphology and specific biochemical endpoints that reflect alterations in the HPG axis. Again, the combined results of the *in vitro* and *in vivo* assays included in the battery are to determine and differentiate if an alteration involves the HPG axis, which may be information for Tier 2 testing.

5. *Assays for detection of chemicals that affect the HPT axis*. In addition to identifying environmental compounds that have the potential to alter the hormonal regulation of reproductive function involving the estrogen and androgen hormonal pathways, certain assays included in the EDSP Tier 1 screening battery (Tables 1 and 2 of this unit) will also provide relevant information about the potential of a chemical to interfere with thyroid function. Thyroid hormones (thyroxine, T4 and triiodothyronine, T3) are essential for normal development and maintenance of physiological functions in vertebrates. Delivery of thyroid hormones to tissues and cells is highly regulated throughout life and is governed by complex physiological processes involving the HPT axis, including peripheral organs/tissues. Environmental factors, such as the presence of specific toxicants, can perturb this system at various points of regulation, inducing a variety of responses that can be detected with thyroid-related endpoints in the *in vivo* assays. Three screening assays have been designed for this purpose within the EDSP Tier 1 battery and include: (1) Pubertal female; (2) pubertal male; and (3) amphibian metamorphosis assays. A brief description as well as the value of each of the three assays for detection of compounds that can potentially interfere with thyroid development and function is provided.

a. *Pubertal male and female assays*. The pubertal male and female assays include multiple endpoints that can detect an interaction of a chemical with the thyroid hormonal system, including circulating concentrations of thyroid stimulating hormone (TSH) and T4, thyroid organ weight and histology, and liver weight. Both the male and the female assays have been shown to detect chemicals that act through various thyroid-related mechanisms. The male and female pubertal assays include the same thyroid endpoints; thus,

examining the thyroid axis in both sexes provides the opportunity to detect potential gender differences in response to treatment at a relatively early life stage.

b. *Amphibian metamorphosis assay*. The amphibian metamorphosis assay (AMA) is an *in vivo* screening assay intended to identify substances which interfere with the normal function of the HPT axis. The AMA represents a generalized vertebrate model based on the conserved structure and function of thyroid systems among species. The AMA is based on the principle that the dramatic morphological changes that occur during post-embryonic development are dependent upon the normal functioning of the HPT axis, and that interference with these processes leads to measurable effects. During tadpole metamorphosis, thyroid hormone (TH) influences virtually every tissue in the body initiating diverse morphological, physiological and biochemical changes that include cell proliferation, differentiation and death. The result is *de novo* organ formation, organ loss, and extensive tissue remodeling. Given the dependence of metamorphosis on TH and the strict biochemical control under which these processes occur, the transformations that occur can serve as endpoints representative of thyroid axis function. The primary endpoints in the AMA are the hindlimb length during the developmental stage and the thyroid histology. Each endpoint can be affected by chemicals that interact with the HPT axis. For example, antagonists of thyroid production, iodination and action have been shown to delay development and induce diagnostic lesions in the thyroid gland. Thyroid agonists (e.g., native thyroid hormone) will accelerate development. Additionally, unlike the mammalian assays that have been developed to detect interactions along the HPT axis, the AMA has the ability to detect chemicals that act on peripheral tissues. For example, inhibition of monodeiodinases that transform T4 to T3 can cause asynchronous development, detected by an inability to assign a developmental stage to a tadpole. Knowledge of this mechanism is important because development can be affected without concomitant effects on thyroid histology or circulating thyroid hormone concentrations. Although post-embryonic development is different between mammals and most amphibians (i.e., metamorphosis), there is a high level of evolutionary conservation of the thyroid system and underlying molecular and cellular pathways among vertebrates. Hence, the AMA, particularly with the use of Anurans, is a general model for evaluating the interaction of chemicals with the HPT axis in the EDSP Tier 1 screening battery. In addition, the results can be used to complement or corroborate results in the pubertal male and female assays (Table 2 of this unit).

VI. Test Guidelines for EDSP Tier 1 Screening Battery

EPA is also announcing the availability of the test guidelines for conducting the assays included in the EDSP Tier 1 Screening Battery (Table 1 in Unit V.A.).

The Androgen Receptor Binding, Aromatase, Estrogen Receptor Binding (Rat Uterine Cytosol), Female Pubertal, Male Pubertal, and Steroidogenesis assays were developed and validated by the Agency.

The Amphibian Metamorphosis, Estrogen Receptor Transcriptional Activation, Fish Short-term Reproduction, Hershberger and Uterotrophic assays were developed and validated using a collaborative process involving EPA's Office of Science Coordination and Policy (OSCP), Office of Research and Development (ORD), and Office of Pesticide Programs (OPP) as well as OECD as previously outlined in a **Federal Register** notice of July 13, 2007 (72 FR 38577) (FRL–8138–4). The process took into account the harmonized testing strategy for the screening and testing of potential endocrine disrupting chemicals and consequences of such a strategy on the development and validation of test guidelines involving regulatory systems for new and existing substances according to OECD's Endocrine Disrupter Testing and Assessment (EDTA) Task Force in 1998.

In both cases, the draft protocols (and all related materials) were made available as part of the independent peer review. The draft protocols were revised to reflect comments received during the peer review process, and have been incorporated into the OPPTS compendium of harmonized test guidelines, under *Series 890–Endocrine Disruptor Screening Program Test Guidelines* as follows:

- 890.1100–Amphibian Metamorphosis (Frog)
- 890.1150–Androgen Receptor Binding (Rat Prostate Cytosol)
- 890.1200–Aromatase (Human Recombinant)
- 890.1250–Estrogen Receptor Binding (Rat Uterine Cytosol)
- 890.1300–Estrogen Receptor Transcriptional Activation (Human Cell Line — HeLa-9903)
- 890.1350–Fish Short-term Reproduction
- 890.1400–Hershberger (Rat)
- 890.1450–Female Pubertal (Rat)
- 890.1500–Male Pubertal (Rat)
- 890.1550–Steroidogenesis (Human Cell Line — H295R)
- 890.1600–Uterotrophic (Rat)

For information on accessing these guidelines see Unit I.B.2.

List of Subjects

Environmental protection, Chemicals, Chemical testing, Endocrine disruptors, Pesticides, Test guideline.

Dated: October 14, 2009.

Stephen A. Owens,

Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.

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ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–0634; FRL–8434–8]

Endocrine Disruptor Screening Program; Tier 1 Screening Order Issuing Announcement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This action announces the Agency's initiation of the Endocrine Disruptor Screening Program (EDSP) Tier 1 screening for the first group of 67 chemicals by issuing orders between October 29, 2009, and February 26, 2010, pursuant to the authority provided to EPA under section 408(p)(5) of the Federal Food, Drug, and Cosmetic Act (FFDCA). The EDSP Tier 1 screening data required to satisfy an order are due within 2 years of the date of issuance of the order. This action also provides information for pesticide registrants, manufacturers and importers of inert chemicals used in pesticide products, and the public on how to obtain details about the orders (such as the date of issuance and the recipients), the ''Pesticide Inert Ingredients Data Submitters and Suppliers List'' (PIIDSSL), and how interested persons other than recipients of test orders may submit other scientifically relevant information on the chemicals subject to the orders.

DATES: Order recipients must respond according to the schedules contained in the order they receive. Persons other than order recipients who wish to submit other scientifically relevant information related to one of the chemical-specific orders should submit

that information within 90 days of the order issuance date.

ADDRESSES: Persons other than order recipients should submit their information identified by docket identification (ID) number EPA–HQ–OPP–2009–0634, by one of the following methods:

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

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2009–0634. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Jane Scott Smith, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–0048; fax number: (703) 308–8090; e-mail address: *smith.jane-scott@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you manufacture, use, or import pesticide/agricultural chemicals and other chemical substances; or if you are or may otherwise be involved in the testing of chemical substances for potential endocrine effects. Potentially affected entities may include, but are not limited to:

- Chemical manufacturers, importers and processors (NAICS code 325), e.g., persons who manufacture, import or process chemical substances.
- Pesticide, fertilizer, and other agricultural chemical manufacturing (NAICS code 3253), e.g., persons who manufacture, import or process pesticide, fertilizer and agricultural chemicals.
- Scientific research and development services (NAICS code 5417), e.g., persons who conduct testing of chemical substances for endocrine effects.

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

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

1. *Docket*. EPA has established a docket for this action under docket ID number EPA–HQ–OPP–2009–0634. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*.

II. Introduction

A. What Action is the Agency Taking?

The Agency is initiating the EDSP Tier 1 screening for the first group of 67 chemicals by issuing test orders from October 29, 2009, through February 26, 2010. Details on the status of the orders will be provided on EPA's website at *http://www.epa.gov/endo* with information, including the order issuance date, the recipient(s) of the order, each order recipient's response and the order due date. EPA intends to update the list with subsequent publications and postings as appropriate. This public listing is provided to invite the public to identify additional entities who should receive the FFDCA section 408(p) test order. The commenters could either identify themselves or another person as additional candidates (with proper substantiation) for receipt of a FFDCA section 408(p) test order by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

FFDCA section 408(p)(1) requires EPA ''to develop a screening program, using appropriate validated test systems and other scientifically relevant information to determine whether certain substances may have an effect in humans that is

similar to an effect produced by a naturally occurring estrogen, or such other effects as [EPA] may designate.'' (21 U.S.C. 346a(p)). Section 408(p)(3) specifically requires that the Administrator ''shall provide for the testing of all pesticide chemicals.'' (21 U.S.C. 346a(p)(3)).

Section 201 of FFDCA defines ''pesticide chemical'' as ''any substance that is a pesticide within the meaning of [FIFRA], including all active and inert ingredients of such pesticide.'' (21 U.S.C. 231(q)(1)).

Section 408(p)(5) of FFDCA provides that the Administrator shall issue an order to a registrant of a substance for which testing is required under this subsection, or to a person who manufactures or imports a substance for which testing is required under this subsection. The order shall require the recipient to conduct testing in accordance with the screening program, and to submit information obtained from the testing to the Administrator, within a reasonable time period that the Administrator determines is sufficient for the generation of the information.

Section 3(c)(2)(B) of FIFRA provides that registrants must submit additional data, upon notification that the Administrator has determined that additional data are required to maintain an existing pesticide registration. (7 U.S.C. 136a(c)(2)(B)). In light of the directive in section 408(p)(3) of FFDCA that EPA is to provide for the endocrine screening of all pesticide chemicals, EPA considers that such data have been statutorily determined to be necessary to maintain an existing pesticide registration.

III. Background

EPA developed the EDSP in response to the Congressional mandate in section 408(p) of FFDCA to ''develop a screening program. . .to determine whether certain substances may have an effect in humans that is similar to an effect produced by a naturally occurring estrogen, or such other endocrine effects as [EPA] may designate'' (21 U.S.C. 346a(p)). When carrying out the program, the statute requires EPA to ''provide for the testing of all pesticide chemicals.'' The statute also provides EPA with discretionary authority to ''provide for the testing of any other substance that may have an effect that is cumulative to an effect of a pesticide chemical if the Administrator determines that a substantial population may be exposed to such a substance.'' In addition, section 1457 of the Safe Drinking Water Act (SDWA) provides EPA with discretionary authority to provide for testing, under the FFDCA 408(p) screening program, ''of any other substances that may be found in sources of drinking water if the Administrator determines that a substantial population may be exposed to such substance.''

EPA initially set forth the EDSP in the August 11, 1998 **Federal Register** notice (63 FR 42852) (FRL–6021–3), and solicited public comment on the program in the December 28, 1998 **Federal Register** notice (63 FR 71542) (FRL–6052–9). The program initiated in these notices was based on the recommendations of the Endocrine Disruptor Screening and Testing Advisory Committee (EDSTAC), which was chartered under the Federal Advisory Committee Act (FACA), 5 U.S.C. App.2, section 9(c). The EDSTAC was comprised of members representing the commercial chemical and pesticides industries, Federal and State agencies, worker protection and labor organizations, environmental and public health groups, and research scientists.

EDSTAC recommended that EPA's program address both potential human and ecological effects; examine effects on estrogen, androgen, and thyroid hormone-related processes; and include non-pesticide chemicals, contaminants, and mixtures in addition to pesticides. Based on these recommendations, EPA developed a two-tiered assessment approach for these chemicals, referred to as the EDSP. The purpose of Tier 1 screening (referred to as ''screening'') is to identify substances that have the potential to interact with the estrogen, androgen, or thyroid hormone systems using a battery of assays. The purpose of Tier 2 testing (referred to as ''testing'') is to identify and establish a dose-response relationship for any adverse effects that might result from the interactions identified through the Tier 1 assays. EDSTAC also recommended that EPA establish a priority-setting approach for choosing chemicals to undergo Tier 1 screening.

EPA implemented its EDSP in three major parts.

1. *Assay validation*. Under FFDCA section 408(p), EPA is required to use ''appropriate validated test systems and other scientifically relevant information'' to determine whether substances may have estrogenic effects in humans or other endocrine effects as EPA may designate. Validation is defined as the process by which the reliability and relevance of test methods are evaluated for the purpose of supporting a specific use. The EDSP Tier 1 screening assays were peer reviewed by independent experts and by the FIFRA Scientific Advisory Panel (SAP) during a public meeting on March 25–27, 2008. Details on the validation and peer review process for the assays as well as the peer review reports can be found on EPA's website at *http://www.epa.gov/scipoly/oscpendo/pubs/assayvalidation/index.htm*. The FIFRA SAP report is available at *http://www.epa.gov/scipoly/sap/meetings/2008/march/minutes2008-03-25.pdf*. Elsewhere in this issue of the **Federal Register**, EPA is issuing the final Tier 1 battery composed of the validated assays. The Tier 1 battery protocols can be found in the corresponding docket EPA–HQ–OPPT–2009–0634 or the website at *http://www.epa.gov/oppts* (select ''Test Methods & Guidelines''). EPA is also in the process of developing and validating Tier 2 tests. The status of each assay can be viewed on the EDSP website in the Assay Status table: *http://www.epa.gov/scipoly/oscpendo/pubs/assayvalidation/status.htm.*

2. *Priority setting*. EPA described its priority setting approach for the first group of pesticide chemicals to be tested under the EDSP in the **Federal Register** of September 27, 2005 (70 FR 56449) (FRL–7716–9), and proposed the draft list of initial chemicals for review and public comment in the **Federal Register** notice of June 18, 2007 (72 FR 33486) (FRL–8129–3). The public comments and Agency responses can be found in the associated docket EPA–HQ–OPPT–2004–0109. In April 2009, EPA published in the **Federal Register** its final list of the first group of chemicals to be screened under EDSP. The first group of 67 chemicals identified for screening includes pesticide active ingredients and high production volume (HPV) chemicals used as pesticide inert ingredients (also known as other ingredients). This list should not be construed as a list of known or likely endocrine disruptors. More information on EPA's priority setting approach for selection of the first group of chemicals for the EDSP is available at *http://www.epa.gov/scipoly/oscpendo/prioritysetting.*

The first group of chemicals to be screened consists of chemicals that section 408(p) of FFDCA requires be screened, i.e., pesticide active ingredients and chemicals used as pesticide inert ingredients (also known as other ingredients). EPA anticipates that it may, in the future, modify its approach to selecting chemicals for screening. Information and factors that EPA may consider in selecting chemicals could include: Public input; the results of testing chemicals on the initial list; management considerations to increase the integration of screening with other regulatory activities within the Agency; implementation considerations flowing from a decision

to extend screening to additional categories of chemicals (e.g., non-pesticide chemical substances); and the availability of new priority setting tools (e.g., High Throughput Pre-screening or Quantitative Structure Activity Relationships models). More information on EPA's priority setting approach is available at *http://www.epa.gov/scipoly/oscpendo/pubs/prioritysetting*.

3. *Procedures*. EPA published a document in the **Federal Register** of December 13, 2007 (72 FR 70842) (FRL–8340–3), that describes the proposed procedures that EPA would use to issue orders, the proposed procedures that order recipients would use to respond to the order, how data protection and compensation would be addressed in the test orders, and other related proposed procedures or policies. In addition, EPA developed a draft template for the test order and a draft information collection request (ICR) to obtain the necessary clearances under the Paperwork Reduction Act (PRA). On April 15, 2009, the Agency published the final policies and procedures and related documents in the **Federal Register** ((74 FR 17560) (FRL–8399–9), (74 FR 17579) (FRL–8399–7), and (74 FR 17477) (FRL–8412–2)). EPA generally intends to adopt these procedures for initial screening of chemicals under the EDSP, including the statutory requirements associated with and format of the test orders, as well as EPA's procedures for fair and equitable sharing of test costs and handling of confidential data (docket number EPA–HQ–OPPT–2007–1080).

IV. Order Issuance Schedule

The Agency intends to initiate the EDSP Tier 1 screening for the first group of 67 chemicals by issuing test orders listed in the following table.

TABLE 1-LIST OF CHEMICALS AND ORDER ISSUANCE DATES FOR TIER 1 SCREENING IN THE EDSP

Chemical Name	CAS Number	Pesticide Active Ingredient (x) or as Noted	Order Issuance Time Frame
Abamectin	71751–41–2	x	January 2010
Acephate	30560–19–1	x	November 2009
Acetone	67–64–1	HPV/Inert	February 2010
Atrazine	1912–24–9	x	October 2009
Benfluralin	1861–40–1	x	October 2009
Bifenthrin	82657–04–3	x	November 2009
Butyl benzyl phthalate	85–68–7	HPV/Inert	January 2010
Captan	133–06–2	x	January 2010
Carbamothioic acid, dipropyl-, S-ethyl ester	759–94–4	x	November 2009
Carbaryl	63–25–2	x	November 2009
Carbofuran	1563–66–2	x	November 2009
Chlorothalonil	1897–45–6	x	December 2009
Chlorpyrifos	2921–88–2	x	November 2009
Cyfluthrin	68359–37–5	x	November 2009
Cypermethrin	52315–07–8	x	November 2009
2,4-D	94–75–7	x	October 2009
DCPA (or chlorthal-dimethyl)	1861–32–1	x	October 2009
Diazinon	333–41–5	x	November 2009
Dibutyl phthalate	84–74–2	HPV/Inert	January 2010
Dichlobenil	1194–65–6	x	December 2009
Dicofol	115–32–2	x	December 2009
Diethyl phthalate	84–66–2	HPV/Inert	January 2010
Dimethoate	60–51–5	x	November 2009
Dimethyl phthalate	131–11–3	HPV/Inert	January 2010
Di-sec-octyl phthalate	117–81–7	HPV/Inert	January 2010
Disulfoton	298–04–4	x	November 2009

TABLE 1-LIST OF CHEMICALS AND ORDER ISSUANCE DATES FOR TIER 1 SCREENING IN THE EDSP—Continued

Chemical Name	CAS Number	Pesticide Active Ingredient (x) or as Noted	Order Issuance Time Frame
Endosulfan	115–29–7	x	December 2009
Esfenvalerate	66230–04–4	x	November 2009
Ethoprop	13194–48–4	x	November 2009
Fenbutatin oxide	13356–08–6	x	October 2009
Flutolanil	66332–96–5	x	December 2009
Folpet	133–07–3	x	January 2010
Gardona (cis-isomer)	22248–79–9	x	November 2009
Glyphosate	1071–83–6	x	January 2010
Imidacloprid	138261–41–3	x	January 2010
Iprodione	36734–19–7	x	January 2010
Isophorone	78–59–1	HPV/Inert	January 2010
Linuron	330–55–2	x	December 2009
Malathion	121–75–5	x	November 2009
Metalaxyl	57837–19–1	X	December 2009
Methamidophos	10265–92–6	X	November 2009
4,7-Methano-1H-isoindole-1,3(2H)-dione, 2-(2-ethylhexyl)-3a,4,7,7a-tetrahydro-	113–48–4	x	January 2010
Methidathion	950–37–8	x	November 2009
Methomyl	16752–77–5	x	November 2009
Methyl ethyl ketone	78–93–3	HPV/Inert	January 2010
Methyl parathion	298–00–0	x	November 2009
Metolachlor	51218–45–2	x	December 2009
Metribuzin	21087–64–9	x	December 2009
Myclobutanil	88671–89–0	X	December 2009
Norflurazon	27314–13–2	X	October 2009
o-Phenylphenol	90–43–7	x	January 2010
Oxamyl	23135–22–0	x	November 2009
Permethrin	52645–53–1	x	November 2009
Phosmet	732–11–6	x	November 2009
Piperonyl butoxide	51–03–6	x	November 2009
Propachlor	1918–16–7	x	December 2009
Propargite	2312–35–8	x	October 2009
Propiconazole	60207–90–1	x	December 2009
Propyzamide	23950–58–5	x	January 2010
Pyridine, 2-(1-methyl-2-(4-phenoxyphenoxy)ethoxy)-	95737–68–1	x	January 2010
Quintozene	82–68–8	x	December 2009

TABLE 1-LIST OF CHEMICALS AND ORDER ISSUANCE DATES FOR TIER 1 SCREENING IN THE EDSP—Continued

Chemical Name	CAS Number	Pesticide Active Ingredient (x) or as Noted	Order Issuance Time Frame
Resmethrin	10453–86–8	x	November 2009
Simazine	122–34–9	x	December 2009
Tebuconazole	107534–96–3	x	December 2009
Toluene	108–88–3	HPV/Inert	February 2010
Triadimefon	43121–43–3	x	December 2009
Trifluralin	1582–09–8	x	January 2010

Details on the status of the orders will be provided on EPA's website at *http://www.epa.gov/endo* with information, including the order issuance date, the recipient(s) of the order, the order recipient's response to the order, and the order due date.

V. Submission of Other Scientifically Relevant Information by Interested Parties

The Agency published the final policies and procedures and related documents in the **Federal Register** of April 15, 2009 ((74 FR 17560), (74 FR 17579), and (74 FR 17477)); as part of those documents, EPA discussed its policies relating to the submission of other scientifically relevant information in satisfaction of a test order. As explained at greater length in those documents, if recipients of the FFDCA section 408(p) test orders choose to cite or submit existing data, (i.e., other scientifically relevant information (OSRI)), along with a rationale that explains how the cited or submitted study satisfies the Tier 1 test order in lieu of developing new data, EPA will determine whether the information can be used to satisfy part or all of the Tier 1 order and/or otherwise inform the Tier 1 determination. Existing data may include data that has already been generated using the assay(s) specified in the order, or other scientifically relevant information. Other scientifically relevant information is information that informs the determination as to whether the substance may have an effect that is similar to an effect produced by a substance that interacts with the estrogen, androgen, and/or thyroid hormonal systems (e.g., information that identifies substances as having the potential to interact with the estrogen, androgen, and/or thyroid system(s); information demonstrating whether substances have an effect on the functioning of the endocrine system). Other scientifically relevant information may either be functionally equivalent to information obtained from the Tier 1 assays—that is, data from assays that perform the same function as EDSP Tier 1 assays—or may include data that provide information on a potential consequence or effect that could be due to effects on the estrogen, androgen or thyroid systems. Some other scientifically relevant information may be sufficient to satisfy part or all of the Tier 1 order and/or otherwise inform the Tier 1 determination.

The Agency has written a paper entitled ''EPA's Approach for Considering Other Scientifically Relevant Information (OSRI) under the EDSP'' (see *www.regulations.gov* and search for docket number EPA–HQ–OPPT–2007–1080–0032). This paper was developed to provide guidance to EPA staff and managers who will review the responses to Tier 1 test orders issued under the EDSP, and may also be of interest to parties considering whether to submit OSRI to EPA. This paper is intended only to provide general guidance and is not binding on either EPA or any outside parties. Anyone, including members of the general public, may provide OSRI, and the Agency will assess the information for appropriateness on a case-by-case basis to determine whether the information can be used to satisfy part or all of the Tier 1 order and/or otherwise inform the Tier 1 determination.

Persons other than those receiving testing orders who would like to submit OSRI on chemicals subject to test orders should include the following information:

- The submitter's contact information.
- The name of the program (i.e., Endocrine Disruptor Screening Program (EDSP).
- The name of the chemical to which the information applies.
- The citation of the study and/or a copy of the study, if possible.
- The order number(s) to which the information applies.
- A rationale that explains how the cited or submitted study(ies) satisfies all or some portion of the Tier 1 order.

In order for this information to be given timely consideration, the information should be submitted on the same time frame as the response to orders, i.e. this information should be submitted as a comment to the docket for this action (EPA–HQ–OPP–2009–0634) within 90 days of the issuance date of the orders for a given chemical. The details about the dates of issuance of the orders can be found at *www.epa.gov/endo*.

VI. Pesticide Inert Ingredients Data Submitters and Suppliers List

Currently, EPA maintains a list of all data on pesticide active ingredients that supports registration of products containing the active ingredient, along with contact information for the submitters (i.e., owners) of the data, known as the ''Data Submitters List.'' The Agency published the final policies and procedures and related documents in the **Federal Register** on April 15, 2009 ((74 FR 17560), (74 FR 17579), and (74 FR 17477)) describing EPA's intention to establish a Pesticide Inert Ingredients Data Submitters & Suppliers List (PIIDSSL) which is similar to the ''Data Submitters List.'' The purpose of the PIIDSSL is to identify any entity who has submitted compensable data on a pesticide inert ingredient in response to a test order issued under section 408(p) of FFDCA. Pursuant to FIFRA section 3(c)(1)(F), when a applicant's product contains a pesticide inert ingredient on the PIIDSSL, EPA intends to require the applicant to identify the source of the pesticide inert ingredient. If the applicant's source does not appear on the PIIDSSL, EPA intends to require the applicant either to switch to a source on the PIIDSSL; offer to pay compensation to the original data submitter(s) on the PIIDSSL; or generate

their own data to support their application.

The PIIDSSL can be found on EPA's website at *www.EPA.gov/DataSubmittersList* or a link to it can be found at *www.epa.gov/endo*.

List of Subjects

Environmental protection, Chemicals, Endocrine disruptors, Pesticides.

Dated: October 14, 2009.

Stephen A. Owens,

Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.

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S. 1707/P.L. 111–73

Enhanced Partnership with Pakistan Act of 2009 (Oct. 15, 2009; 123 Stat. 2060)

Last List October 15, 2009

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